Filed 1/21/09 – opinion after rehearing

CERTIFIED FOR PARTIAL PUBLICATION[*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

JORGE A. PINEDA, Plaintiff and Appellant, v. BANK OF AMERICA, N.A., Defendant and Respondent.	A122022 (City & County of San Francisco Super. Ct. No. 468417)

Plaintiff Jorge A. Pineda appeals an adverse judgment entered after the trial court granted a motion for judgment on the pleadings by defendant Bank of America, N.A. He contends that the court applied the wrong statute of limitations to his claim under Labor Code[1] section 203 for penalties incurred for the late payment of wages; that the court erred in concluding that section 203 penalties are not restitution within the meaning of Business and Professions Code section 17203; and that the court abused its discretion in denying him leave to amend. In the unpublished portion of this opinion we adopt the conclusion reached in *McCoy v. Superior Court* (2007) 157 Cal.App.4th 225, 233, that the extended statute of limitations for the recovery of section 203 penalties found in that section applies only if the penalties are sought in conjunction with an action for recovery of the unpaid wages. Since plaintiff here acknowledges that all wages due were paid before this action was filed, we reject his contention that the court erred in applying the one-year statute of limitations for an action upon a statute for a penalty found in Code of Civil Procedure section 340, subdivision (a), and we also reject the contention that the

---

[*] Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts 2 and 3 of the Discussion.

[1] All statutory references are to the Labor Code unless otherwise noted.

court abused its discretion in denying plaintiff leave to amend his complaint. In the published portion of the opinion we affirm the trial court's conclusion that section 203 penalties may not be recovered as restitution under Business and Professions Code section 17203.

Factual and Procedural Background

Plaintiff's complaint, filed on October 22, 2007, alleges that "Plaintiff was employed by defendant Bank of America within the three-year period preceding the filing of the complaint . . . . Plaintiff gave Bank of America two weeks advance notice of his resignation, which occurred on May 11, 2006. Bank of America did not pay him his final pay until May 15, 2006." Plaintiff seeks to represent a class of persons formerly employed by Bank of America "whose final wage payment occurred after their last day of employment." His first cause of action alleges that "Bank of America failed to pay plaintiff and members of the class final wages timely upon separation from employment in accordance with Labor Code section 201 or 202" and that as a result of Bank of America's conduct, "plaintiff and members of the class are entitled to recover the full amount of their continuation wages under Labor Code section 203 . . . ." Plaintiff's second cause of action alleges that "[t]he unlawful conduct of Bank of America alleged herein constitutes unfair competition within the meaning of Business and Professions Code section 17200." As a result of the unfair competition, the pleading continues, "plaintiff and members of the class were deprived of their rights to timely payment of final wages . . . and were not paid continuation wages owed to them under Labor Code section 203." The complaint seeks "restitution of all the unpaid continuation wages" owed to plaintiff and other class members under Labor Code section 203.

The trial court ultimately granted defendant's motion for judgment on the pleadings. The trial court concluded that plaintiff's claim under the Labor Code was barred by the one-year statute of limitations for the recovery of a penalty prescribed by Code of Civil Procedure section 340, subdivision (a), and that plaintiff could not allege a cause of action under the Unfair Competition Law (UCL) because section 203 penalties are not recoverable as restitution under Business and Professions Code section 17203.

The court denied plaintiff leave to amend to substitute a new plaintiff in the first cause of action. Plaintiff filed a timely notice of appeal.

Discussion

1. *Standard of Review*

"The standard of review for a motion for judgment on the pleadings is the same as that for a general demurrer: We treat the pleadings as admitting all of the material facts properly pleaded, but not any contentions, deductions or conclusions of fact or law contained therein. . . . We review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any theory." (*Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1298.)

2. *Plaintiff's claim for penalties under section 203 is barred by the statute of limitations.*

Section 202, subdivision (a) provides in relevant part: "If an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting." Under section 203, "If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.3, 201.5, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefore is commenced; but the wages shall not continue for more than 30 days. . . . [¶] Suit may be filed for these penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise." The statute of limitations on an action to recover unpaid wages under section 202 is three years. (Code Civ. Proc., § 338, subd. (a); *Murphy v. Kenneth Cole Productions, Inc*. (2007) 40 Cal.4th 1094, 1108-1109 (*Murphy*).) Plaintiff argues that the three-year statute of limitations is applicable to this action by virtue of section 203.

