

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 12/06/10

DEPT. 86

HONORABLE ANN I. JONES

JUDGE

N. DIGIAMBATTISTA

DEPUTY CLERK

B. JAUREGUI, COURTROOM ASST.

ELECTRONIC RECORDING MONITOR

HONORABLE #9

JUDGE PRO TEM

NONE

Deputy Sheriff

C. CRUZ, CSR# 9095

Reporter

9:30 am

BS127443

Plaintiff

JAMES V. KOSNETT (X)

Counsel

ZHEN QING CAO

Defendant

VS

Counsel

MARGARET J. PHE (X)

ACUPUNCTURE BOARD

NATURE OF PROCEEDINGS:

RESPONDENT, ACUPUNCTURE BOARD OF CALIFORNIA'S,
DEMURRER;

PETITIONER, ZHEN QING CAO'S, MOTION FOR RELIEF UNDER
CCP 473;

Matters come on for hearing and are argued. The court
takes the matters under submission.

LATER: The court rules on the demurrer and motion for
relief as set forth in the document entitled COURT'S
RULING ON PETITIONER'S MOTION FOR RELIEF PURSUANT TO
CODE OF CIVIL PROCEDURE SECTION 473 AND RESPONDENT'S
DEMURRER HEARD ON DECEMBER 6, 2010.

The case is ordered dismissed this date.

A copy of this minute order as well as the Court's
Ruling are mailed via U.S. Mail to counsel of record
addressed as follows:

MARGARET PHE, DEPUTY ATTY GENERAL, 300 S. SPRING ST.,
SUITE 1702, LOS ANGELES, CA 90013

JAMES V. KOSNETT, KOSNETT & DURCHFORT, 11355 W.
OLYMPIC BLVD., SUITE 300, LOS ANGELES, CA 90064

<p align="center">MINUTES ENTERED 12/06/10 COUNTY CLERK</p>
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ORIGINAL FILED

DEC - 6 2010

ZHEN QING CAO)
Petitioner)
vs)
ACUPUNCTURE BOARD)
Respondent)

LOS ANGELES
SUPERIOR COURT

CASE NO. BS127443

**COURT'S RULING ON PETITIONER'S MOTION FOR RELIEF PURSUANT
TO CODE OF CIVIL PROCEDURE SECTION 473 AND RESPONDENT'S
DEMURRER HEARD ON DECEMBER 6, 2010**

Respondent demurred to the Petition on the basis that it does not state facts sufficient to constitute a cause of action because the Petition is time barred. In response, Petitioner moved for relief from her failure to file her Petition within the filing period pursuant to CCP section 473.

After considering the pleadings, hearing argument and taking the matter under submission, the court rules as follows:

Statement of the Case

Petitioner Zhen Qing Cao is a formerly licensed acupuncturist. Respondent Acupuncture Board of California revoked Petitioner's license on May 17, 2010, effective on June 16, 2010. (Petition at ¶ 1, 3; Demurrer Exh. A, at 1). Respondent's Decision and Order was based on Petitioner's convictions in 2000 and 2007 for solicitation of prostitution and on Petitioner's knowingly making false statements regarding the convictions (i.e., Petitioner did not disclose the convictions on her application for licensure or on any subsequent update). (Demurrer Exh. A, at 2-8).

Petitioner petitioned this court on July 19, 2010 for a writ of administrative mandamus to overturn Respondent's Decision and Order revoking Petitioner's acupuncture license. Petitioner alleges that Respondent's Decision and Order is invalid because (1) Respondent failed to grant Petitioner a fair hearing; and (2) Respondent abused its discretion because it failed to proceed in the manner required by law, its decision is not supported by the findings, and its findings are not supported by the evidence.

On October 19, 2010, Respondent filed a Notice of Demurrer; Demurrer; and Memorandum of Points and Authorities, in which Respondent argues that the Petition does not state facts sufficient to constitute a cause of action because the Petition is time barred under Government Code section 11523.

On October 27, 2010, Petitioner filed a Notice of Motion and Motion for Relief Under Code of Civil Procedure section 473; Memorandum of Points and Authorities; Declaration of Petitioner; Declaration of Counsel and Opposition to Demurrer. Petitioner states that English is a second language for her and she had difficulty understanding her rights because the Decision and Order failed to state that she had only 30 days to appeal and the cover letter for the Decision and Order states that Petitioner may "petition the Board for reinstatement of [her] acupuncture license no sooner than three (3) years from the effective date of this Decision," which Petitioner misunderstood to mean she had three years to appeal. (Demurrer Exh. A, at 1-8; Opposition Exh. A, at 1; Cao Decl., at ¶ 3, 4). Petitioner also claims she had difficulty finding an attorney to represent her but met with one on July 16, 2010, the last day on which an appeal could be made. (Cao Decl., at ¶ 4). The attorney did not have sufficient time to file the Petition before the courthouse closed on July 16, 2010 and filed the Petition on the next business day, July 19, 2010. (Kosnett Decl., ¶ 2).

