FILED
Superior Court of California
County of Los Angeles
JAN 28 2022
Sherri R. Carter, Executive Officer/Clerk of Court
By: F. Becerra, Jr., Deputy

SANTA MONICA BAYSIDE OWNERS ASSOCIATION v. CITY OF SANTA MONICA
Case Number: 21SMCP00269
Hearing Date: January 28, 2022

ORDER GRANTING MOTION TO DISMISS CASE PURSUANT TO PUBLIC RESOURCES CODE SECTION 21167.4

ORDER DENYING MOTION FOR RELIEF FROM UNTIMELY FILING OF REQUEST FOR HEARING

ORDER TAKING HEARING CONCERNING AMOUNT OF BOND OFF CALENDAR AS MOOT

---

(1) Respondent, the City of Santa Monica, moves to dismiss the petition filed on June 15, 2021 by Petitioner, Santa Monica Bayside Owners Association, with prejudice pursuant to Public Resources Code section 21167.4, subdivision (a). Petitioner opposes the motion.

The motion to dismiss is granted.

(2) Petitioner moves for relief under Code of Civil Procedure Section 473, subdivision (b) from its untimely filing of a request for hearing as required by Public Resources Code Section 21167.4, subdivision (a). The City opposes the motion. Respondent, California Coastal Commission, joins the City's opposition.

The City's single objection to the Declaration of Ellia M. Thompson is sustained.

The motion is denied.

(3) Finally, the court on its own motion set a hearing to consider the appropriate amount of bond related to the preliminary injunction it ordered on January 13, 2022. As the action has been dismissed, the issue of bond is moot as the preliminary injunction is no longer in place.

ANALYSIS

Motion to Dismiss:

The City moves to dismiss this action pursuant to Public Resources Code section 21167.4.

Public Resources Code section 21167.4, subdivision (a) falls within the California Environmental Quality Act (CEQA), Public Resources Code section 21000 *et seq.* It provides:

01/31/2022

> "In any action or proceeding alleging noncompliance with this division, the petitioner shall request a hearing within 90 days from the date of filing the petition or shall be subject to dismissal on the court's own motion or on the motion of any party interested in the action or proceeding."

It is well established the statute's dismissal language is "plainly" mandatory.[1] (*Fiorentino v. City of Fresno* (2007) 150 Cal.App.4th 596, 603; see also *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1987) 189 Cal.App.3d 498, 504.) Accordingly, "a CEQA action must be dismissed when a timely request for hearing is not filed, provided that a motion is made by any interested party or the court." (*Fiorentino v. City of Fresno, supra*, 150 Cal.App.4th at 603.)

The facts here are undisputed. Petitioner filed this CEQA action on June 15, 2021. Public Resources Code section 21167.4, subdivisions (a) and (b) required Petitioner to file a request for hearing with the court with service on the parties no later than September 13, 2021.

On August 16, 2021, this court served its notice of trial setting conference and attached orders thereon on Petitioner. The court ordered Petitioner to give notice of the hearing scheduled for November 17,2021 within 10 days.[2]

On October 4, 2021, the City filed this motion to dismiss the action based on Petitioner's failure to comply with Public Resources Code section 21167.4, subdivision (a).

The following day, October 5, 2021 and 112 days after initiating this action, Petitioner filed its request for hearing with the court and served it on the parties.[3] Petitioner also gave notice on that date of the November 17, 2021 trial setting conference hearing. Prior to that date, Petitioner had not requested a hearing as required by Public Resources Code section 21167.4, subdivision (a).

There is no question more than 90 days had elapsed since Petitioner initiated the action when the City brought its motion to dismiss. As noted, Petitioner filed its request for hearing 112 days after initiating its action.

Despite the mandatory nature of the 90-day requirement specified by Public Resources Code section 21167.4, subdivision (a), Petitioner argues it substantially complied with the purpose

01/31/2022

---

[1] The court rejects Petitioner's argument at the hearing that this court is free to disregard published appellate cases not issued by the Second District Court of Appeal. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.)

[2] Petitioner's counsel's office has no record of having ever received the notice. (Thompson Decl., ¶ 12.)

