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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CITY OF RIVERSIDE,

Petitioner,

v.

THE SUPERIOR COURT OF
RIVERSIDE COUNTY,

Respondent;

ARLINE JUAREZ,

Real Party in Interest.

E046794

(Super.Ct.No. RIC503014)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Robert Mitchell, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Petition granted.

Gregory T. Priamos, City Attorney, James E. Brown, Supervising Deputy City Attorney, Gregg M. Gu, Deputy City Attorney; Greines, Martin, Stein & Richland, Timothy T. Coates, and Carolyn Oill, for Petitioner.

No appearance for Respondent.

Law Offices of Dipaolo & Kellogg and Michael L. Kellogg, for Real Party in Interest.

In this matter we have reviewed the petition and the opposition thereto, which we conclude adequately address the issues raised by the petition. We have determined that resolution of the matter involves the application of settled principles of law, and that issuance of a peremptory writ in the first instance is therefore appropriate. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178.)

A claimant seeking relief under Government Code section 946.6 must demonstrate two essentials by a preponderance of the evidence: (1) that the application for late claim relief must be presented to the public entity within a *reasonable* time not to exceed one year from accrual; and (2) that the failure to file a timely claim was due to mistake, inadvertence, surprise, or excusable neglect. (*El Dorado Irrigation Dist. v. Superior Court* (1979) 98 Cal.App.3d 57, 62 (*El Dorado*).)

The determination of the trial court in granting or denying a petition for relief under Government Code section 946.6 will not be disturbed on appeal except for an abuse of discretion. (*Ebersol v. Cowan* (1983) 35 Cal.3d 427, 435 (*Ebersol*).)

The policy favoring trial on the merits is the primary policy underlying Government Code section 946.6. (*Ebersol, supra*, 35 Cal.3d at p. 435.) In order to implement this policy, any doubts should be resolved in favor of granting relief. (*Ibid.*) Consequently, where uncontradicted evidence or affidavits of the petitioner establish adequate cause for relief, denial of relief constitutes an abuse of discretion. (*Ibid.*)

However, as the Supreme Court in *Ebersol* recognized, the trial court has to have an evidentiary basis on which to exercise its discretion. *Ebersol* noted that in *El Dorado*, the trial court had no evidentiary basis on which to exercise its discretion where plaintiff did not consult counsel until 120 days after the accrual of the cause of action and where, subsequently, counsel's investigator did not report the public nature of the alleged defendant until seven months later. Due to the lack of facts upon which to base its grant of relief, the appellate court issued a writ ordering the trial court to deny the application. (*Ebersol, supra*, 35 Cal.3d at pp. 436-437 & fn. 12.)

Presentation of a claim to the wrong entity does not give notice to the right public entity of its potential liability so that it could investigate the claim and possibly settle it. *Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 279 explained, "The claim presentation requirement serves several purposes: (1) it gives the public entity prompt notice of a claim so that it can investigate the strengths and weaknesses of the claim while the evidence is still fresh and the witnesses are available; (2) it affords opportunity for amicable adjustment, thereby avoiding expenditure of public funds in needless litigation; and (3) it informs the public entity of potential liability so that it can better prepare for the upcoming fiscal year." The public entity is not required to show prejudice unless the claimant first shows excusable neglect in failing to file a timely claim. (See, e.g., *Rojas v. Riverside General Hospital* (1988) 203 Cal.App.3d 1151, 1163, disapproved on other grounds in *Passavanti v. Williams* (1990) 225 Cal.App.3d 1602, 1605.)

The key in this case is that real party in interest failed to present *evidence* to show that counsel's error constituted excusable neglect. His declaration says that he reviewed the claim to the county. It does not say, as real party in interest later intimated, that he realized all along that the city was the responsible public entity and intended to file the claim against it, nor does it explain why the claim was clearly directed against the county.

Real party in interest argues in her response that the documents merely show a clerical error and not that her counsel intentionally sued the county and not the city. She argued that a court would have to have psychic powers to presume to know what her counsel was thinking. This is exactly the point. Her counsel never explained what he was thinking. Thus, there was no evidence to show whether filing the claim with the county was the result of a clerical error or a failure to determine the proper entity.

Finally, real party in interest contends that relief is mandatory under Code of Civil Procedure section 473 due to counsel's mistake. However, mistake of counsel is not a basis for granting relief from the claim filing requirements. (*Tackett v. City of Huntington Beach* (1994) 22 Cal.App.4th 60, 64-65.)

DISPOSITION

Let a writ of mandate issue to the Superior Court of Riverside County directing it to set aside its order granting relief from the requirements of Government Code section 945.4 and to reconsider the matter in light of the views expressed herein.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

Costs are awarded to petitioner.

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GAUT
Acting P. J.

We concur:

HOLLENHORST
J.

McKINSTER
J.