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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

BEACON HEALTHCARE SERVICES, INC., Plaintiff and Appellant, v. NOSSAMAN LLP et al., Defendants and Respondents.	B250834 (Los Angeles County Super. Ct. No. BC 485796)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara A. Meiers, Judge. Affirmed.

Miller Barondess, Mira Hashmall, Justin M. Brownstone and Lauren Wright for Plaintiff and Appellant.

Lindahl Beck, George M. Lindahl and Alan D. Mehaffey for Defendants and Respondents.

In the underlying action, appellant Beacon Healthcare Services, Inc. (Beacon) asserted claims against respondents Nossaman, LLP (Nossaman), and Kathy Emanuel for legal malpractice and breach of fiduciary duty. The trial court granted summary judgment in favor of respondents on Beacon's claims, and denied Beacon's request for leave to amend its complaint. We reject Beacon's challenges to those rulings, and thus affirm.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

There are no disputes regarding the following facts: Beacon operates the Newport Bay Hospital. That hospital is located on property leased by the Newport Hospital Corporation (NHC) pursuant to a ground lease between NHC and certain ground lessors. The term of NHC's ground lease ends in October 2021. In 1993, Beacon executed a sublease with NHC regarding the property. The sublease originally provided for Beacon's tenancy for a 10-year term, but was later amended to extend the term to 2005.

In March 2007, the ground lessors filed an unlawful detainer action against both NHC and Beacon (ground lease action). Their complaint alleged that NHC and Beacon had breached the ground lease by placing temporary modular buildings on the property. Nossaman and attorney Emanuel jointly represented Beacon and NHC throughout the action. In settling the action, the parties -- including Beacon -- executed a document entitled "Third Amendment and Addendum to Ground Lease, Including Settlement Agreement, Mutual Release, and Compromise" (amended ground lease). In March 2010, respondents ended their representation of Beacon.

In a letter to Beacon dated March 4, 2011, NHC stated that Beacon had been a month-to-month tenant since 2005, and that NHC would commence eviction proceedings unless Beacon agreed to a new lease at a monthly rent of $40,000. In

April 2011, Beacon filed an action against NHC, alleging that the parties had agreed to a monthly rent of $20,000, and that its existing sublease expired in October 2021. Shortly afterward, NHC served a 30-day notice of termination of Beacon's subtenancy.

On June 2, 2011, NHC commenced an unlawful detainer action against Beacon. Later, in May 2012, Beacon and NHC settled their respective lawsuits over the sublease. Under the settlement agreement, Beacon entered into a sublease with NHC effective until October 31, 2021, at a monthly rent of $33,000.

On June 1, 2012, Beacon initiated the underlying action against Nossaman and Emanuel, asserting claims for professional negligence and breach of fiduciary duty. The complaint alleged that respondents had provided inadequate advice relating to the status and terms of Beacon's sublease during the ground lease action. Respondents sought summary judgment on the complaint, arguing that Beacon's claims were time-barred, that their representation imposed no duty on them to advise Beacon regarding its sublease, and that their conduct caused no damages. While respondents' summary judgment motion was pending, Beacon filed a motion for leave to amend its complaint. The trial court granted summary judgment in favor of respondents and denied Beacon's request for leave to amend the complaint. On June 14, 2013, the court entered judgment in favor of respondents and against Beacon.

DISCUSSION

Beacon contends the trial court erred in (1) granting summary judgment on its complaint and (2) denying its request for leave to amend the complaint. For the reasons explained below, we reject those contentions.

A. *Summary Judgment*

We begin with the grant of summary judgment in respondents' favor on Beacon's complaint.

1. *Standard of Review*

"A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail. [Citation.]" (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.) Generally, "the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) In moving for summary judgment, "all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action -- for example, that the plaintiff cannot prove element X." (*Id*. at p. 853.)

"'Review of a summary judgment motion by an appellate court involves application of the same three-step process required of the trial court. [Citation.]'" (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1662 (*Bostrom*).) The three steps are (1) identifying the issues framed by the complaint, (2) determining whether the moving party has made an adequate showing that negates the opponent's claim, and (3) determining whether the opposing party has raised a triable issue of fact. (*Ibid*.) Following a grant of summary judgment, we review the record de novo for the existence of triable issues, and consider the evidence submitted in connection with the motion, with the exception of evidence

to which objections were made and sustained. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)[1]

Our review is governed by a fundamental principle of appellate procedure, namely, that "'[a] judgment or order of the lower court is presumed correct,'" and thus, "'error must be affirmatively shown.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, italics omitted, quoting 3 Witkin, Cal. Procedure (1954) Appeal, § 79, pp. 2238-2239.) Under this principle, Beacon bears the burden of establishing error on appeal, even though respondents had the burden of proving its right to summary judgment before the trial court. (*Frank and Freedus v. Allstate Ins. Co*. (1996) 45 Cal.App.4th 461, 474.) For this reason, our review is limited to contentions adequately raised in Beacon's briefs. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125-126.)

2. *Professional Negligence and Breach of Fiduciary Duty*

Beacon's complaint asserts claims for professional negligence and breach of fiduciary duty, which constitute distinct torts. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086 (*Stanley*).) To state a cause of action for professional negligence, "a plaintiff must plead '(1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence.'" (*Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 179,

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[1] In the present case, the parties raised numerous written evidentiary objections to the showing proffered by their adversary. Because the trial court did not expressly rule on the objections, we presume them to have been overruled. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534.) To the extent respondents have reasserted certain objections on appeal, we discuss them below (see fn. 6, *post*).

quoting *Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1199.) Here, the attorney's duty requires more than the adequate use of legal skills. (*Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1147.) "Rather, it is a wider obligation to exercise due care to protect a client's best interests in all ethical ways and in all circumstances." (*Ibid*.)

In contrast, in actions against attorneys, the elements of a cause of action for breach of fiduciary duty are: "(1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach. [Citation.] [¶] The scope of an attorney's fiduciary duty may be determined as a matter of law based on the Rules of Professional Conduct which, 'together with statutes and general principles relating to other fiduciary relationships, all help define . . . the fiduciary duty which an attorney owes to his [or her] client.' [Citations.]" (*Stanley*, *supra*, 35 Cal.App.4th at pp. 1086-1087.)

In seeking summary judgment on the complaint, respondents contended that Beacon's claims failed for three independent reasons: (1) that the claims were time-barred under the applicable one-year statute of limitations (Code Civ. Proc., § 340.6); (2) that their representation imposed no duty on them to advise Beacon regarding the terms of its sublease; and (3) that Beacon could show no damages flowing from their conduct.[2] The trial court determined that summary judgment was proper on all three grounds. Because we conclude that summary judgment was properly granted on the basis of the first ground, we do not examine the remaining grounds.

