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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ABBOTT ALTWIJI, Plaintiff and Appellant, v. RUSSELL R. BEHJATNIA et al., Defendants and Respondents.	B209914 (Los Angeles County Super. Ct. No. LC078980)

APPEAL from an order of the Superior Court of Los Angeles County, Richard B. Wolf, Judge. Affirmed.

Abbott Altwiji, in pro. per.

Law Offices of Afzali & Behjatnia and Russell F. Behjatnia for Defendants and Respondents.

Plaintiff Abbott Altwiji (plaintiff) appeals from an order of dismissal granted in favor of defendants Russell F. Behjatnia and the Law Offices of Afzali and Behjatnia (defendant). The order was granted after the trial court sustained without leave to amend, on statute of limitations grounds, defendant's demurrer to plaintiff's second amended complaint. The case is based on a medical malpractice suit (the underlying action) which plaintiff lost. Initially defendant represented plaintiff in the underlying action but then, according to plaintiff's allegations in the instant suit, defendant tricked plaintiff into substituting defendant out of that case and representing himself.

Plaintiff alleges a cause of action against defendant for attorney malpractice, which has a one-year statute of limitations. However, we find that the essential claims asserted by plaintiff in this case are really claims of actual fraud, which has a three-year statute of limitations. Nevertheless, plaintiff did not file this suit within three years of losing the underlying action, and the statute of limitations for fraud does not provide grounds for tolling that limitation period. Therefore, we will affirm the order of dismissal.

BACKGROUND OF THE CASE

1. *The Original and First Amended Complaints*

Plaintiff filed this suit on August 31, 2007. The original complaint alleges a cause of action against defendant for attorney malpractice. Defendant demurred on statute of limitations grounds and also filed a motion to strike. Those responses were placed off calendar when plaintiff filed a first amended complaint. Defendant demurred to the first amended complaint and also moved to strike portions of it. The demurrer

was sustained and plaintiff was again given leave to amend. The motion to strike was deemed moot and placed off calendar. Plaintiff filed a second amended complaint.

2. *Allegations in the Operative Complaint*

The second amended complaint (complaint) alleges all of the matters set out in this portion of our opinion. Plaintiff retained the defendant to represent him in a medical malpractice suit against UCLA and a doctor. Plaintiff and defendant entered into a written retainer agreement on June 13, 2003, with defendant telling plaintiff he had a meritorious medical malpractice case. Defendant thereafter refused to give plaintiff a copy of the retainer agreement. Because of their agreement, defendant was under a duty to take the measures necessary to protect plaintiff's rights. The agreement called for plaintiff to deposit $2,500 with defendant and plaintiff paid $2,000 on the date the agreement was signed and paid the remaining $500 in July 2003. The retainer was to pay for defendant's deposition, mediation, exhibits and expert witness expenses. Defendant understood that plaintiff had no money to pay for his representation until trial, and defendant agreed to accept the hourly rate of $100 until completion of trial. Plaintiff performed as agreed.

On August 28, 2003, after mediation, defendant requested $25,000 from plaintiff to "continue into trial." That was contrary to defendant's agreement to charge plaintiff $100 per hour. This request by defendant was defendant's tactic to gain a release from the retainer agreement with plaintiff because defendant knew plaintiff did not have the funds to make such a payment. Plaintiff requested that defendant perform his duties to plaintiff and defendant countered that if plaintiff would sign a substitution of attorney

form and agree to represent himself, defendant would continue to help plaintiff with the case by overseeing it, including trial, and that arrangement would reduce plaintiff's legal costs. When defendant made the representation to plaintiff that he would oversee the case he did so (1) after having represented to plaintiff, when plaintiff hired him, that he would protect plaintiff's interests in the underlying action, and (2) while he was still plaintiff's attorney of record. Defendant made the representation without any reasonable grounds for believing it was true. Defendant never intended to act in good faith and deal with plaintiff in a fair manner. Plaintiff was not aware that the representation was false. Plaintiff reasonably relied on it because defendant had promised to protect plaintiff's interest in the underlying suit. It was foreseeable to defendant that plaintiff would rely on it.

Based upon defendant's promise of future help with the underlying suit, plaintiff executed the substitution of attorney. Plaintiff believed, "and continued to believe that Defendant was be [sic] the attorney overseeing the case and advise Plaintiff at all times as to the pre-trial litigation process for the underlying case including trial." However, defendant failed to help plaintiff with the underlying case. Had plaintiff known that the representations of help were false he would not have agreed to act as his own attorney but would have remained defendant's client until new representation could be found.

