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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

BEAL BANK, SSB, Plaintiff and Appellant, v. ARTER & HADDEN, LLP, et al., Defendants and Respondents.	B179383 (Los Angeles County Super. Ct. No. BC308535)

APPEAL from judgments of the Superior Court of Los Angeles County. John P. Shook, Judge. Reversed and remanded.

Leland, Parachini, Steinberg, Matzger & Melnick, Harvey L. Gould; Carroll, Burdick & McDonough, Vicki L. Freimann, Richard Fannan and David M. Rice for Plaintiff and Appellant.

Moscarino & Connolly, John M. Moscarino and Paula C. Greenspan for Defendants and Respondents.

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The question presented is whether the limitations period for a legal malpractice action under Code of Civil Procedure[1] section 340.6 is tolled as to an attorney's former law firm and one of its partners while the attorney continues to represent the client in the same subject matter at his new firm. We hold that it is tolled and therefore reverse the judgments of dismissal in favor of the former law firm and its partner following demurrers sustained without leave to amend.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff and appellant Beal Bank, SSB (Beal Bank) filed this legal malpractice action against the attorneys who represented Beal Bank in its efforts to collect default interest on certain loans: Steven Gubner, Beal Bank's current attorney; Gubner's two firms in which he was a partner; Gubner's prior law firm, respondent Arter & Hadden, where Gubner was an associate; and respondent Eric Dean, a partner at Arter & Hadden. Each of the defendants demurred. The trial court sustained the demurrers of Arter & Hadden and Dean without leave to amend, finding the claims against them to be time-barred. On appeal, Beal Bank contends that the statute of limitations was tolled as to Arter & Hadden and Dean during the time Gubner continued to represent Beal Bank.[2]

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[1] Unless otherwise noted, all statutory references are to the Code of Civil Procedure.

[2] Beal Bank settled with the Gubner defendants, who are not parties to this appeal.

A. Allegations in the First Amended Complaint[3]

In 1996, Beal Bank acquired certain loans from another bank, which had been placed into conservatorship by the Federal Deposit Insurance Corporation (FDIC). The loan documents contained "default interest clauses," which provided that in the event of default, the entire balance of principal and interest would become due and thereafter bear interest at an increased rate over and above the contract rate. The debtors missed payments on some of the loans. By the time Beal Bank acquired the loans, the debtors had negotiated discounted payoffs of the remaining loans with the FDIC, but had failed to make those payments as well. Beal Bank sent notices of acceleration and default to the debtors and recorded notices of default that were based on the increased default interest rate.

In March 1997, Beal Bank retained Arter & Hadden to handle its collection efforts. Dean was the attorney primarily responsible for the representation. Counsel for the debtors repeatedly advised Arter & Hadden, through correspondence and other means, that Beal Bank had no legal or factual basis for attempting to collect the default interest. In the first amended complaint, Beal Bank alleged that Arter & Hadden failed to conduct any legal research on the issue, advise Beal Bank that its position was unlikely to prevail, or inform it of the risks involved in continuing to maintain its position.

In June 1997, the collateral for the outstanding loans was transferred by the debtors to an entity the debtors controlled. On the following day, that entity filed for bankruptcy protection. Gubner, an associate at Arter & Hadden, then began representing Beal Bank in the bankruptcy court. On Beal Bank's behalf, Arter & Hadden filed a motion for summary judgment in the bankruptcy court, arguing that Beal Bank was

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[3] On appeal from a judgment of dismissal following a demurrer sustained without leave to amend, we assume the truth of all well-pleaded facts, as well as those that are judicially noticeable, but not contentions, deductions or conclusions of fact or law. (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

entitled to recover the default interest rate. The bankruptcy court ruled against Beal Bank and entered its final order on May 28, 1998. Beal Bank appealed the matter to the district court, represented by Arter & Hadden.

On December 31, 1998, Gubner left the employ of Arter & Hadden and formed Gubner & Associates, which later became Ezra, Brutzkus & Gubner. In turn, Gubner's new firms took over representation of Beal Bank. In April 1999, the district court affirmed the bankruptcy court's ruling, and Beal Bank, represented by Ezra, Brutzkus & Gubner, appealed to the Ninth Circuit Court of Appeals. On September 25, 2001, the Ninth Circuit issued its opinion, affirming the rulings of the lower courts.