Respondent filed its Reply to Petitioner's Opposition to Demurrer and its Opposition to Petitioner's Motion for Relief under Code of Civil Procedure section 473 on November 4, 2010.

Summary of the Law

California Code of Civil Procedure section 430.10 states in relevant part:

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action."

A general demurrer based on the statute of limitations is only permissible where the dates alleged in the complaint show that the action is barred by the statute of limitations. Roman v. Los Angeles, 85 Cal. App. 4th 316, 324 (2000). The running of the statute must appear "clearly and affirmatively" from the dates alleged. Marshall v. Gibson, Dunn & Crutcher, 37 Cal. App. 4th 1397, 1403 (1995).

A final decision by the Acupuncture Board of California is appealable to the superior court by petition for writ of mandate under Government Code section 11523, which states in relevant part:

"Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure, subject, however, to the statutes relating to

the particular agency. Except as otherwise provided in this section, any such petition shall be filed within 30 days after the last day on which reconsideration can be ordered.”

A proceeding for writ of mandate is barred if not properly commenced within the applicable limitations period. Kupka v. Board of Admin., 122 Cal. App. 3d 791, 794 (1981).

Code of Civil Procedure section 473(a)(1) states as follows:

“The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code.”

Code of Civil Procedure section 473(b) contains two relevant provisions. The first mainly provides discretionary relief and states:

“The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect . . .”

The second relevant provision of section 473(b) provides mandatory relief and states:

“ . . . Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney’s sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney’s mistake, inadvertence, surprise, or neglect . . .”

Section 473 does not, however, extend the 30-day filing period for appeals established by Government Code section 11523. Kupka, supra, 122 Cal. App. 3d 791; See Castro v. Sacramento County Fire Protection District, 47 Cal. App. 4th 927 (1996) (reaffirming Kupka despite the addition of “dismissal” to Code of Civil Procedure section 473(b) after Kupka was decided). “Statutes of limitations are a fundamental aspect of our legal system. They are vital to the welfare of society and are favored in the law.” Castro, supra, 47 Cal. App. 4th at 933.

Analysis

Respondent has motioned for a demurrer on the basis that Petitioner's action is time barred under Government Code section 11523.

The court takes judicial notice of the Decision and Order issued by the Acupuncture Board of the Department of Consumer Affairs ("Board") on May 17, 2010. (Demurrer Exh. A). The Board's Decision and Order was effective on June 16, 2010.

Under Government Code section 11523, Petitioner had to seek judicial review within 30 days of the last day on which reconsideration could be ordered, *i.e.*, by July 16, 2010.

The court takes judicial notice of the Petition's filing date in this case. It is uncontroverted that Petitioner did not file her Petition until July 19, 2010.

Based on this simple, undisputed chronology, the Petition by July 16, 2010 is time barred.

However, Petitioner requests that the court extend the limitations period under Code of Civil Procedure section 473 for good cause shown.

Respondent objects, contending that Government Code § 11523 contains no provision for extending the filing period on a showing of good cause, and notes that the very absence of such a provision in the language of the statute must be taken to mean that no extension may be granted. Kupka, *supra*, 122 Cal. App. 3d at 794, 797.

The court agrees. Particularly in the area of mandate, a clear application of the statute of limitations is required to ensure finality of administrative decisions. A standard that allowed untimely appeals upon a showing of "good cause" would result in chaos. There would be no principled line to draw in trying to ascertain whether an administrative ruling would be subject to review in the trial court. "The prescribed statutes of limitation for commencement of actions against the State are 'mandatory and must be strictly complied with.'" Chase v. State of California, 67 Cal. App. 2d 808, 812 (1977).

Petitioner has failed to offer any legal authority supporting an extension of the limitation period. The Code of Civil Procedure section 473(a)(1) does not support Petitioner's claim for relief from having to file her petition before the end of the applicable limitations period:

"The Court may, in furtherance of justice, and on such terms as may be proper . . . enlarge the time for answer . . . and . . . allow an answer to be made after the time limited by the code . . ."

Nor does Ginns v. Savage, 61 Cal. 2d 520, 523 (1964) provide the missing authority. In Ginns, the plaintiff filed her petition late because she mistakenly relied on misrepresentations made to her by defense counsel. In such an instance, the Court relied on the doctrine of equitable estoppel to preclude the defendant from asserting the statute of

limitations. By contrast here, there is nothing in the record to support a claim that Petitioner was misled or otherwise told by the Board that she did not have to pursue her appeal to Superior Court promptly. The Board's Decision and Order is silent on the issue of when an appeal had to be filed. There is no reasonable ground upon which to find that Petitioner was misled by the Board.

While she claimed not to understand her legal duties, Petitioner's ignorance of the law is no excuse. As a self-represented litigant, Petitioner is held to the same standards as an attorney and her ignorance regarding the time she had to file an appeal does not constitute good cause.

Moreover, assuming *arguendo* that this court has the power to allow relief from Government Code section 11523 upon a showing of good cause, no such cause has been shown here. As counsel for Petitioner admitted during argument, he failed to file the appeal timely because he was tied up in traffic and was unable to get to the courthouse. Petitioner's limited language skills or her legal inexperience are not transferrable were negated when she retained counsel in this matter. Traffic delays by counsel do not constitute good cause.