The following occurred as a result of defendant's failure to honor the terms of "the agreement." Defendant charged plaintiff an hourly rate of $250 instead of $100; defendant failed to take the deposition of the defendant in the underlying action; plaintiff was not able to timely designate an expert witness for his case because

defendant failed to advise him that an expert witness was required and that there was a statutory time limit for designation of a witness; defendant failed to advise plaintiff that motions filed by the defendant in the underlying action required timely filing of opposition; defendant failed to advise plaintiff regarding procedures in trial preparation; plaintiff was not prepared for trial; and ultimately plaintiff lost the underlying action "due to technical deficiencies and due to plaintiff's failure to follow statutory procedures, including being precluded from introducing medical records "and related issues." Plaintiff lost the underlying suit on March 23, 2004, and "[s]oon after" he filed an appeal.

On March 5, 2005, plaintiff telephoned the State Bar of California to report defendant's "wrongful conduct and misrepresentations." On March 24, 2005, the State Bar informed plaintiff that defendant may have committed malpractice, and it was not until then that plaintiff "had knowledge and discovered that a malpractice may have existed." Although this suit was not filed until August 31, 2007, the one-year statute of limitations for filing suits for attorney malpractice (Code Civ. Proc., § 340.6)[1] was

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[1] Unless otherwise indicated, all references herein to statutes are to the Code of Civil Procedure. Plaintiff's inclusion of an allegation that the statute of limitations on his cause of action was tolled was prompted by defendant's demurrer to plaintiff's original complaint, which put plaintiff on notice that there is a statute of limitations issue.

Section 340.6 states in relevant part: "(a) An action against an attorney for a wrongful act or omission, *other than for actual fraud*, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. . . . [I]n no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that

tolled pursuant to provisions in that statute because of several events that affected plaintiff's health prior to filing this suit.

Specifically, on May 9, 2004, plaintiff had a trip and fall accident that left him "virtually incapacitated." He sustained "serious back injury, injury to the right arm, and both legs." Then on July 10, 2005 plaintiff had another trip and fall accident and "sustained serious rotor [sic] cuff tear of his right shoulder requiring surgery, and exacerbation of the previous back injury. Surgery was performed June 23, 2006." Additionally, on September 13, 2006, plaintiff had cataract surgery on his right eye, and on May 1, 2007, he had surgery on his left eye. Because of these injuries plaintiff was bedridden and thus "incapacitated to find legal counsel to represent him in this matter or for him to prepare and file his Summons and Complaint until August 31, 2007." Plaintiff "resides alone [and] did not have the assistance, legal or personal, to help him find legal counsel or to help him in the preparation or filing of his Summons and Complaint prior to the one year Statute of Limitation of March 24, 2006." Thus, although March 24, 2006 was one year after plaintiff received information from the State Bar concerning plaintiff's report to the Bar, because of the tolling provision in

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any of the following exist: [¶s] (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action." (Italics added.) There are four matters enumerated in section 340.6 that will toll the running of the statute. While the statute specifically states that one of them will only toll the four-year limitation period, the other three will toll both the one-year and the four-year limitation periods. (*Gurkewitz v. Haberman* (1982) 137 Cal.App.3d 328, 336.)

Section 338, subdivision (d) provides for a three-year statute of limitations for "[a]n action for relief on the ground of fraud or mistake. The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." Unlike section 340.6, section 338, subdivision (d) does not have provisions for tolling on account of disability.

subdivision (a)(4) of section 340.6, the statute of limitations was tolled for plaintiff because he "was under the type of physical disability which restricts his ability to commence legal action."[2]

3. *The Court Sustains Defendant's Demurrer Without Leave to Amend*

Defendant demurred to the second amended complaint on statute of limitation grounds. A hearing on the demurrer was held on June 10, 2008, and the demurrer was sustained without leave to amend, the court finding that plaintiff's claims are precluded by the statute of limitations for claims of attorney negligence. This appeal followed.

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[2] On August 12, 2008, plaintiff requested, and received, an extension of time to file his designation of record for this appeal. His application for the extension states he needed the extension because he was seeking an attorney who would handle the case, and because he was "busy with my future outcome of my corneal transplant of October 31, 2007 which I still have (12) twelve stitches in my right eye from this surgery."

On August 26, 2008, plaintiff requested, and received, an extension of time to file his case information sheet. His stated reason for the extension was his "several disabilities, daily to copp [sic] with, plus a new fall that I suffered on 8/19/08 treated by Northridge Hosp. ER section to rt arm, rt knee and rt ribs (chest) I have to move and sit slowly, lots of pain."

On December 17, 2008, plaintiff filed a motion to amend his designation of the record to omit a reporter's transcript. He stated he suffers from "spinal stenosis, which has limited my ability to drive and walk, and I am blind in the right eye. These disabilities have hindered my ability to continue in my efforts to locate the court reporter."