In the first amended complaint, Beal Bank alleged that none of the defendants ever advised it of the risks associated with its legal position, thereby causing damages as follows: Beal Bank was deprived of an opportunity to settle its disputes with the debtors on favorable terms; Beal Bank was named as a cross-defendant by the debtors in an action filed in state court, which settled on terms causing economic loss to Beal Bank; and Beal Bank incurred unnecessary legal fees in litigating the question of default interest before the bankruptcy court, the district court and the Ninth Circuit. Beal Bank alleged that it has suffered damages totaling more than $3.5 million.

B. Procedural History

On September 24, 2002, Beal Bank filed an action for professional negligence against Arter & Hadden, Dean, Gubner and Gubner's two law firms. Two days later, Gubner filed a notice of withdrawal as counsel for Beal Bank in the bankruptcy court. In November 2002, Beal Bank and the defendants entered into a written tolling agreement, which provided that the period between September 24, 2002 and December 31, 2003 would not be included in determining the applicability of any statute of limitations. Beal Bank dismissed its complaint without prejudice on November 20, 2002.

On December 30, 2003, Beal Bank commenced the instant action for professional negligence.[4] Dean and Arter & Hadden separately demurred to the first amended complaint, arguing that Beal Bank suffered an actual injury on May 28, 1998, the date the bankruptcy court entered an adverse ruling against Beal Bank, which commenced the running of the one-year statute of limitations under section 340.6 on Beal Bank's malpractice claim. They argued that the statute of limitations was tolled only until December 31, 1998, when Gubner left Arter & Hadden taking Beal Bank with him as a client and when Arter & Hadden ceased representing Beal Bank. They further argued that the statute of limitations was not tolled as to them by any continuous representation of Beal Bank by Gubner and his new firms, so that the one-year limitations period expired on December 31, 1999, nearly four years prior to the filing of the instant action.

In opposition, Beal Bank argued that the statute of limitations did not commence until the Ninth Circuit's opinion was issued on September 25, 2001 and that by virtue of the parties' tolling agreement, its malpractice action was timely filed.

The trial court recognized that there was a conflict of authority between *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509 (*Crouse*) and *Beane v. Paulsen* (1993) 21 Cal.App.4th 89 (*Beane*) on the application of the continuing-representation tolling provision to an attorney's prior firm. The trial court found *Crouse* to be more persuasive and sustained the demurrers without leave to amend. Judgments of dismissal were entered as to the claims against Dean and Arter & Hadden. This appeal followed.

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[4] The first amended complaint named as defendants Dean, Gubner and Gubner's two law firms. At the time it was filed, Arter & Hadden was in bankruptcy. After the bankruptcy court entered an order for relief from stay of the malpractice litigation, Arter & Hadden was named as a Doe defendant in the first amended complaint.

DISCUSSION

Standard of Review

We review de novo the trial court's sustaining of a demurrer without leave to amend, exercising our independent judgment as to whether a cause of action has been stated as a matter of law. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) We assume the truth of properly pleaded allegations in the complaint and disregard those which are contrary to law or to a fact of which judicial notice may be taken. (*Wolfe v. State Farm Fire & Casualty Ins. Co.* (1996) 46 Cal.App.4th 554, 559-560.) We give the complaint a reasonable interpretation, reading it as a whole and with all its parts in their context. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 558; *People ex rel. Lungren*, *supra,* at p. 300.) A demurrer on statute of limitations grounds will not lie where the action may be, but is not necessarily, time-barred; it must clearly and affirmatively appear on the face of the complaint that the action is necessarily barred. (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 881.)

The Limitations Period Was Tolled As to Arter & Hadden and Dean

Section 340.6, subdivision (a) provides in relevant part: "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. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist: [¶] . . . [¶] (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred; . . . ."

The parties do not dispute that the Gubner defendants continued to represent Beal Bank in the same subject matter in which the alleged malpractice had occurred or that the one-year limitations period is applicable. The dispute is whether the continuous-representation tolling provision applies to a current attorney's former law firm and one of that firm's partners with whom the current attorney was associated when the alleged malpractice occurred.