Leave to amend shall not be granted in this case. In general, where a defect raised by a demurrer is reasonably capable of cure, courts routinely and liberally grant leave to amend. CLC Const., Inc. v. City of San Ramon, 120 Cal. App. 4th 1141 (2004). In this case, however, the defect cannot be cured by amendment. The amended Petition would only relate back to the date of the original filing, which falls after the limitations period expired. See Hawkins v. Pacific Coast Bldg. Products, Inc., 124 Cal. App. 4th 1497 (2004) as modified on subsequent appeal 2006 WL 1361224 (employee's breach of contract action against employer could not be salvaged by application of relation back doctrine to deem amended complaint filed on date of original complaint, as statute of limitation on contract claims had already run when employee filed original complaint).

Conclusion

Petitioner's request for relief under Code of Civil Procedure section 473 is denied.

Respondent's motion for demurrer is sustained without leave to amend.

Petitioner's Petition for Writ of Mandate is dismissed as being barred by the limitations period in Government Code section 11523.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 12/30/10

DEPT. 86

HONORABLE ANN I. JONES

JUDGE

N DIGIAMBATTISTA

DEPUTY CLERK

HONORABLE
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JUDGE PRO TEM

B JAUREGUI/COURTROOM ASST

ELECTRONIC RECORDING MONITOR

NONE

Deputy Sheriff

NONE

Reporter

8:30 am BS127443

Plaintiff
Counsel

ZHEN QING CAO
VS
ACUPUNCTURE BOARD

Defendant NO APPEARANCES
Counsel

NATURE OF PROCEEDINGS:

CLERK'S CERTIFICATE OF MAILING/NOTICE OF ENTRY OF
JUDGMENT AND JUDGMENT

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I service Notice of Entry of the Judgment and Judgment entered on December 30, 2010, upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

DATED: DECEMBER 30, 2010

JOHN A. CLARKE, EXECUTIVE OFFICER/CLERK

N. Digiambattista

BY:

N DIGIAMBATTISTA

JAMES V. KOSNETT, KOSNETT & DURCHFORT, 11355 W.
OLYMPIC BLVD., SUITE 300, LOS ANGELES, CA 90064

MARGARET PHE, DEPUTY ATTY GENERAL, 300 S. SPRING ST.,
SUITE 1702, LOS ANGELES, CA 90013

<p align="center">MINUTES ENTERED 12/30/10 COUNTY CLERK</p>
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1 EDMUND G. BROWN JR.
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6 Fax: (213) 897-9395
E-mail: Margaret.Phe@doj.ca.gov

7 *Attorneys for Respondent*
8 *Acupuncture Board*

ORIGINAL FILED

DEC 30 2010

**LOS ANGELES
SUPERIOR COURT**

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 FOR THE COUNTY OF LOS ANGELES

11
12 **ZHEN QING CAO,**

Petitioner,

13
14 v.

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16 **ACUPUNCTURE BOARD,**

17 Respondent.

Case No. BS127443

**[PROPOSED] JUDGMENT DISMISSING
PETITION FOR WRIT OF MANDATE**

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19 The Demurrer to the Petition for Writ of Mandate and Motion for Relief came regularly for
20 hearing as scheduled on December 6, 2010, in Department 86 of the above-entitled court before
21 the Honorable Ann I. Jones. Edmund G, Brown Jr., Attorney General of the State of California,
22 by Deputy Attorney General Margaret Phe, appeared for Respondent Acupuncture Board;
23 attorney James V. Kosnett appeared on behalf of Petitioner Zhen Qing Cao.

24 The court, having considered the oral and written arguments presented,

25 **HEREBY ORDERS, ADJUDGES and DECREES that:**

- 26 1. Respondent's motion for demurrer is sustained without leave to amend;
27 2. Petitioner's Petition for Writ of Mandate is dismissed as being barred by the
28 limitations period in Government Code section 11523; and

1 3. Pursuant to Government Code section 6103.5, Respondent is awarded the costs of
2 \$ _____ it would have paid for a filing fee but for Government Code section 6103;
3 Petitioner is to pay the filing fee award to Respondent for remittance to the proper Los Angeles
4 County officers within 45 days as required by Government Code section 6103.5.

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9 DATED: DEC 30 2010

ANN I. JONES
HONORABLE ANN I. JONES

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **ZHEN QING CAO v. ACUPUNCTURE BOARD**
LASC Case No. BS127443

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **December 27, 2010**, I served the attached [Proposed] Judgment Dismissing Petition for Writ of Mandate by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

James V. Kosnett, Esq.
Attorney at Law
KOSNETT & DURCHFORT
11355 W. Olympic Blvd., Suite 300
Los Angeles, CA 90064
Attorney for Zhen Qing Cao

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **December 27, 2010**, at Los Angeles, California.

Cherry Salac
Declarant

Cherry G. Salac
Signature