On March 25, 2009, plaintiff filed an application for an extension of time to file his opening brief. He stated he needed the extension because "[m]y only eye is failing and my back is broken and both my knees are broken." He received the extension.

On May 26, 2009, plaintiff filed an application for a second extension of time to file his opening brief. He stated he needed the extension because "[o]n 5/6/09 I slipped/tripped on/ by left ankle and knee, having back & leg pains, also I had chest, couphing [sic] badly, I am still on antibaiatics [sic] plus lack of vision."

On July 6, 2009, plaintiff was granted a third extension of time to file his opening brief. He stated he needed the additional time because "I have problems with my neck and vision. I cannot sit for very long."

However, when the appeal was filed there was no order of dismissal from which to take an appeal. We informed the parties of the need for a dismissal of the suit. Thereafter, initially the case was dismissed without prejudice. The trial court corrected the error and the case was dismissed with prejudice on November 5, 2008. We treat plaintiff's notice of appeal as having been filed after the dismissal was entered. (Cal. Rules of Court, rule 8.104 (e).)

ISSUE ON APPEAL

The issue in this appeal is whether the trial court was correct in its determination that this suit is barred by the statute of limitations.

DISCUSSION

1. *Standard of Review for Demurrers*

A demurrer tests the sufficiency of the allegations in a complaint as a matter of law. (*Pacifica Homeowners' Assn. v. Wesley Palms Retirement Community* (1986) 178 Cal.App.3d 1147, 1151.) We review the sufficiency of the challenged complaint de novo. (*Coopers & Lybrand v. Superior Court* (1989) 212 Cal.App.3d 524, 529.) We accept as true the properly pleaded allegations of fact in the complaint, but not the contentions, deductions or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We also accept as true facts which may be inferred from those expressly alleged. (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.) We consider matters which may be judicially noticed, and we "give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.) "[I]ts allegations must be

liberally construed, with a view to substantial justice between the parties." (Code Civ. Proc., § 452.) We do not concern ourselves with whether the plaintiff will be able to prove the facts which are alleged in the complaint. (*Parsons* v. *Tickner* (1995) 31 Cal.App.4th 1513, 1521.) The judgment or order of dismissal entered after the demurrer is sustained must be affirmed if any of the grounds for demurrer raised by the defendant is well taken and disposes of the complaint. (*Aubry v. Tri-City Hospital Dist*. (1992) 2 Cal.4th 962, 967.) It is error to sustain a general demurrer if the complaint states a cause of action under any possible legal theory. (*Ibid*.)

2. *Applicable Statute or Statutes of Limitations*

a. *Focus of the Trial Court and Defendant*

As noted in footnote 1, section 340.6 provides that "[a]n action against an attorney for a wrongful act or omission, *other than for actual fraud*, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first." (Italics added.) Thus, section 340.6 does not apply to actions against an attorney that are based on fraud. (*Gurkewitz v. Haberman*, *supra*, 137 Cal.App.3d at p. 336.)

Neither defendant nor the trial court addressed the fraud exception in section 340.6 Instead they focused on when plaintiff discovered or should have discovered the injury that plaintiff asserts came from defendant's alleged failure to oversee plaintiff's handling of the underlying suit—the loss of that case. The court and

defendant denominated that alleged failure professional negligence, and they gave short shrift to the tolling provision claimed by plaintiff—that plaintiff was under a physical disability which restricted his ability to commence the instant law suit. On appeal, defendant continues this analysis, arguing that plaintiff's complaint sounds in professional negligence and that the limitations period ran before the instant case was filed; defendant gives only a passing nod to the merits of plaintiff's claim of tolling based on physical disability.

We find that the "actual fraud" exception in section 340.6 applies in this case. That exception applies to intentional fraud, not to constructive fraud that results from negligent misrepresentation. "Constructive fraud may result from a breach of fiduciary duty, regardless of intent or motive, and the Legislature intended to only except instances of actual fraud on grounds that acts of actual fraud should not be treated as legal malpractice." (*Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 69-70.)

There are five elements of intentional fraud. They are (1) a misrepresentation by false representation, concealment, or nondisclosure; (2) knowledge of the falsity; (3) an intent to defraud, i.e., to induce reliance; (4) justifiable reliance on the misrepresentation; and (5) resulting damage. (*Lazar* v. *Superior Court* (1996) 12 Cal.4th 631, 638.) When the defendant in a cause of action for actual fraud is an attorney the analysis is the same as for non-attorney defendants. (*Quintilliani v. Mannerino*, *supra*, 62 Cal.App.4th at p. 69.)