Arter & Hadden and Dean contend that the plain language of section 340.6 answers the question. They argue that because the tolling provision refers to the time that "the attorney" continued to represent the client, and does not refer to the law firm or its attorneys with whom the attorney was associated when the alleged malpractice occurred, the tolling provision cannot be applied to anyone but the attorney who continues the representation. We disagree. Mere examination of the statutory language does not end the inquiry, because section 340.6, which establishes the limitations period for "an action against an attorney," has already been applied to actions against both the attorney and the law firm. (See, e.g., *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739; *Gold v. Weissman* (2004) 114 Cal.App.4th 1195.)

We must interpret a statute in accordance with its purpose. (*Calatayud v. State of California* (1998) 18 Cal.4th 1057, 1064-1065.) The continuing-representation tolling provision has two purposes: (1) to avoid the disruption of an ongoing attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error; and (2) to prevent an attorney from defeating a malpractice claim by continuing to represent the client until the statutory period has expired. (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618, citing Sen. Com. on Judiciary, 2d reading analysis of Assem. Bill No. 298 (1977-1978 Reg. Sess.) as amended May 17, 1977.) The two cases which have addressed the application of the tolling provision to former law firms are *Beane* and *Crouse*.

In *Beane,* attorney Vodonick, who was in partnership with two other attorneys, was hired to file a state court action on behalf of a client and to prosecute a related proceeding in bankruptcy court. The bankruptcy action was dismissed for failure to

prosecute. Thereafter, the three partners severed their relationship and Vodonick continued to represent the client. (*Beane, supra,* 21 Cal.App.4th at pp. 93-94.) The client's state court action was eventually dismissed based on the res judicata effect of the bankruptcy court dismissal, and Vodonick continued to represent the client through appeal. (*Id.* at p. 94.) In the subsequent malpractice action against Vodonick and his former partners, the former partners brought a motion for summary judgment, arguing that they were released from any liability for malpractice when they ceased practicing with Vodonick and that the action was time-barred under section 340.6. (*Beane, supra,* at p. 92.) The trial court granted the motion, but the Third District reversed.

The *Beane* court first concluded that dissolution of the partnership did not terminate the vicarious liability of Vodonick's former partners for his malpractice during the existence of the partnership. (*Beane, supra,* 21 Cal.App.4th at pp. 97-98.) The *Beane* court then addressed whether the limitations period was tolled against the former partners based on Vodonick's continuous representation. The court found that if the action was not tolled against the former partners, the client would be placed "in an extremely awkward position, preserving on the one hand her attorney-client relationship with the active tortfeasor, while chasing his former partners to the courthouse on the other. This would undermine the express legislative intent, since the former partners if sued . . . would immediately file cross-claims against Mr. Vodonick, disrupting the attorney-client relationship." (*Id*. at p. 99.) The court also noted that "the fiduciary nature of the relationship between attorney and client will lull the client into inaction even after the client hears about an adverse result" (*id*. at p. 99), and that Vodonick had "made soothing statements" to the client about the likelihood of ultimate vindication. (*Ibid*.) The court concluded that "tolling for reasons of continuous representation has an 'all for one and one for all' application when one (or more) of several former partners continue to represent the allegedly wronged client." (*Ibid*.)

In *Crouse,* Division One of the Fourth District expressly declined to follow *Beane*. (*Crouse, supra,* 67 Cal.App.4th at p.1539.) The client in *Crouse* retained Brobeck, Phleger & Harrison (Brobeck) to advise and assist her in connection with the sale of a

limited partnership interest. Attorney Boatwright, an associate and later a partner at Brobeck, was primarily responsible for representing Crouse in the sale. (*Id*. at p. 1520.) Following the sale, the client received a promissory note, which Boatwright apparently lost. (*Id*. at p. 1521.) Thereafter, Boatwright left Brobeck and became a partner at Page, Polin, Busch & Boatwright (Page). The client subsequently retained Page and Boatwright to represent her in connection with renegotiation of the note. When the note could not be produced at the closing, the obligors' attorney aborted the closing. Boatwright then renegotiated a different note-restructuring agreement on less favorable terms. (*Id*. at p. 1522.) In the subsequent malpractice action against Brobeck, Boatwright and Page, Brobeck sought summary judgment, arguing that there was no basis for tolling the statute of limitations on the client's claim against Brobeck after it ceased representing her. (*Id*. at p. 1523.) The trial court agreed and the dismissal was affirmed on appeal.