[3] Petitioner's notice stated: "Though such a request is moot in light of the Court's August 16, 2021 order for a trial setting conference on November 17, 2021 (See, Exhibit A), Petitioner submits the instant request in any event."

and intent of the provision. Petitioner supports its argument with the trial setting conference notice the court provided to Petitioner on August 16, 2021—26 days prior to the 90-day date.[4]

Petitioner asserts for all practical purposes, the court's notice of a trial setting conference and Petitioner's service of same eliminated the need for the technical hearing request. That is, Petitioner substantially complied with the mandatory statutory requirement.

" 'Substantial compliance, as the phrase is used in the decisions, means *actual* compliance in respect to the substance essential to every reasonable objective of the statute.' [Citation.] Where there is compliance as to all matters of substance[,] technical deviations are not to be given the stature of noncompliance. [Citation.] Substance prevails over form. When the plaintiff embarks [on a course of substantial compliance], every reasonable objective of [the statute at issue] has been satisfied." (*Southern Pac. Transportation Co. v. State Ed. of Equalization* (1985) 175 Cal.App.3d 438, 442.) "Thus, the doctrine gives effect to our preference for substance over form, but it does not allow for an excuse to literal noncompliance in every situation." (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1430.)

Petitioner's substantial compliance argument is not persuasive.

First, Petitioner did not initiate the trial setting conference notice. The *court* generated the notice. Pursuant to the court's local rules, the court set the matter for a trial setting conference and served Petitioner with notice. (Los Angeles County Court Rules, Rule 3.232, subd. (h).) The court cannot attribute its own actions as demonstrating substantial compliance *by Petitioner*. Moreover, there is no evidence any other party to the action received notice of the trial setting conference until after the 90-day date.

Moreover, the court declines to find the *court's* notice of a trial setting conference is the functional equivalent of a request for hearing required by Public Resources Code section 21167.4, subdivision (a). If treated as such, the legislature's adoption of Public Resources Code section 21167.4, subdivision (a) would be meaningless because Public Resources Code section 21167.4, subdivision (c) triggers important statutory deadlines under CEQA running from a petitioner's request for hearing. (See Pub. Res. Code § 21167.4, subd. (c) [completion of briefing within 90 days from request for hearing and trial 30 days thereafter].) A court's notice of a trial setting conference does not establish a briefing schedule or hearing date. Thus, a court's notice of a trial setting conference is not coextensive with a request for hearing.

Second, the court finds Petitioner's claim the City waived the requirement is not persuasive. Petitioner contends the City's litigation conduct acted as a waiver by implication.

[4] The court served only Petitioner with the notice of trial setting conference. Thus, there is no evidence any other party received the notice until after October 5, 2021 when Petitioner filed its request for a hearing.

Specifically, Petitioner points to the City's failure to move to advance its motion to dismiss from March 22, 2022—five months after it was filed on October 4, 2021—and the City's active engagement to date in the litigation. This argument is legally unsupported. That the court set Petitioner's motion for hearing months after the City filed it does not suggest the City voluntarily relinquished the rights it asserted in its motion to dismiss. Moreover, in argument concerning the temporary restraining order and the preliminary injunction, the City noted its pending motion to dismiss and argued it informed on the merits.

Based on the foregoing, the motion to dismiss is granted.[5]

Motion for Relief:

Having granted the City's motion to dismiss, the court addresses Petitioner's motion for relief pursuant to Code of Civil Procedure section 473, subdivision (b). Petitioner argues it is entitled to relief:

> "for its inadvertent mistake under CCP section 473(b) on either of two bases: (1) for excusable neglect determined at the court's discretion, or (2) for Petitioner's counsel attesting by sworn affidavit of its mistake that caused the dismissal." (Motion for Relief 9:21-24; see Reply 6:7-11.)

Consistent with Petitioner's assertion,

> "Section 473(b) contains two distinct provisions for relief from default. The first provision . . . is discretionary and broad in scope: '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.' [Citation.] The second provision is mandatory, at least for purposes of [Code of Civil Procedure] section 473, and narrowly covers only default judgments and defaults that will result in the entry of judgments. This provision . . . declares as follows: '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.' " (*Even*

01/31/2022

[5] The City's argument concerning alleged delays in the preparation of the administrative record because of Petitioner's alleged failure to pay for it is of no consequence to this motion. Therefore, the court need not address the issue.

Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC (2015) 61 Cal.4th 830, 838-839.)

It appears Petitioner relies primarily—but not solely—upon the mandatory relief provision of Code of Civil Procedure section 473, subdivision (b) for relief from the court's dismissal. (Reply 7:6-7. ["Neither the statute itself nor the underlying policy require more than what Petitioner has provided here—namely, an affidavit attesting to counsel's error."])

a. Discretionary Relief:

Petitioner argues it is entitled to discretionary relief based on own counsel's inadvertence. The party seeking discretionary relief under the statute has the burden of demonstrating the mistake, inadvertence or neglect was excusable. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258 [party must demonstrate].) A moving party must prove the basis for relief by a preponderance of the evidence. (See *Toscano v. Los Angeles County Sheriff's Department* (1979) 92 Cal.App.3d 775, 784-785.)

" 'In determining whether the attorney's mistake or inadvertence was excusable, "the court inquires whether 'a reasonably prudent *person* under the same or similar circumstances' might have made the same error.["] [Citation.] In other words, the discretionary relief provision of [Code of Civil Procedure] section 473 only permits relief from attorney error "fairly imputable to the client, i.e., mistakes anyone could have made." ' " (*Comunidad en Accion v. Los Angeles City Council* (2013) 219 Cal.App.4th 1116, 1132.)

There is but a single conclusion before the court offered to excuse counsel's inadvertence. Petitioner's counsel represents: "I also learned at that moment that the City was moving to dismiss the Petition because I had inadvertently failed to file with the Court a Request for a Hearing pursuant to Public Resources Code Section 21167.4(a)."[6] (Thompson Decl., ¶ 11.)

The court finds that the evidence (or lack thereof) is entirely inadequate to show excusable inadvertence. Petitioner has not met its burden of demonstrating excusable neglect under the discretionary provision of Code of Civil Procedure section 473, subdivision (b).

> "The mere recital of mistake, inadvertence, surprise or excusable neglect is not sufficient to warrant relief. Relief on grounds of mistake, inadvertence, surprise or excusable neglect is available only on a showing that the claimant's failure to timely present a claim was reasonable when tested by the objective 'reasonably prudent person' standard." The definition of excusable neglect is defined as 'neglect that might have been the act or omission of a reasonably prudent person

[6] This single statement (along with Petitioner's argument in its reply brief about how it is proceeding on this motion [Reply 7:6-7]) suggests Petitioner is actually relying solely on the mandatory provision for relief in Code of Civil Procedure section 473, subdivision (b).

01/21/2021

under the same or similar circumstances.' [Citation]. (*Department of Water & Power v. Superior Court* (2000) 82 Cal.App.4th 1288, 1293.)[7]

Here, Petitioner provides no evidence to demonstrate its counsel's inadvertence was excusable or the facts and circumstances giving rise to the alleged inadvertence. There is no evidence by which the court can judge "whether 'a reasonably prudent *person* under the same or similar circumstances' might have made the same error.["] [Citation.]' " (*Comunidad en Accion v. Los Angeles City Council, supra*, 219 Cal.App.4th at 1132.) The single conclusion of inadvertence does not justify relief under Code of Civil Procedure section 473, subdivision (b).

Petitioner's reliance on *Miller v. City of Hermosa Beach* (1993) 13 Cal.App.4th 1118 is unpersuasive. In *Miller v. City of Hermosa Beach*, the petitioner requested two hearings within 90 days of filing her petition—one for a motion for a temporary restraining order and one for a request for a preliminary injunction. Petitioner failed, however, to request a hearing on the merits of her petition pursuant to Public Resources Code section 21167.4. (*Id.* at 1132, 1135.) Thus, the Court of Appeal concluded the petitioner had failed to fulfill the statutory requirement of Public Resources Code section 21167.4. (*Id.* at 1135.)