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[2] All further statutory citations are to the Code of Civil Procedure, unless otherwise indicated.

3. *Section 340.6*

Section 340.6 sets forth the limitations periods potentially applicable to Beacon's claims. Subdivision (a) of section 340.6 states in pertinent 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." The statute applies to claims for professional negligence and breach of fiduciary duty arising out of the performance of an attorney's professional duties. (*Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1121; *Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 67-68.)

Subdivision (a) of section 340.6 states "'two distinct and alternative limitation periods: *one* year after actual or constructive *discovery*, or *four* years after *occurrence* (the date of the wrongful act or omission), whichever occurs first.'" (*Samuels v. Mix* (1999) 22 Cal.4th 1, 7, quoting *Radovich v. Locke-Paddon* (1995) 35 Cal.App.4th 946, 966 (*Samuels*).) That subdivision also incorporates tolling provisions, stating: "[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 any of the following exist: [¶] (1) The plaintiff has not sustained actual injury. [¶] (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred. [¶] (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation. [¶] (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action." (§ 340.6, subd. (a).) With the exception of subdivision

(a)(3), the tolling provisions apply to both the one-year and four-year limitations periods. (*Bennett v. McCall* (1993) 19 Cal.App.4th 122, 126; *Gurkewitz v. Haberman* (1982) 137 Cal.App.3d 328, 334-336.)

Here, the key issues concern the one-year limitations period and the first tolling provision predicated on the existence of "actual injury" (§ 340.6, (a)(1)). Respondents' summary judgment motion contended that Beacon's claims were time-barred under the one-year limitations period, arguing that Beacon actually or constructively discovered the alleged misconduct in March 2011, over one year before Beacon filed the underlying action on June 1, 2012. In opposing summary judgment, Beacon has not invoked the second and fourth tolling provisions, as it is undisputed that respondents' representation ended in March 2010, and Beacon has identified no pertinent disability. Nor is it necessary for us to examine the application of the third tolling provision, notwithstanding Beacon's allegations that respondents' "concealed" information relating to the alleged misconduct before 2012. That provision applies solely to the four-year limitations period, which is operative only when there is no "actual or constructive discovery" of the purported attorney misconduct sufficient to trigger the one-year limitations period. (*Samuels*, *supra*, 22 Cal.4th at p. 7.) Accordingly, the focus of our inquiry is on whether Beacon so discovered respondents' alleged misconduct, and whether the one-year limitations period was otherwise tolled by the absence of "actual injury" (§ 340.6, (a)(1)).

Generally, under section 340.6, a cause of action accrues only when "the client discovers or should discover the facts essential to the malpractice claim . . . . " (*Laird v. Blacker* (1992) 2 Cal.4th 606, 611 (*Laird*).) The applicable test is "whether the plaintiff has information of circumstances sufficient to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his or her investigation." (*McGee v. Weinberg* (1979) 97

Cal.App.3d 798, 803; accord, *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 685 (*Peregrine Funding*).) That test is applicable to claims for professional negligence and breach of fiduciary duty. (*Peregrine Funding*, *supra*, 133 Cal.App.4th at pp. 668, 682-687.)

The first tolling provision also plays a crucial role in triggering the one-year period. As our Supreme Court has explained, "[t]he legislative scheme . . . toll[s] the limitations period if the plaintiff has not sustained any actual injury. [Citation.] As a result, a plaintiff who actually or constructively discovered the attorney's error, but who has suffered no damage to support a legal malpractice cause of action, need not file suit . . . ." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 757-758 (*Jordache*).) However, under the first tolling provision, "*discovery* of damage is not a necessary component of actual injury . . . ." (*Id*. at p. 762.)

Generally, "[t]he test for actual injury . . . is whether the plaintiff has sustained any damages compensable in an action, other than one for actual fraud, against an attorney for a wrongful act or omission arising in the performance of professional services." (*Jordache*, *supra*, 18 Cal.4th at p. 751.) As determining actual injury "require[s] examination of the particular facts of each case in light of the alleged wrongful act or omission," there are no bright-line rules regarding the occurrence of actual injury. (*Id*. at p. 761, fn. 9.) Nonetheless, in cases involving attorneys engaged to secure rights through preparation of leases, agreements, or other instruments, our courts have found actual injury to occur when the instrument results in the improper loss of a right (*Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 227 (*Foxborough*), or when the client engages in litigation arising out of deficiencies in the instrument (*Callahan v. Gibson, Dunn & Crutcher LLP* (2011) 194 Cal.App.4th 557, 575 (*Callahan*); *Truong v. Glasser* (2009) 181

Cal.App.4th 102, 113-115 (*Truong*); *Village Nurseries v. Greenbaum* (2002) 101 Cal.App.4th 26, 42-45 (*Village Nurseries*)).

4. *Complaint*

In assessing the grant of summary judgment, we look first at Beacon's allegations in its complaint, which frame the issues pertinent to a motion for summary judgment. (*Bostrom, supra*, 35 Cal.App.4th at p. 1662.) The complaint, filed June 1, 2012, alleged that in 2007, when Beacon retained respondents to represent it in the ground lease action, Beacon believed that its sublease ended in October 2021, and that the terms of its sublease required Beacon "to pay to defend the . . . action." During the litigation, up to and including the execution of the amended ground lease, respondents allegedly breached their duty of care and their fiduciary duties by failing to advise Beacon that it lacked the right to use the property until 2021, that it could be treated as a month-to-month tenant in the absence of a valid written lease, and that it had no obligation to incur legal fees or costs. According to the complaint, had respondents so advised Beacon, it would not have undertaken the "substantial obligations" arising from the amended ground lease. In addition, respondents breached their duties by failing to draft the amended ground lease to secure Beacon's right to use the property until October 2021.

The complaint further alleged that in NHC's unlawful detainer action against Beacon, filed June 2, 2011, NHC asserted that Beacon lacked a valid sublease and was merely a "month-to-month, hold-over tenant." NHC also asserted that the amended ground lease "failed to identify [Beacon's] 1993 [l]ease (or any other lease between Beacon and NHC) . . . ." Due to the "deficient language" in the amended ground lease, Beacon entered into an unfavorable settlement of NHC's

action "because there existed a material risk that it was . . . a month-to-month tenant."

The complaint further alleged that as a result of respondents' conduct, Beacon incurred legal fees when NHC commenced its unlawful detainer action in June 2011, and suffered other damages. Among the purported items of damage was that respondents "did not secure the right for which [Beacon] retained [respondents] and for which it paid legal fees, namely, the right to use the [property] through October 31, 2021."