In *McCoy v. Superior Court* (2007) 157 Cal.App.4th 225, 233 (*McCoy*), the court held that the extended statute of limitations set forth in section 203 applies only if the

penalties are sought in conjunction with an action for the unpaid wages. If the action seeks to recover only waiting time penalties under section 203, the one-year statute of limitations found in Code of Civil Procedure section 340, subdivision (a) applies. Code of Civil Procedure section 340, subdivision (a) sets forth a one-year statute of limitations for "[a]n action upon a statute for a penalty or forfeiture, if the action is given to an individual . . . except if the statute imposing it prescribes a different limitation." Section 203 is a "statute for a penalty" within the meaning of Code of Civil Procedure section 340, subdivision (a). (*Murphy*, *supra*, 40 Cal.4th at p. 1108 ["section 203 establishes that the unpaid wages continue to accrue as a 'penalty' "]; *McCoy*, *supra*, 157 Cal.App.4th at p. 229.)

In *McCoy,* the court found that the limitations language of section 203, subdivision (b) is ambiguous as to whether it applies to an action for penalties alone. Relying on legislative intent and its understanding of the purpose and language of the statute, the court concluded that the limitations period is extended under subdivision (b) only when penalties are sought in conjunction with an action for unpaid wages. "Section 203 was enacted to give employees additional time to sue for waiting time penalties when they also bring an action for late wages." (*McCoy*, *supra*, 157 Cal.App.4th at p. 233.) The court reasoned: "Provision for a waiting time penalty serves as an inducement to pay wages timely. Allowing for recovery of such a penalty as part of an action for payment of back wages is consistent with that intent. Within this framework, making the statute of limitations coincident for both the wages and the penalty furthers the statute's purpose. It would be unwieldy if an employee were required to bring an action for the penalties within one year but have a longer time to sue for unpaid wages . . . . [T]he language of the statute, i.e., that suit for penalties may be filed before expiration of the statute of limitations 'on *an action for the wages* from which the penalties arise' (italics added [in *McCoy*]), and its intent make clear that the concurrent statute of limitations for wages and penalties was enacted more for an employee's convenience than for the purpose of establishing a time to independently recover a penalty without regard to whether and when the back wages were paid." (*Id.* at pp. 229-230.) When an employee has been paid

his wages, there is no reason and there was no intent to allow the employee to delay more than a year before filing an action for waiting time penalties alone. We agree with the reasoning in *McCoy*. Although far from clear, the language of the statute implies that there is in fact "an action for the wages from which the penalties arise" for section 203, subdivision (b) to apply.

Contrary to plaintiff's argument, this interpretation does not allow an employer to use the statute of limitations as an offensive tool to defeat a former employee's claims for penalties by delaying payment of the unpaid wages until more than one year from the termination of employment, nor does it provide an incentive for the employer to delay payment of the unpaid wages for that reason. "If an employer waits to pay wages beyond one year, he is subject to a longer statute of limitations for the penalty than if he pays sooner before a wage claim is filed." (*McCoy*, *supra*, 157 Cal.App.4th at p. 230.)

We also agree with *McCoy* that the dictum in *Murphy, supra,* 40 Cal.4th at pages 1108-1109 ("the Legislature expressly provided that a suit seeking to enforce the section 203 penalty would be subject to the same three-year statute of limitations as an action to recover wages") does not require a contrary conclusion. (*McCoy, supra*, 157 Cal.App.4th at p. 233.) The issue under consideration in *Murphy* was whether the additional hour of pay that section 226.7 requires an employer to pay an employee denied a mandatory meal or rest period constitutes wages subject to the three-year statute of limitations or a penalty subject to the one-year statute. As the *McCoy* court stated, the language of the opinion "does not purport to distinguish between an action where both wages and a waiting time penalty are sought as opposed to one for penalties only . . . . 'An appellate decision is not authority for everything said in the court's opinion but only "for the points actually involved and actually decided." ' " (*McCoy*, *supra*, at p. 233.)

Pineda's complaint, filed on October 22, 2007, alleges that he was paid his final wages on May 15, 2006, and he makes no claim for the payment of any additional wages. Accordingly, section 203, subdivision (b) does not apply and the one-year statute of limitations governs. Therefore, the court ruled correctly that the cause of action for penalties is barred by the statute of limitations.