The Court of Appeal decided, however, the petitioner was entitled to discretionary relief from the dismissal under Code of Civil Procedure section 473, subdivision (b). The Court of Appeal reasoned petitioner's counsel's misunderstanding that requests for hearing for injunctive relief did not satisfy the requirements of Public Resources Code section 21167.4 constituted grounds for discretionary relief. The Court of Appeal found the evidence adequate because it demonstrated an honest mistake of law as to the type of hearing a petitioner must request within 90 days of filing a CEQA action. (*Id.* at 1136-1137.)

Unlike the petitioner in *Miller v. City of Hermosa Beach*, however, Petitioner does not present evidence its counsel made an honest mistake about the law—there is simply no evidence before the court on the issue.[8] Nor could Petitioner argue an honest mistake based on its reliance on the court's notice of a trial setting conference as the substitute for the statutorily required notice. Petitioner's counsel reports she did not even discover the trial setting notice (to support the claim a timely request for hearing had been made) until the after the 90-day deadline passed and the City filed its motion to dismiss. (Thompson Decl., ¶¶ 11-12).

01/31/2022

---

[7] While *Department of Water & Power v. Superior Court* addressed a petition under Government Code section 946.6, the showing required for relief under the statute is the same as that required by Code of Civil Procedure section 473, subdivision (b). (*Han v. City of Pomona* (1995) 37 Cal.App.4th 552, 557 [quoting *Ebersol v. Cowan* (1983) 35 Cal.3d 427, 435].)

[8] As explained in *Miller v. City of Hermosa Beach*, an honest mistake of law "is a valid ground for relief where a problem is complex and debatable." (*Id.* at 1136 [*cleaned up*].) "The controlling factors in determining whether a mistake is excusable are: (1) the reasonableness of the misconception; and (2) the justifiability of the failure to determine the correct law." (*Ibid.*) Petitioner has not claimed a mistake of law or suggested any facts supporting such a claim.

For similar reasons, Petitioner's reliance on the holding in *McCormick v. Board of Supervisors* (1988) 198 Cal.App.3d 352 is equally unavailing. (*Id.* at 360 [noting " '[a]n honest mistake of law is a valid ground for relief [from dismissal under Public Resources Code section 21167.4] where a problem is complex and debatable' "].) *McCormick v. Board of Supervisors* found relief from a dismissal appropriate where the law "was unsettled in at least two significant respects." (*Id.* at 360.)

Finally, Petitioner suggests the prosecution of its action generally somehow satisfies the grounds for discretionary relief. (It may be, however, Petitioner raises the argument in response to the City's claim Petitioner unnecessarily delayed the action's prosecution.) Even assuming Petitioner actively moved this action forward, such evidence does not demonstrate an honest mistake or excusable inadvertence/neglect. That is, it does not inform on Petitioner's burden on this motion.

Instead, Petitioner's description of various litigation-related events, at most, informs on whether prejudice will be suffered by the City if the motion is granted. Prejudice, however, does not factor into Petitioner's initial burden under Code of Civil Procedure section 473, subdivision (b). Prejudice becomes relevant after the moving party demonstrates some entitlement to relief. A responding party has no burden to establish prejudice until the moving party has satisfied the court its inaction was due to mistake, inadvertence surprise or excusable neglect. (*Zamora v. Claybord Contracting Group, Inc., supra,* 28 Cal.4th at 259; see also *Comunidad en Accion v. Los Angeles City Council, supra,* 219 Cal.App.4th at 1132-1133, *Rivera v. City of Carson* (1981) 117 Cal.App.3d 718, 726.)

Accordingly, Petitioner has not met its burden of demonstrating discretionary relief on this motion. It has submitted no evidence—only a conclusion—from which the court could make the findings required under the statute for discretionary relief.

b. Mandatory Relief:

Petitioner also contends relief should be granted pursuant to the mandatory relief provision of Code of Civil Procedure section 473, subdivision (b). (Motion 5:13-17, 7:18-8:6; Reply 6:24.) As noted, it appears Petitioner primarily relies upon this provision as the basis for its motion.