5. *Respondents' Showing*

In seeking summary judgment, respondents challenged the complaint's allegations that they were obliged to advise Beacon regarding the sublease during the ground lease action, and that their failure to do so caused the purported damages. Furthermore, respondents contended that for purposes of the one-year limitations period under section 340.6, Beacon's claims accrued no later than March 2011, over a year before Beacon commenced the underlying action.

Respondents submitted evidence of the underlying facts: Throughout the pertinent events, Beacon was controlled by James Parkhurst and his wife. In 1993, when Parkhurst executed the original sublease, he knew that it provided for a 10-year term. The sublease was later amended in writing to extend its term to April 2005.

From 1993 to 2006, Parkhurst never consulted with an attorney to determine whether it was necessary for Beacon to secure written extensions of the sublease. Parkhurst testified in his deposition that he viewed extensions as "implied" because the property "was of no value to anybody else other than Beacon." Parkhurst thus believed that Beacon "effectively . . . had a permanent occupancy . . . ."

Respondents jointly represented Beacon and NHC in the ground lease action against them, which commenced in March 2007. Parkhurst never told respondents he believed the sublease extended to 2021. According to Parkhurst, he thought the sublease's term "was implied" in the "documents." Parkhurst also never asked respondents to review the term of Beacon's sublease, negotiate an extension of that term, or secure the right to use the property until October 2021.

Parkhurst further testified that if respondents had advised him that the sublease did not extend to October 2021, he would not have regarded that fact "as a huge threat." Parkhurst stated: "Without Beacon being the sublessee . . . the property . . . would have been rendered virtually useless for any kind of use that would have provided [NHC] an opportunity for moneys anywhere close to [$]20,000 a month." In addition, Parkhurst acknowledged that in December 2011, during the litigation over the sublease between Beacon and NHC, he had testified that it made no sense to try to extend the sublease while the ground lease action was pending, because Beacon might have been "hurled out of there."

Regarding the settlement of the ground lease action, Parkhurst testified that he never had a discussion with NHC regarding the incorporation in the settlement documents of "a clear indication that the sublease was to go to 2021." Furthermore, when Parkhurst reviewed the proposed settlement documents, he made no comment regarding the absence of a provision establishing that the sublease was to run to 2021. According to Parkhurst, the sublease's term was not "germane" to the specific issues raised by the documents.

Respondents' representation of Beacon ended in March 2010, when the ground lease action settled. One year later, in a letter to Beacon dated March 4, 2011, NHC stated: "Since the original lease expired on [the] property on December 31, 2003, and was extended on December 18, 2003, at $60,000 per month until April 30, 2005, [Beacon] has been operating on a month-to-month

rental basis since April 30, 2005. [¶] Approximately three [] months ago, your company was presented with a new lease arrangement by [NHC], which was to be effective May 1, 2011, at $40,000 per month. . . . [¶] Please be advised that if the attached lease is not executed on or before April 1, 2011, we will have no alternative but to commence eviction proceedings . . . ."

Upon receiving the March 4, 2011 letter, Beacon engaged new counsel. On April 8, 2011, Beacon initiated an action against NHC, asserting claims for breach of contract, breach of the covenant of good faith and fair dealing, promissory estoppel, declaratory relief, and an accounting. Beacon's complaint alleged: "In 1993, Beacon entered into a written lease with NHC. . . . [¶] . . . [T]he parties agreed that the monthly rent payments under the lease would be dictated by the cost-reimbursement policies of the Medicare program and the financial viability of the hospital. The payments fluctuated over time, but by January 2007 the parties agreed to a reasonable monthly rent of $20,000 . . . . The initial lease was modified and extended; in accordance with the parties' agreement, Beacon must pay NHC a reasonable monthly rent until expiration of the lease in October 2021 . . . ." The complaint further alleged that "[o]ut of nowhere," NHC sought to increase Beacon's monthly rent, and that "[f]or the first time in March 2011, NHC purported to . . . claim that . . . Beacon was renting the premises on a month-to-month-basis." Beacon sought a declaration that it had the right to retain the premises until October 2021.

In late April 2011, NHC served a 30-day notice of termination of Beacon's subtenancy. On May 4, 2011, Beacon's counsel wrote to NHC, stating that the lease dispute would be settled in Beacon's action against NHC. From March to May 2011, Beacon incurred legal fees in connection with its sublease dispute with NHC.

On June 2, 2011, NHC initiated its unlawful detainer action against Beacon, In response, Beacon maintained that its sublease ended in October 2021. In May 2012, Beacon and NHC settled their respective lawsuits regarding the sublease. Beacon then executed a sublease operative until October 31, 2021, at a monthly rent of $33,000.

On June 1, 2012, Beacon initiated the underlying action.

6. *Beacon's Showing*

In opposing summary judgment, Beacon contended that it retained respondents to maintain its "continued right" to use the property, and that when respondents advised Beacon to execute the amended ground lease, Beacon signed it in the belief that it secured that right until October 2021. Beacon further contended that respondents violated their ethical duties to Beacon during the ground lease action, arguing that respondents never obtained written consent from Beacon and NHC regarding the joint representation.[3] In addition, Beacon argued that due to Beacon's and NHC's potentially adverse interests concerning Beacon's sublease, respondents withheld crucial advice from Beacon.

Regarding the one-year limitations period, Beacon contended there were triable issues of fact regarding the accrual of its claims. Beacon maintained that NHC's March 4, 2011 letter and the ensuing events in April and May 2011 did not constitute adequate notice of the existence of the claims. Beacon argued that it

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3 Beacon relied on rule 3-310(C) of the Rules of Professional Conduct of the State Bar, which provides that a lawyer "shall not, without the informed written consent of each client: [¶] (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or [¶] (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict . . . ."

lacked the requisite knowledge regarding its claims until 2012. Beacon further maintained that it suffered no "actual injury" until it settled that litigation in May 2012.

In support of these contentions, Beacon pointed to Parkhurst's deposition testimony and other evidence, including deposition testimony from Emanuel. Parkhurst testified that no later than 2005, Beacon and NHC entered into an "assumptive" agreement that the sublease was valid until 2021.[4] In 2006, after the ground lessors served notice that some temporary modular buildings on the property violated the ground lease, Parkhurst contacted Nossaman and provided it with a copy of the sublease. In December 2006, Nossaman conducted a "conflict check" and identified NHC's principals as "opposing part[ies]." In March 2007, respondents began to represent both Beacon and NHC, but neither explained the risks of joint representation nor identified any potential conflicts between Beacon and NHC. Beacon paid NHC's legal fees because Parkhurst believed that it was obliged to do so under the terms of the sublease.