After finding that *Beane* was factually distinguishable, the *Crouse* court expressly disagreed with *Beane's* policy analysis, finding that the *Beane* court had ignored the principles that a defendant cannot waive the statute of limitations defense on behalf of another co-obligor and that a former partner may not bind other former partners after the partnership is dissolved. (*Crouse, supra,* 67 Cal.App.4th at pp. 1538-1539.) The *Crouse* court further relied on principles of fairness, noting that if a negligent attorney's election to continue the client representation is enforced against his former partners, "those former partners pay the statutory price of the tolling of the statute of limitations without any voice in the election *and* without obtaining the statutory benefit of participating in eliminating or minimizing their liability of damages from the negligence." (*Id*. at p. 1539.) Finally, while the *Crouse* court agreed that requiring the injured client to promptly sue the former partners may trigger cross-complaints against the negligent attorney and thereby impede that attorney's ability to remedy or mitigate the damages caused by his error, "this detriment equitably should be borne by the negligent attorney rather than by his former partners." (*Ibid*.)

We are not persuaded by the *Crouse* court's reasoning. With respect to waiver of the statute of limitations, we note that the statute of limitations is an affirmative defense that is forfeited by the defendant if not appropriately invoked. (*Adams v. Paul* (1995) 11 Cal.4th 583, 597.) But an attorney does not waive the statute of limitations defense by continuing to represent the client. The continuous representation only tolls commencement of the limitations period. The statute of limitations defense is still viable and can be asserted by both the attorney and the law firm if the client does not timely sue after the attorney's continuing representation has ended. The cases cited in *Crouse* for the proposition that a co-obligor cannot waive the statute of limitations defense on behalf of another co-obligor involved written acknowledgments reviving debts that were already barred by the statute of limitations. The cases held that such acknowledgments cannot bind co-obligors who were not signatories and the nonsignatory co-obligors therefore could not be held to have waived the statute of limitations defense. (*Steiner v. Croonquist* (1951) 108 Cal.App.2d Supp. 895, 898-899; *Bemer v. Bemer* (1957) 152 Cal.App.2d 766, 772-773.) The cases did not involve tolling of the limitations period as to an existing claim, as pled here.

Nor does the principle that a partner cannot bind his former partners by actions taken after dissolution of the partnership have application here. First, we note that Gubner was an associate and never a partner at Arter & Hadden. Moreover, even if he had been a partner, the malpractice alleged here occurred while he was at Arter & Hadden, not after he left. Because the malpractice liability arose while the attorney was associated with the former partners, it cannot be said that the attorney's later acts, including the continued representation, created the liability. The cases cited in *Crouse* do not alter this outcome. (*Sears v. Starbird* (1889) 78 Cal. 225, 229 [stating that "after the dissolution of the partnership one partner cannot revive a debt barred by the statute, but during the pendency of the partnership each partner is an agent for all in making an acknowledgment under the statute of limitations"]; *Blackmon v. Hale* (1970) 1 Cal.3d 548, 560 [holding that an attorney who withdrew from a firm before his former partner's tortious act was not liable as a partner]; *Williams v. Ely* (1996) 423 Mass. 467, 478-479

[668 N.E.2d 799, 807-808] [holding that attorneys who withdrew from a firm before their former partner executed a tolling agreement were not bound by the tolling agreement].)

The *Crouse* court was also concerned that it would be unfair to toll the statute of limitations as to the negligent attorney's former law firm because the firm would not obtain the statutory benefit of being able to participate in the negligent attorney's steps to correct or mitigate the error. (*Crouse, supra,* 67 Cal.App.4th at p. 1539.) However, the effects of the tolling provision cut both ways. If the attorney who continues the representation ultimately corrects or mitigates the error, the former law firm benefits by not being sued or by having its potential liability reduced.