As a preliminary matter:

> "[t]he range of attorney conduct for which relief can be granted in the mandatory provision is broader than that in the discretionary provision, and includes inexcusable neglect. But the range of adverse litigation results from which relief can be granted is narrower. Mandatory relief only extends to vacating a default which will result in the entry of a default judgment, a default judgment, or an entered dismissal." (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 616.)

01/31/2022

Petitioner's reliance on the mandatory provision of Code of Civil Procedure section 473, subdivision (b) is misplaced. The mandatory relief provision does not apply where a CEQA action has been dismissed pursuant to Public Resources Code section 21167.4. (*Nacimiento Regional Water Management Advisory Com. v. Monterey County Water Resources Agency* [*Nacimiento*] (2004) 122 Cal.App.4th 961, 968-969.[9] ["Application of section 473(b)'s mandatory relief provision to CEQA dismissals for failing to request a hearing within the prescribed 90-day time period would undermine CEQA's design for expedited litigation."])

In *Nacimiento, supra*, 122 Cal.App.4th at 961, the Court directly addressed the question of "whether mandatory relief under section 473 for a section 21167.4 dismissal caused by an *inexcusable* mistake is required." (*Id.* at 966, 964 ["*inexcusable* mistake or neglect"].) The court's decision required it to consider the mandatory relief provision of Code of Civil Procedure section 473, subdivision (b). (*Id.* at 968.)

Finding mandatory relief under Section 473, subdivision (b) was not available where the court dismissed a CEQA action for failure to comply with Public Resources Code section 21167.4, the *Nacimiento* court concluded:

> "Nearly every section 21167.4 dismissal for failing to request a hearing on alleged CEQA violations is caused by the mistake, inadvertence, or neglect of the plaintiff's attorney, and thus few dismissals would be final if mandatory relief under section 473 were applied to such dismissals. The CEQA dismissal statute would effectively be nullified, and the legislative intent that CEQA challenges be promptly resolved and diligently prosecuted would be defeated. [Citation.]" (*Nacimiento, supra,* 122 Cal.App.4th at 968; accord *Alliance for Protection of Auburn Community Environment v. County of Placer* (2013) 215 Cal.App.4th 25, 34.)

Petitioner's response to *Nacimiento* is unavailing. (Reply 7:8-25.) *Nacimiento* addressed the *mandatory provision* of Code of Civil Procedure section 473, subdivision (b).[10] *Nacimiento* did not address the discretionary provision of Code of Civil Procedure section 473, subdivision (b).

---

[9] While Petitioner insists *Nacimiento* was wrongly decided, this court has no discretion to disregard the case. (*Auto Equity Sales, Inc. v. Superior Court, supra,* 57 Cal.2d at 450.)

[10] Petitioner's suggestion otherwise is inaccurate. In fact, *Nacimiento* notes, "Discretionary relief under section 473(b) for a section 21167.4(a) dismissal cause by an *excusable* mistake is unquestionably available." (*Nacimiento, supra,* 122 Cal.App.4th at 968.) *Nacimiento* explained the issue before it was "whether mandatory relief under section 473 for a section 21167.4 dismissal caused by an *inexcusable* mistake is required." (*Ibid.*) Unlike discretionary relief under the statute, mandatory relief does not require a finding of "excusable" neglect. To obtain mandatory relief under Code of Civil Procedure section 473, subdivision (b), relief must be requested with "an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise or neglect . . . ." (Code Civ. Proc. § 473, subd. (b).) Whether the error, mistake or inadvertence is excusable is irrelevant for mandatory relief. Like here, the petitioner in

01/31/2022

Accordingly, even though Petitioner submitted its attorney's declaration of fault with its motion, this court is bound by *Nacimiento* and cannot grant Petitioner mandatory relief under Code of Civil Procedure section 473, subdivision (b).

During the hearing, Petitioner's counsel requested the opportunity to submit additional evidence—through a supplement to the already timely filed declaration—providing facts to support discretionary relief under Code of Civil Procedure section 473, subdivision (b). The City objected to the court considering counsel's proposed declaration.