During the ground lease action, respondents never advised Beacon that it lacked the right to use the property until 2021, that it could be treated as a month-to-month tenant in the absence of a valid written lease, and that it had no obligation to pay NHC's legal fees. In addition, respondents failed to alert Beacon to certain issues whose resolution was potentially unfavorable to NHC. Emanuel, who managed the case for Nossaman, was aware that NHC appeared to enjoy a substantial "profit margin" on the sublease, and that then-current poor economic conditions provided a basis for negotiating a lower rent for Beacon. She also knew

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[4] According to Parkhurst, an "assumptive agreement is where you put together a whole series of data points over years and years and years, and you operate according to those assumptive points that are consistent and develop a trend and a potential outcome."

that the parties, in discussing settlement of the action, explored the possibility of extending the term of the ground lease pursuant to two five-year options. Unknown to Beacon, Emanuel examined that possibility with a fellow Nossaman attorney. Emanuel's notes from that conversation state: "Get subtenant to agree to get master deal done and then deal with subtenant but bad advice because subtenant will get a better deal if gets them now." Furthermore, in executing the amended ground lease, the parties agreed to adjust the property's boundaries, but respondents never disclosed their analysis of that adjustment's potential effect on Beacon's property tax liabilities.

According to Parkhurst, when he reviewed the settlement documents in the ground lease action, he believed that they reflected an agreement between Beacon and NHC that the sublease extended to October 2021. During the settlement negotiations, he talked to Emanuel regarding a proposal -- not incorporated in the amended ground lease -- under which NHC would obtain two five-year options to extend its ground lease, which Parkhurst believed would also extend Beacon's subtenancy. Later, in executing the amended ground lease, Beacon, NHC, and the ground lessors signed a related agreement describing the sublease as terminating in October 2021.[5] Parkhurst further stated that had he been aware of the matters that respondents failed to disclose, he would have renegotiated the sublease with NHC, declined to pay NHC's legal fees, and pursued terms more favorable to Beacon in the settlement of the ground lease action.

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[5] In conjunction with the amended ground lease, the parties executed an agreement entitled "Covenant and Agreement," which stated: "Owner, Lessee, and/or Sublessee expressly agree that in any event, the modular building shall either be removed . . . or brought into conformance with laws, rules and regulations of the City [of Newport Beach] by the later[-]to[-]occur [date] of October 31, 2021, which is the date that the Lease and Sublease terminate, or, if extended, the termination date of the Lease and Sublease . . . ."

According to Beacon, it first learned the facts essential to its claims in 2012.[6] In late 2012, during discovery in the underlying action, respondents produced Emanuel's communications with other Nossaman attorneys, and Emanuel testified in her deposition that nothing in the amended ground lease gave Beacon the right to use the property until October 2021.

7. *Analysis*

In granting summary judgment, the trial court concluded that Beacon's claims were time-barred. We agree. As explained below, the record establishes that Beacon's claims accrued as early as March 2011, and in any event no later than early May 2011, more than one year before it commenced the underlying action on June 1, 2012.

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6 Before the trial court and on appeal, Beacon has maintained that it discovered some of those facts in March 2012. According to Beacon, Emanuel told Beacon's counsel at that time that she had never reviewed the 1993 sublease, and that the expiration of a written lease ordinarily transforms the lessee into a month-to-month tenant. To establish the existence of Emanuel's purported remarks, Beacon relies on a declaration from James Parkhurst and on deposition testimony of his wife, neither of whom was present during the pertinent conversation. Respondents asserted hearsay objections to the pertinent evidence regarding Emanuel's remarks, but the trial court did not rule on them.

Because the Parkhursts' evidence constitutes inadmissible hearsay, we exclude it from our analysis. Although Emanuel's purported remarks to Beacon's counsel, viewed in isolation, may constitute admissible party admissions (Evid. Code, § 1220), the Parkhursts' evidence crucially relies on counsel's statements to them regarding the remarks. Beacon suggests that those statements by counsel are admissible for the nonhearsay purpose of establishing the Parkhursts' state of mind. However, as the Parkhursts' evidence is offered to show the truth of what Emanuel purportedly asserted, rather than the Parkhursts' state of mind, it is inadmissible hearsay. (*Travelers Property Casualty Company of America v. Superior Court* (2013) 215 Cal.App.4th 561, 569, fn. 7; Evid. Code, § 1201.)

a. *Discovery of Claims*

We begin by examining when Beacon knew, or should have known, "the facts essential" to its claims. (*Laird*, *supra*, 2 Cal.4th at p. 611.) Under the test applicable to that determination, "'[a] plaintiff need not be aware of the specific "facts" necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her.'" (*Peregrine Funding*, *supra*, 133 Cal.App.4th at p. 685, quoting *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1111.) Furthermore, "'"[i]t is irrelevant that the plaintiff is ignorant of his legal remedy or the legal theories underlying his cause of action."'" (*Village Nurseries*, *supra*, 101 Cal.App.4th at p. 43, quoting *Worton v. Worton* (1991) 234 Cal.App.3d 1638, 1650.) Although the test ordinarily poses a factual inquiry, it presents a question of law when the material facts are undisputed. (*McCann v. Welden* (1984) 153 Cal.App.3d 814, 824 & fn. 13 (*McCann*); *Village Nurseries*, *supra*, 101 Cal.App.4th at pp. 42-45.)

An instructive application of the test is found in *Peregrine Funding.* There, investors in a mortgage lender sued a law firm for professional negligence and aiding and abetting a breach of fiduciary duty, alleging that the law firm had represented the lender and assisted it in bilking them through a "Ponzi scheme." (*Peregrine Funding*, *supra,* 133 Cal.App.4th at p. 665.) The investors maintained that the law firm had impliedly undertaken to represent them, and that it had breached its duties of care and loyalty to them by engaging in conduct that favored the lender but disadvantaged them. (*Id*. at pp. 670-671.) The law firm filed a motion under the "anti-SLAPP" law (§ 425.16), contending, inter alia, that the action was time-barred because the investors knew of the purported misconduct

two years before they filed suit. (*Peregrine Funding*, *supra*, at pp. 665, 668, 682.) In opposing the motion, the investors argued that they first learned that the law firm had effectively undertaken their representation less than one year before they filed the action, when they obtained certain documents from the law firm. (*Id*. at pp. 684-685.)

After the trial court denied the motion, the appellate court reversed, concluding that the investors' claims were time-barred. (*Peregrine Funding*, *supra*, 133 Cal.App.4th at pp. 682-684.) The court determined that the investors knew, or should have known, the facts alleged in the complaint more than one year before they commenced their action, including the existence of the attorney-client relationship. The court also rejected the investors' contention that their belated discovery of the law firm's documents triggered the one-year limitations period, stating: "[T]his 'fact' is ancillary to the allegations of misconduct in the complaint; it is merely evidence the investors cite to support the theory that [the law firm] owed them implied duties of care and loyalty." (*Id*. at p. 685; see also *Village Nurseries*, *supra*, 101 Cal.App.4th at pp. 42-45 [prior to judicial determination that contractor's counsel had failed to perfect its lien in bankruptcy proceeding, contractor acquired constructive knowledge of malpractice when bankruptcy court, bankruptcy trustee, and contractor's own attorney voiced doubts that liens had been perfected].)