Finally, the *Crouse* court acknowledged that if the tolling provision did not apply to former attorneys and the client was forced to promptly sue, those attorneys would likely file cross-complaints against the attorney who was continuing the representation and thereby impede that attorney's ability to remedy or mitigate the damages caused by his error. But the *Crouse* court concluded that such detriment equitably should be borne by the negligent attorney rather than by the former firm. (*Crouse, supra,* 67 Cal.App.4th at p. 1539.) In this vein, the *Crouse* court viewed the former attorneys as the more innocent parties. But here, Beal Bank is not seeking to hold Arter & Hadden and Dean liable solely on the theory that they are vicariously liable for actions taken by Gubner while he was employed by the firm. Rather, Beal Bank is seeking to hold all defendants directly liable for their own allegedly negligent acts. Under these circumstances, it would be inequitable to force the Gubner defendants alone "to pay the statutory price" for the continued representation. Moreover, the detriment caused by the disruption to the ongoing attorney-client relationship affects not only the attorney, but the client as well. The purpose of the continuing-representation tolling provision is to benefit the client's interest by preserving undisturbed the client's relationship with its attorney so that the attorney can try to undo the damage he has done to the client.

Arter & Hadden and Dean argue that applying the tolling provision to former attorneys would extend ad infinitum the time for filing legal malpractice cases, "thereby causing an enormous increase in malpractice insurance, rendering policies virtually

unobtainable for many lawyers." We agree that this is a serious concern. But it is not one that can be resolved on the record before us. Nor do we agree that the time for filing legal malpractice cases would be extended indefinitely. The limitations period is tolled only while the attorney continues to represent the client in the same specific subject matter in which the alleged malpractice occurred.

We therefore hold that the limitations period for a legal malpractice action under section 340.6 is tolled as to the attorney and the attorney's former law firm and its attorneys while the attorney continues to represent the client in the same specific subject matter in which the alleged malpractice occurred.

In this case, we find that the action was timely filed. The first amended complaint alleges that the Gubner defendants continued to represent Beal Bank in the collection matters until September 26, 2002, when Gubner filed a notice of withdrawal in the bankruptcy court. We note from other allegations in the first amended complaint that this occurred two days after Beal Bank filed its original complaint for professional malpractice. The original complaint was dismissed after the parties entered into a tolling agreement, which tolled the action until December 31, 2003. Beal Bank timely filed the instant action on December 30, 2003. Thus, we conclude that the trial court erred in sustaining the demurrers of Arter & Hadden and Dean on the grounds that the action against them was time-barred.[5]

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[5] "'Ordinarily, an attorney's representation is not completed until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for withdrawal.' (2 Mallen & Smith, Legal Malpractice [3d ed. 1989] Statutes of Limitations, *supra*, § 18.12, p. 120.) 'The rule is that, for purposes of the statute of limitations, the attorney's representation is concluded when the parties so agree, and that result does not depend upon formal termination, such as withdrawing as counsel of record.'" (*Worthington v. Rusconi* (1994) 29 Cal.App.4th 1488, 1497.) "Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing *mutual* relationship and of activities in furtherance of the relationship." (*Id*. at p. 1498.)

Here, the first amended complaint contains no allegations of actions taken by the Gubner defendants on behalf of Beal Bank prior to their formal withdrawal as counsel,

DISPOSITION

The judgments of dismissal in favor of Arter & Hadden and Dean are reversed, and the matter is remanded with directions to the trial court to vacate its orders sustaining their demurrers without leave to amend. Beal Bank to recover its costs on appeal.

CERTIFIED FOR PUBLICATION.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST

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other than pursuing the appeal to the Ninth Circuit. It is reasonable to infer that they continued to represent Beal Bank on appeal until the Ninth Circuit issued its opinion on September 25, 2001. The parties' tolling agreement tolled the action from September 24, 2002 until December 31, 2003. Thus, even if we were to disregard Beal Bank's allegation that the Gubner defendants represented it until their formal withdrawal as being contrary to law, we would nevertheless find the action to be timely.