The court denies Petitioner's request to submit additional evidence on the issue. Consideration of additional evidence—after the matter has been fully briefed and the court has issued a written tentative decision to aid the parties during argument—is unwarranted here under the circumstances. Petitioner's request to submit new, additional evidence *in response to deficiencies noted by the court at the time of hearing* is simply not justified. Such relief would unfairly allow any party to continually submit new evidence when faced with an unfavorable ruling based on an evidentiary deficiency.

Further, as noted during the hearing, Petitioner had months to respond to the City's motion to dismiss and to file its own motion for relief. The City filed and served its motion to dismiss on October 4, 2021. Petitioner timely filed its motion for relief three months later (January 3, 2022) and its opposition to the motion to dismiss shortly thereafter (January 13, 2022). Petitioner had ample opportunity to investigate the facts and law and determine how best to proceed against the City's motion and on its own motion. This is not a situation where the court shortened the time for hearing or even set the motions on statutory time.

The law and relevant evidence on the issues—dismissal under Public Resources Code section 21167.4 and Code of Civil Procedure section 473, subdivision (b)—is also not new or novel. Thus, Petitioner should have known what was required of it to meet its evidentiary burden on the motions. Moreover, Petitioner had access to all relevant facts for its motion for relief. That is, nothing precluded Petitioner from setting forth all relevant facts in its papers for consideration at the time of the hearing.

Instead, Petitioner only addressed *Nacimiento* in reply in an attempt to distinguish it suggesting *Nacimiento* had no application here because it concerned Code of Civil Procedure section 473, subdivision (b)'s discretionary relief provision. Despite *Nacimiento*'s clear holding, Petitioner asserted: "Neither the statute itself nor the underlying policy require more than what Petitioner

01/31/2022

Nacimiento "made no claim of excusable mistake, but founded its motion entirely upon its counsel's declaration of inexcusable mistake." (*Nacimiento, supra,* 122 Cal.App.4th at 965.)

has provided here—namely, an affidavit attesting to counsel's error."[11] (Reply 7:6-7.) Thus, it appears Petitioner made the tactical decision to stand on its request for mandatory relief.

Finally, under Code of Civil Procedure section 1005, subdivision (b), Petitioner was entitled to have all of Petitioner's evidence and legal theory before it when it responded to Petitioner's motion 16 court days in advance of the hearing. To allow Petitioner to supplement its evidence long after the time has run for Petitioner to provide that evidence is inconsistent with the statute.

c. Bond Adjustment:

On January 13, 2022, this court issued a preliminary injunction finding Petitioner had demonstrated "some ability to prevail on the merits of its claim." (Minute Order p. 5.) The court ordered Petitioner to post an undertaking of $125,000 by January 24, 2022 in connection with the preliminary injunction. The court further ordered the parties (who had disputed the appropriate amount of bond at the hearing) could submit evidence to support any proposed adjustment in the amount of the undertaking, and the court would address the issue on this date.

Given that the court has granted the motion to dismiss and denied the motion for relief from the dismissal pursuant to Code of Civil Procedure section 473, subdivision (b), issues related to the amount of the bond are moot. As the action is dismissed this date, the preliminary injunction is no longer in effect.

CONCLUSION

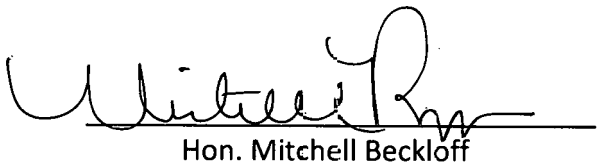
The City's motion to dismiss this action pursuant to Public Resources Code section 21167.4, subdivision (a) is granted.

Petitioner's motion for relief pursuant from the dismissal pursuant to Code of Civil Procedure section 473, subdivision (b) is denied.

Any issue concerning the amount of bond is deemed moot.

IT IS SO ORDERED.

January 28, 2022



Hon. Mitchell Beckloff
Judge of the Superior Court

01/31/2022

[11] As the court understood it from Petitioner's counsel, Petitioner understood *Nacimiento* could not be distinguished. Petitioner's counsel indicated if this court were to "follow" *Nacimiento,* the court could not grant Petitioner's motion for relief.