Here, the record establishes that Beacon knew, or should have known, of the misconduct alleged in the complaint as early as March 2011 and no later than early May 2011, more than one year before Beacon commenced the underlying action. Generally, in a "transactional category," legal malpractice claims may be predicated on allegations that the attorney's misconduct resulted in the client "enter[ing] into a binding agreement . . . detrimental to his interests." (*Tchorbadjian v. Western Home Ins. Co.* (1995) 39 Cal.App.4th 1211, 1219.)

Here, the complaint alleges that in drafting the amended ground lease, respondents failed to secure Beacon's right to use the property until October 2021, and failed to advise Beacon regarding certain consequences of the absence of a valid written sublease, namely, that Beacon lacked the right to use the property until 2021, that it could be treated as a month-to-month tenant, and that it had no obligation to pay NHC's legal fees.

The gravamen of Beacon's claims is that respondents failed to include within the amended ground lease a provision *clearly* securing Beacon's right to use the property to October 2021. In opposing summary judgment, Beacon asserted: "[Respondents] prepared transactional real estate documents that were supposed to protect [Beacon's] use of the property. []*They did not*.[]" (Italics supplied.) On appeal, Beacon maintains that the amended ground lease "states that . . . the sublease expire[s] on October 31, 2021," but nonetheless argues that respondents "advised Beacon to sign the [amended ground lease] that gave Beacon no rights to the property as a sublessee." As explained below, the events from March to early May 2011 showed that Beacon had abundant grounds for a "'suspicion of wrongdoing'" obliging it to "'go find the facts.'" (*Peregrine Funding*, *supra*, 133 Cal.App.4th at p. 685.)[7]

No later than early March 2011, Beacon had notice that NHC denied the existence of any agreement extending Beacon's sublease to October 2021. On March 4, 2011, NHC asserted to Beacon that it had lacked a valid written sublease

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[7] We recognize that Beacon's claims can be understood in two ways. Beacon's theory may be that the amended ground lease did not, in fact, secure an extension of the sublease, or alternatively, that the amended ground lease secured that extension, but was so poorly drafted that Beacon could not rely on it to establish the extension. For the reasons discussed below, Beacon had notice of its claims no later than May 4, 2011, regardless of the precise theory underlying them.

after 2005, stating: "Since the original lease expired on [the] property on December 31, 2003, and was extended . . . until April 30, 2005, [Beacon] has been operating on a month-to-month rental basis since April 30, 2005." In response, Beacon retained new counsel, and the following month Beacon sued NHC for breach of contract and declaratory relief, alleging that in or after 2007, the parties agreed that Beacon "must pay NHC a reasonable monthly rent until expiration of the lease in October 2021 . . . ." Beacon specifically sought a declaration that it had the right to retain the premises until October 2021. The following month, on May 4, 2011, after NHC served a 30-day notice of the termination of Beacon's tenancy, Beacon's counsel told NHC that the lease dispute would be settled in Beacon's action against NHC. These facts leave no doubt that as early as March 2011 and no later than May 4, 2011, Beacon knew that NHC disputed that the parties had any written agreement -- including the amended ground lease -- constituting a valid sublease affording Beacon the right to use the property to October 2021.

The record further shows that Beacon knew, or should have known, that respondents had neither advised them that the 1993 sublease and its amendments had expired nor clearly secured an extension of the sublease in the amended ground lease. Beacon does not dispute that its 1993 lease and its amendments expired in 2005, and that respondents provided no advice to Beacon regarding any extension. Furthermore, in March 2012, Beacon had copies of its agreements with NHC, including the amended ground lease, and was aware of the circumstances surrounding the execution of the amended ground lease, including the parties' preceding course of conduct and their negotiations. Accordingly, Beacon then possessed the facts necessary to determine that the amended ground lease contained no provision clearly extending Beacon's sublease to October 2021.

Generally, "[t]he precise meaning of any contract, including a lease, depends upon the parties' expressed intent, using an objective standard." (*Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 21.) For that reason, the interpretation of a lease "begins with the language of the lease itself," which is "presumptively controlling in determining the intent of the parties." (*Hadian v. Schwartz* (1994) 8 Cal.4th 836, 844.) When there is ambiguity in the language, extrinsic evidence may be considered to ascertain a meaning to which the instrument's language is reasonably susceptible. (*Golden West Baseball Co. v. City of Anaheim, supra,* 25 Cal.App.4th at p. 21.) That evidence may include the circumstances surrounding the negotiation of the lease (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 748, pp. 836-838), but not the private and unexpressed views of participants in the negotiations (*Edwards v. Comstock Insurance Co.* (1988) 205 Cal.App.3d 1164, 1169). However, if the lease contains an integration clause, extrinsic evidence is ordinarily not admissible to "add to or vary its terms." (*SDC/Pullman Partners v. Tolo Inc.* (1997) 60 Cal.App.4th 37, 53.)

The amended ground lease, which contains an integration clause, discloses no provision clearly extending the term of Beacon's sublease.[8] Moreover, to the extent extrinsic evidence potentially resolved ambiguities in the amended ground lease, Beacon possessed the key evidence in March 2011, as Parkhurst was well acquainted with Beacon's course of conduct relating to NHC, and had participated in the negotiations regarding the amended ground lease. Accordingly, when

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8 We note that the provision in the "Covenant and Agreement" describing the sublease as ending in October 2021 does not do so (see fn. 5, *ante*). That provision, by its plain language, does not contain an agreement to extend the lease, but makes a factual assertion regarding the sublease's termination date in the context of stating a different agreement among the parties.

Beacon hired counsel to address NHC's claim that Beacon was merely a month-to-month tenant, Beacon had the facts necessary to establish the gravamen of its claims -- namely, that the amended ground lease lacked a provision clearly securing its right to use the property to October 2021 -- as well as access to legal counsel to make that assessment.