3. *The trial court did not abuse its discretion in denying plaintiff leave to amend.*

Plaintiff argues in the alternative that if his personal claim under section 203 is barred by the statute of limitations, the trial court erred in denying him leave to amend to substitute a suitable class plaintiff. Under Code of Civil Procedure section 473, subdivision (a)(1), "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 . . . ." In general, courts liberally allow amendments to a complaint for the purpose of permitting a plaintiff who lacks or has lost standing to substitute as plaintiff the true real parties in interest. (*CashCall, Inc. v. Superior Court* (2008) 159 Cal.App.4th 273.) "Leave to amend a complaint is thus entrusted to the sound discretion of the trial court. '. . . The exercise of that discretion will not be disturbed on appeal absent a clear showing of abuse. More importantly, the discretion to be exercised is that of the trial court, not that of the reviewing court. Thus, even if the reviewing court might have ruled otherwise in the first instance, the trial court's order will yet not be reversed unless, as a matter of law, it is not supported by the record.' " (*Haley v. Dow Lewis Motors, Inc*. (1999) 72 Cal.App.4th 497, 506.)

Here, the trial court explained that "given that plaintiff has had several months to locate a substitute plaintiff/class representative and had thus far been unable to do so, if I granted leave to amend, this case would effectively become a lawsuit in search of a plaintiff, which while within my discretion to allow, I fail to see why I should. Plaintiff and his counsel have known since late November 2007 [when *McCoy* was decided] that there were serious questions as to the viability of the plaintiff as a class representative." Plaintiff argues that he cannot be faulted for failing to locate a proper plaintiff because the use of pre-certification discovery to locate a suitable class representative is common and proper. (*Parris v. Superior Court* (2003) 109 Cal.App.4th 285, 300-301 [In deciding whether to order precertification discovery of the identities of potential class members, a "trial court must . . . expressly identify any potential abuses of the class action procedure that may be created if the discovery is permitted, and weigh the danger of such abuses against the rights of the parties under the circumstances"]; *Best Buy Stores, L.P. v.*

Superior Court (2006) 137 Cal.App.4th 772, 779 ["Discovery to ascertain a suitable class representative is proper"]; *CashCall, Inc. v. Superior Court*, *supra*, 159 Cal.App.4th at pp. 288-289.) He also argues that he had no obligation to locate a substitute plaintiff until the court granted defendant's motion.

That it would have been within the court's discretion to allow pre-certification discovery to ascertain the identity of other members of the putative class does not compel the conclusion that the court abused its discretion in denying leave to amend. Pineda was reasonably put on notice of the need to identify a substitute plaintiff six months prior to the hearing, when *McCoy* was decided, but failed to do so. Plaintiff reports that he began negotiating with defendant regarding pre-certification discovery shortly after the Supreme Court denied review of *McCoy* in February 2008. Plaintiff propounded interrogatories requesting the names and addresses of class members. However, although the interrogatories were past due prior to the submission of his points and authorities opposing the motion for judgment on the pleadings, he did not move to compel responses prior to the court's ruling. In light of plaintiff's failure to pursue discovery diligently, his reliance on the need for pre-certification discovery is not persuasive. While plaintiff surely had the right to wait until the court ruled, he was not relieved of the risks associated with such a strategy. Moreover, it was also relevant to the exercise of the court's discretion that the action was still in its infancy, so that the effect of the dismissal was not to cause substantial time and expense of extended pretrial proceedings to be wasted. On balance, we cannot say that the court abused its discretion in denying plaintiff leave to amend.

4. *Penalties under section 203 cannot be recovered as restitution under the UCL.*

Plaintiff's second cause of action alleges that defendant's failure to pay his final wages immediately upon termination constitutes an unfair business practice within the meaning of the UCL. As set forth above, plaintiff's complaint does not seek restitution of unpaid wages. He seeks only "restitution of all the unpaid continuation wages owed under Labor Code section 203." The trial court granted defendant's motion for judgment on the pleadings on the ground that continuation wages made payable by section 203 are

a penalty, rather than wages, the recovery of which does not constitute restitution within the meaning of Business and Professions Code section 17203.[2]

"A UCL action is an equitable action by means of which a plaintiff may recover money or property obtained from the plaintiff or persons represented by the plaintiff through unfair or unlawful business practices. It is not an all-purpose substitute for a tort or contract action. '[D]amages are not available under [Business and Professions Code] section 17203.' " (*Cortez v. Purolator Air Filtration Products Co*. (2000) 23 Cal.4th 163, 173; *Korea Supply Co. v. Lockheed Martin Corp*. (2003) 29 Cal.4th 1134, 1150.)