What plaintiff has alleged in this case is actual fraud. According to the complaint, after plaintiff refused to pay defendant more in attorney's fees than their

agreement called for and instead insisted that defendant perform his duties to plaintiff, defendant proposed that if plaintiff would sign a substitution of attorney form and agree to represent himself, defendant would continue to help plaintiff with the case by overseeing it, including trial. Plaintiff alleged that when defendant made the representation to him that there would be oversight of the underlying action, defendant made that representation without any reasonable grounds for believing it was true and defendant never intended to act in good faith and deal with plaintiff in a fair manner. Plaintiff further alleged he was not aware that the representation was false, he reasonably relied on it because defendant had promised to protect plaintiff's interest in the underlying suit, and it was foreseeable to defendant that plaintiff would rely on it.

" 'Promissory fraud' is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud. [Citations.]" (*Lazar v. Superior Court, supra*, 12 Cal.4th at p. 638.) Here, plaintiff alleged defendant fraudulently induced him to enter into the agreement to represent himself in return for defendant's promise to oversee the underlying case.

As noted in footnote one, subdivision (d) of section 338 provides for a three-year statute of limitations for actions for relief on the ground of fraud. There is a "delayed discovery" component—causes of action for fraud are "not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud . . . . " (*Ibid*.) Thus in a suit for fraud, the plaintiff's cause of action accrues when the plaintiff

learns or is put on notice that a representation was false. (*Brandon G. v. Gray* (2003) 111 Cal.App.4th 29, 35.) The issue of inquiry notice involves the question when did the plaintiff have notice or information of circumstances that would put a reasonable person on inquiry that his or her injury was caused by the wrongful act of another. (*Ibid.*) Stated another way, when did the plaintiff suspect, or when should he or she have suspected, that the injury was caused by someone's wrongdoing. (*Kline v. Turner* (2001) 87 Cal.App.4th 1369, 1373-1374.)

In the instant case, plaintiff alleged that after he commenced representing himself in the underlying action defendant failed to give him the assistance that defendant promised and as a result plaintiff made missteps regarding designation of experts, documentary evidence, filing opposition to motions, and trial preparation, and the result was that because of defendant's failure to help him, he lost that case "due to technical deficiencies and due to [his] failure to follow statutory procedures." Although the facts alleged by plaintiff show that he must have known as the underlying action progressed that he was not receiving the assistance he alleges defendant promised, clearly plaintiff's cause of action for fraud accrued no later than when he lost that case on March 23, 2004. However, he did not file the instant suit until August 31, 2007, more than three years later.

Unlike section 340.6 with its one-year statute of limitations, section 338, subdivision (d)'s three-year limitations period does not have specific provisions for tolling on account of matters such as the disability of the plaintiff. Thus, plaintiff's various medical issues did not toll the three-year period for bringing this suit for fraud.

Moreover, although plaintiff alleged that he filed an appeal in the underlying action, that appeal did not toll the running of the statute of limitations. Section 356 states that "[w]hen the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action." Section 356 has been applied in situations where an appeal in a related action *prevents* the filing a suit, such as when a suit against a governmental entity must be preceded by the presentation of a claim to that entity and there is an appeal pending from an order that denied a person relief from his failure to file a timely claim with the governmental entity. (*Paniagua v. Orange County Fire Authority* (2007) 149 Cal.App.4th 83, 88.) Here, the appeal that plaintiff filed in the underlying suit did not prevent him from filing the instant action within three years of losing the underlying case.

The question of the impact of an appeal in an underlying suit that was based on attorney negligence was addressed in *Laird v. Blacker* (1992) 2 Cal.4th 606, where the court applied section 340.6's provision that the limitations period for filing a cause of action for attorney malpractice will be tolled until the plaintiff sustains an "actual injury." The court held that the statute of limitations in section 340.6 cases "commences when a client suffers an adverse judgment or order of dismissal in the underlying action on which the malpractice action is based" *and not when an appeal from the underlying case becomes final*. (*Id*. at pp. 609, 615.) The court observed that while an appeal may reduce the client's damages it "does not necessarily exonerate the attorney, nor does it extinguish the client's action against him for negligence," and "the

focus of a legal malpractice action (when litigation is involved) is the attorney's *conduct* in the underlying case." (*Id*. at pp. 614-615.) The same analysis applies to plaintiff's allegation of fraud in the instant case.

Because plaintiff did not file this suit within three years of suffering the loss of the underlying case, this suit was not timely filed and the dismissal of it was warranted.

DISPOSITION

The order of dismissal from which plaintiff has appealed is affirmed. Costs to defendant on appeal.

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CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.