In view of Beacon's knowledge of the amended ground lease and the circumstances surrounding its execution, it is clear that Beacon had notice of its claims against respondents as early as March 2011, when it received NHC's letter asserting its month-to-month tenancy, and no later than May 4, 2011, when its counsel stated that NHC's assertion would be resolved in Beacon's action against NHC. This is so, regardless of the fact that Beacon's action against NHC relied on the theory that the amended ground lease extended its sublease to October 2021. (*Village Nurseries, supra*, 101 Cal.App.4th at pp. 42-45 [for purposes of triggering one-year limitations period, contractor acquired constructive knowledge that its counsel had improperly failed to perfect its liens during bankruptcy proceedings in which contractor defended the liens' validity].) Beacon thus knew, or should have known, of respondents' alleged breach of their duty of care in advising Beacon and negotiating the amended ground lease, for purposes of a claim of professional negligence. Furthermore, as Beacon was aware that respondents had jointly represented it and NHC during the ground lease action, Beacon knew, or should have known, of respondents' alleged actions that disadvantaged Beacon in violation of their duty of loyalty, for purposes of a claim of breach of fiduciary duties.[9]

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9 Beacon suggests that respondents' evidentiary showing was insufficient to carry their burden on summary judgment of demonstrating that prior to commencing the underlying action, Beacon knew, or should have known, of respondents' wrongful acts. However, we may review all the evidence submitted by the parties to determine whether
(Fn. continued on next page.)

Beacon contends that its claims -- or some portion of them -- are not time-barred because it discovered aspects of respondents' alleged misconduct in 2012. In this regard, Beacon argues that respondents concealed a critical fact regarding their breach of fiduciary duties until September 2012, when Beacon secured Emanuel's notes relating to her conversation with a colleague, which state: "Get subtenant to agree to get master deal done . . . ." Beacon further argues that it first discovered a critical fact regarding respondents' professional negligence in December 2012, when Emanuel testified in her deposition that she did not believe that the amended ground lease extended the sublease to October 2021. In addition, Beacon maintains that respondents engaged in several acts of misconduct, some of which are not expressly specified in the complaint, including that respondents failed to disclose a known conflict of interest between Beacon and NHC, never obtained a waiver regarding that conflict, permitted Beacon to pay NHC's legal fees when it was unnecessary for Beacon to do so, and failed to renegotiate Beacon's rent despite favorable economic conditions.[10]

We reject Beacon's contention for two reasons. To the extent Beacon maintains it could not have discovered its claims until it learned Emanuel's hitherto undisclosed views regarding the amended ground lease and her conversations with fellow Nossaman attorneys, that evidence is immaterial to the gravamen of Beacon's claims, namely, that the amended ground lease lacked a provision clearly extending the sublease. As explained above, the unexpressed

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respondents carried their initial burden. (*Villa v. McFerren* (1995) 35 Cal.App.4th 733, 750-751.) As explained above, the record establishes the absence of triable issues regarding when Beacon had notice of its claims.

10 Beacon also argues that it lacked adequate notice of respondents' misconduct until March 2012, when Emanuel purportedly told Beacon's counsel that she had never reviewed the sublease. However, that contention fails, as it relies on inadmissible evidence regarding Emanuel's purported remarks (see fn. 6, *ante*).

views of Emanuel and her colleagues are not pertinent to the interpretation of the amended ground lease.

Moreover, the belatedly discovered facts merely supplement the essential facts already known to Beacon in early 2011. As explained in *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1526, fn. 2 (*Crouse*), "[w]hen a cause of action for malpractice alleges a single injury, the fact that the attorney's course of conduct involved discrete negligent acts or omissions does not create separate causes of action with a separate statute of limitations for each act or omission." Although Beacon asserts several acts of misconduct, they constitute a single course of conduct -- namely, respondents' failure to rectify Beacon's lack of a written sublease continuing its tenancy on favorable terms to October 2021 -- and all the injuries identified in the complaint flow from that misconduct. The purportedly new facts are thus "'ancillary to the allegations of misconduct in the complaint,'" and constitute nothing more than additional evidence to support Beacon's claims. (*Peregrine Funding*, *supra*, 133 Cal.App.4th at p. 685.)[11]

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11 We recognize that under the test stated in *Crouse*, one of the allegedly wrongful acts identified by Beacon may possibly fall outside the course of misconduct described above. In opposing summary judgment, Beacon argued that in executing the amended ground lease, the parties agreed to adjust the property's boundaries, but respondents "never disclosed their analysis regarding the potential impact of the lot line adjustment on Beacon's property tax exposure . . . ." However, assuming -- without deciding -- that respondents' failure to so advise Beacon can be segregated from the course of misconduct described above, Beacon's contention fails for another reason asserted in respondents' summary judgment motion, namely, that Beacon has not shown that respondents' purported misconduct caused any damages.

In legal malpractice actions, "[b]reach of duty causing only speculative harm is insufficient to create such a cause of action. [Citation.] '[D]amages may not be based upon sheer speculation or surmise, and the mere possibility or even probability that damage will result from wrongful conduct does not render it actionable. [Citation.]'" (*Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, 661-662, quoting *In re Easterbrook* (1988) 200 Cal.App.3d 1541, 1544, disapproved on another ground in *People v. Romero*
(Fn. continued on next page.)

The decisions in *Fritz v. Ehrmann* (2006) 136 Cal.App.4th 1374 and *McCann*, *supra*, 153 Cal.App.3d 814, upon which Beacon relies, are distinguishable. In each case, the plaintiff's claim for legal malpractice was predicated on two distinct acts of misconduct, which worked separate injuries. (*Fritz v. Ehrmann*, *supra*, 136 Cal.App.4th at pp. 1381-1387 [in drafting promissory note, attorney made separate errors relating to prepayment of principal and deferred interest payments, resulting in distinct injuries at different times]; *McCann*, *supra*, 153 Cal.App.3d at pp. 819-824 [in drafting property distribution agreement in marital dissolution action, attorney made separate errors in provisions regarding allocation of property and support obligations, resulting in distinguishable injuries].) In reversing summary judgment on the claims, the appellate courts concluded that the claims were time-barred only with respect to one act of misconduct. (*Fritz v. Ehrmann*, *supra*, at pp. 1381-1387; *McCann*, *supra*, 153 Cal.App.3d at pp. 819-824.) Here, in contrast, the allegedly wrongful acts upon which Beacon relies constituted a single course of misconduct, for purposes of section 340.6. In sum, Beacon knew, or should have known, of "the facts essential" to its claims more than one year before it commenced the underlying action (*Laird*, *supra*, 2 Cal.4th at p. 611).

(1994) 8 Cal.4th 728, 744, fn. 10.) Thus, to avoid summary judgment on a malpractice claim, the plaintiff must allege and show "facts demonstrating actual damage." (*Thompson v. Halvonik*, *supra*, at p. 662.)