Unpaid wages can be recovered as restitution pursuant to Business and Professions Code section 17203. "[A]n order that a business pay to an employee wages unlawfully withheld is consistent with the legislative intent underlying the authorization in [Business and Professions Code] section 17203 for orders necessary to restore to a person in interest money or property acquired by means of an unfair business practice." (*Cortez v. Purolator Air Filtration Products Co*., *supra*, 23 Cal.4th at p. 178.) "The concept of restoration or restitution, as used in the UCL, is not limited only to the return of money or property that was once in the possession of that person. The commonly understood meaning of 'restore' includes a return of property to a person from whom it was acquired [citation], but earned wages that are due and payable pursuant to section 200 et seq. of the Labor Code are as much the property of the employee who has given his or her labor to the employer in exchange for that property as is property a person surrenders through an unfair business practice. An order that earned wages be paid is therefore a restitution remedy authorized by the UCL. The order is not one for payment of damages." (*Id*. at p. 178.)

---

[2] Business and Professions Code section 17203 provides in pertinent part: "Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition."

Penalties under section 203, however, are not imposed as compensation for the labor of the employee, but are triggered by the employer's willful failure to timely pay the wages that have been earned. As the court explained in *Tomlinson v. Indymac Bank, F.S.B.* (C.D.Cal. 2005) 359 F.Supp.2d 891, 895, "the remedy contained in Section 203 is a penalty because Section 203 does not merely compel [the employer] to restore the *status quo ante* by compensating Plaintiffs for the time they worked; rather, it acts as a penalty by punishing [the employer] for willfully withholding the wages and forces [the employer] to pay Plaintiffs an additional amount. This type of payment clearly is not restitutionary, and thus cannot be recovered under the UCL." (See also *Montecino v. Spherion Corp*. (C.D.Cal. 2006) 427 F.Supp.2d 965, 967 ["§ 203 payments are clearly a penalty, and thus cannot be claimed pursuant to the UCL"]; *In re Wal-Mart Stores, Inc. Wage and Hour Litigation* (N.D.Cal. 2007) 505 F.Supp.2d 609, 619; *Murphy, supra,* 40 Cal.4th at pp. 1108-1109.)[3]

Plaintiff argues that section 203 penalties are recoverable as restitution not for the employee's past services, but for a vested property interest wrongly retained by the employer. Plaintiff suggests that an employee has a vested right to receive the penalty that arises immediately upon the employer's willful failure to pay final wages upon termination. Relying on *Korea Supply Co. v. Lockheed Martin Corp*., *supra*, 29 Cal.4th at page 1150, the plaintiff suggests that the employee's interest in the penalty payment can "be likened to 'property' converted by [the employer] that can now be the subject of a constructive trust." However, in *Korea Supply*, the court reiterated that "[t]o create a constructive trust, there must be a res, an 'identifiable kind of property or entitlement in defendant's hands.' [Citation.] As the United States Supreme Court recently said, a constructive trust requires 'money or property identified as belonging in good conscience to the plaintiff [which can] clearly be traced to particular funds or property in the

[3] We note that in *Cortez v. Purolator Air Filtration Products Co*., *supra*, 23 Cal.4th at pages 169-170, the plaintiff sought to recover waiting time penalties in conjunction with her claim for unpaid wages under the Labor Code but did not seek to recover such penalties as restitution under the UCL.

defendant's possession.' " (*Ibid*.) Despite plaintiff's creative attempt to recharacterize the liability imposed by the statute, section 203 penalties do not meet this definition. There is no automatic right to the penalty. The employee must first bring an enforcement action and establish that the employer willfully failed to timely pay his or her wages. (*Murphy, supra*, 40 Cal.4th at p. 1108 ["Labor Code provisions imposing penalties state that employers are 'subject to' penalties and the employee or Labor Commissioner must first take some action to enforce them. The right to a penalty . . . does not vest until someone has taken action to enforce it"]; see also *People v. Durbin* (1966) 64 Cal.2d 474, 479 ["No person has a vested right in an unenforced statutory penalty or forfeiture"].)

Hence, the trial court properly granted defendant's motion for judgment on the pleadings with regard to plaintiff's second cause of action.

Disposition

The judgment is affirmed. Defendant is to recover its costs on appeal.

____
Pollak, Acting P. J.

We concur:

____
Siggins, J.

____
Jenkins, J.

Trial court:	City & County of San Francisco
Trial judge:	Hon. Harold E. Kahn
Counsel for plaintiff and appellant:	SPIRO MOSS BARNESS LLP Gregory N. Karasik
Counsel for defendant and respondent:	PAUL, HASTINGS, JANOFSKY & WALKER LLP Maria A. Audero Stephen P. Sonnenberg