Here, Beacon's opposition alleged only that respondents failed to advise it regarding the "potential impact" of the adjustment. Furthermore, in support of that allegation, Beacon pointed to Parkhurst's declaration, which stated only that respondents did not disclose their opinion that "*potential* exposure to increased property tax liability *could* result from [the] lot-line adjustments . . . ." (Italics added.) Because Beacon offered no allegation or evidence of actual damages, its contention does not bar summary judgment.

b. *Actual Injury*

We also conclude that no later than early May 2011, Beacon suffered actual injury, for purposes of triggering the one-year limitations period. For purposes of section 340.6, actual injury occurs when the plaintiff suffers "any damages compensable in an action . . . against an attorney" for professional negligence or breach of fiduciary duty. (*Jordache, supra*, 18 Cal.4th at p. 751.) "[O]nce the plaintiff suffers actual harm, neither difficulty in proving damages nor uncertainty as to their amount tolls the limitations period." (*Id*. at p. 752.) Although "determining when actual injury occurred is predominantly a factual inquiry, . . . [w]hen the material facts are undisputed, the trial court can resolve the matter as a question of law in conformity with summary judgment principles." (*Id*. at p. 751.)

Generally, "when malpractice results in the loss of a right, remedy, or interest, or in the imposition of a liability, there has been actual injury regardless of whether future events may affect the permanency of the injury or the amount of monetary damages eventually incurred." (*Foxborough v. Van Atta, supra,* 26 Cal.App.4th at p. 227.) Under that principle, actual injury may occur no later than when the right or interest has been lost, and the client incurs legal fees in litigation implicating the lost right or interest.

In *Truong*, a manufacturer located a suitable property for its operations, and engaged an attorney to review the lease. (*Truong, supra*, 181 Cal.App.4th at p. 106.) After the lease was executed, disputes between the manufacturer and the lessor arose regarding building code compliance and improvements to the property. (*Id.* at p. 107.) When the lessor proposed a lease addendum to resolve the disputes, the manufacturer submitted it to the attorney for his review. (*Ibid*.) After signing it, the manufacturer remained dissatisfied with the lessor's performance, and filed an action against the lessor for breach of the lease. (*Ibid*.) When the lessor

prevailed in the action, the manufacturer asserted a claim for professional malpractice against the attorney, who secured summary judgment on the ground that the claim was time-barred under the one-year statute of limitations. (*Id*. at p. 108.) In affirming that ruling, the appellate court rejected the manufacturer's contention that it suffered no actual injury until the resolution of its action against the lessor, concluding that the manufacturer first sustained actual injuries when it was required to hire new counsel to pursue the action against the lessor. (*Id*. at pp. 114-115.)

In *Village Nurseries*, an landscape contractor agreed to provide services to a property developer. (*Village Nurseries, supra*, 101 Cal.App.4th at p. 32.) When the developer declared bankruptcy, the contractor hired counsel to perfect its liens against the developer. (*Ibid*.) During the bankruptcy proceedings, the bankruptcy trustee asserted that the contractor's liens had not been perfected because a required notice had never been served. (*Id*. at p. 33.) Although the bankruptcy court did not then rule on that issue, it stated that it had "'serious doubts'" whether the liens had been properly perfected. (*Ibid*.) The contractor nonetheless continued to assert the liens' validity in the proceedings. (*Id*. at p. 34.) Later, after the bankruptcy court determined that the liens were invalid, the contractor filed a malpractice action against the attorneys responsible for the liens. (*Village Nurseries, supra,* 101 Cal.App.4th at p. 34.) In affirming summary judgment in favor of the attorneys on the basis of the one-year statute of limitations, the appellate court rejected the contractor's contention that it sustained actual injury only when the bankruptcy court ruled that the liens were invalid, concluding that actual injury occurred when the trustee first questioned their validity. (*Id.* at pp. 40-42.)

In *Callahan*, brothers Robert and Oliver Inge engaged a law firm to advise them how to structure their business to facilitate its continuation after their death.

(*Callahan, supra*, 194 Cal.App.4th at pp. 561-562.) At the law firm's recommendation, they executed a partnership agreement prepared by the law firm. (*Ibid*.) The agreement provided for the partnership's dissolution upon the brothers' death or incapacity. (*Ibid*.) After Oliver died, the trustee of his personal trust demanded distribution of partnership income, which Robert rejected. (*Id*. at p. 563.) The trustee initiated a probate action, seeking to dissolve the partnership under the terms of the partnership agreement. (*Id*. at p. 563.) Later, after Robert died, members of his family filed a malpractice action against the law firm, alleging, inter alia, that Robert became fully disabled during the period when the trustee began to try to dissolve the partnership. (*Id*. at pp. 563-564.) When the law firm secured summary judgment on the ground that the action was time-barred under the one-year statute of limitations, the appellate court determined that the family members suffered actual injury from the partnership agreement when Robert became disabled or when the trustee asserted that his disability permitted the partnership's dissolution, "whichever first occurred." (*Id*. pp. 581-582.) The court nonetheless reversed the grant of summary judgment, as there were triable issues regarding the timing of those events. (*Id*. at p. 576.)

Here, Beacon incurred actual injury no later than early May 2011. The complaint alleges as an item of damages that Beacon "did not secure the right for which it retained [respondents] and for which it paid legal fees, namely, a right to use the [property] through October 31, 2021." As explained above (see pt. A.7.a., *ante*), in response to NHC's March 4, 2011 letter asserting that Beacon had been a month-to-month tenant since 2005, Beacon promptly retained new counsel to assert its purported right under the amended ground lease to use the property until

October 2021, and filed suit in April 2011. In view of *Truong*, *Village Nurseries*, and *Callahan*, Beacon sustained actual injury at that time.[12]

The record also establishes that Beacon incurred actual injury during the ground lease action itself. A party may suffer actual injury when it makes unnecessary payments due to its attorney's negligence. (*Safine v. Sinnott* (1993) 15 Cal.App.4th 614, 617.) Here, the complaint alleges that Emanuel never advised Beacon regarding the consequences of the absence of a valid written lease, and that Beacon "expended money on attorney[] fees in connection with the [g]round [lease] action that it would not have spent [had] . . . Emanuel . . . properly advised [it]." In opposing summary judgment, Beacon submitted Parkhurst's testimony that Beacon had paid NHC's legal fees during the ground lease action only because Parkhurst believed that the 1993 sublease and its amendments required Beacon to do so. That testimony is sufficient to show that actual injury occurred during the ground lease action.

Pointing to *Sirott v. Latts* (1992) 6 Cal.App.4th 923 (*Sirott*) and *Baltins v. James* (1995) 36 Cal.App.4th 1193 (*Baltins*), Beacon contends it sustained no actual injury until it settled its dispute with NHC in May 2012. We disagree. *Sirott* and *Baltins* predate *Jordache*, in which our Supreme Court clarified the "actual injury" tolling provision under section 340.6. As explained below, to the extent those decisions retain their vitality following *Jordache*, they are distinguishable.[13]

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12 Beacon suggests that the legal fees it incurred in its action against NHC did not constitute actual injury because it paid those fees "in defending [respondents'] work, not [in] seeking to avoid it." That contention fails in light of *Village Nurseries*.

13 Beacon also purports to find support for its contention from *Callahan* There, the appellate court concluded that the fees that the Inge brothers paid to the law firm to prepare the defective partnership agreement did not constitute actual injury, for purposes
(Fn. continued on next page.)

In *Sirott*, an attorney advised a doctor that he need not pay for medical malpractice insurance providing coverage during his retirement because the required premium was "unconstitutional and unenforceable." (*Sirott, supra,* 6 Cal.App.4th at p. 926.) The doctor followed the advice and was sued for medical malpractice. (*Id.* at p. 927.) In an arbitration involving the insurer, the arbitrator issued an award denying the doctor's requests for the reinstatement of his insurance coverage and a ruling that the required premium was unconstitutional and unenforceable. (*Id*. at pp. 927, 929.) The doctor then entered into a settlement regarding medical malpractice litigation. (*Ibid*.) In the doctor's subsequent action for legal malpractice, the appellate court held that the doctor suffered actual injury under section 340.6 only when the arbitration award was confirmed. (*Id*. at pp. 929-930.)

In *Baltins*, a married couple obtained an interlocutory judgment of dissolution that incorporated a property settlement. (*Baltins, supra,* 36 Cal.App.4th at p. 1197.) When the wife obtained an order setting aside the property settlement, the husband noticed an appeal from the order. (*Id*. at pp. 1197-1198.) While the appeal was pending, the husband's attorney advised him that he was entitled to dispose of marital property "as though [the order under appeal] did not exist." (*Id*. at p. 1198.) After the order was affirmed on appeal, the family court determined that the husband had breached his fiduciary duties by disposing of property during the appeal. (*Id*. at pp. 1198-1199.) In the husband's action for legal malpractice, the appellate court concluded that the husband

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of section 340.6. (*Callahan, supra,* 194 Cal.App.4th at pp. 576-581.) Because our analysis regarding actual injury relies on Beacon's payment of fees to respondents for NHC's representation, rather than for Beacon's own representation, *Callahan* is also distinguishable.

sustained actual injury under section 340.6 only when the family court ruled that he had violated his fiduciary duties. (*Baltins, supra*, at p. 1208.)

Later, in *Jordache*, the Supreme Court rejected "facile, 'bright line'" rules for determining the occurrence of actual injury for purposes of section 340.6, stating that "[t]he resolution of litigation related to alleged malpractice may or may not mark the point at which a plaintiff first sustains actual injury." (*Jordache, supra*, 18 Cal.4th at pp. 763-764, quoting *Adams v. Paul* (1995) 11 Cal.4th 583, 588, 591.) Discussing *Sirott* and *Baltins*, the court concluded they were correctly decided only to the extent they held that when an attorney's advice is essentially a prediction regarding the outcome of litigation, the propriety of the advice cannot be determined until the litigation's outcome. (*Jordache, supra,* at pp. 759-761.) The court otherwise disapproved *Baltins* insofar as it suggested that no actual injury could occur prior to a relevant judicial determination. (*Id*. at p. 761, fn. 9.)

Sirott and *Baltins* are thus distinguishable, as Beacon does not assert that respondents made improper or ill-considered predictions regarding the outcome of litigation. On the contrary, their claims are predicated on allegations that respondents *failed* to advise Beacon and to take adequate action regarding its sublease and the amended ground lease to the ground lease. In sum, for purposes of the one-year limitations period under section 340.6, Beacon suffered actual injury no later than early May 2011.

8. *Denial of Continuance*

Beacon contends it was improperly denied a continuance. In opposing the summary judgment motion, Beacon sought a continuance to complete the depositions of attorneys employed by Nossaman. Although the record discloses no express ruling on the request, at the hearing on the summary judgment motion, the

trial court appears to have concluded that Beacon made no showing sufficient to warrant a continuance. As explained below, we see no error in that determination.

"The [summary judgment] statute mandates a continuance of a summary judgment hearing upon a good faith showing by affidavit that additional time is needed to obtain facts essential to justify opposition to the motion. [Citations.] Continuance of a summary judgment hearing is not mandatory, however, when no affidavit is submitted or when the submitted affidavit fails to make the necessary showing . . . . [Citations.] Thus, in the absence of an affidavit that requires a continuance . . . , we review the trial court's denial of appellant's request for a continuance for abuse of discretion." (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 253-254.)[14]

Generally, a party seeking a continuance must show that the facts to be obtained are essential to opposing the motion, that there is reason to believe such facts may exist, and that additional time is needed to obtain these facts. (*Wachs v. Curry* (1993) 13 Cal.App.4th 616, 623, disapproved on another ground in *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 987-988.) It is "not sufficient under the statute merely to indicate further discovery or investigation is contemplated." (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 548.) Thus, declarations offered in support of a continuance ordinarily should show: "(1) 'Facts establishing a likelihood that controverting evidence may exist and why the information sought is essential to opposing the motion'; (2) 'The specific reasons

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14 The summary judgment statute provides: "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just." (Code Civ. Proc., § 437c, subd. (h).)

why such evidence cannot be presented at the present time'; (3) 'An estimate of the time necessary to obtain such evidence'; and (4) 'The specific steps or procedures the opposing party intends to utilize to obtain such evidence.'" (*Johnson v. Alameda County Medical Center* (2012) 205 Cal.App.4th 521, 532 (*Johnson*), italics omitted, quoting (Weil & Brown, Cal. Practice Guide: Civil Proc. Before Trial (The Rutter Group 2011) ¶ 10:207.15, p. 10-83 (rev. #1, 2011).)

In requesting a continuance, Beacon's opposition stated: "Here, discovery is ongoing. The depositions of Nossaman attorneys who were involved in Emanuel's discussions regarding the firm's conflicts of interest are not [yet] available . . . . This is information that should come before the [c]ourt." In addition, the opposition asserted that a continuance was necessary to ensure that the court had an opportunity to evaluate Beacon's proposed amended complaint.

Supporting the request was a declaration from attorney Mira Hashmall, stating: "Beacon has been unable to conduct important discovery. The depositions of [three Nossaman] -- attorneys who were involved in discussions about Beacon's sublease rights and [respondents'] conflict of interest -- could not be taken [prior to the opposition]. This is important discovery that goes to [respondents'] breaches of duty to Beacon and other aspects of Beacon's claims in this case."

Hashmall's declaration was insufficient to mandate a continuance, as it failed to show "'a likelihood that controverting evidence may exist'" that was "'essential to opposing the motion.'" (*Johnson*, *supra*, 205 Cal.App.4th at p. 532.) The propriety of summary judgment on the basis of section 340.6 hinged on (1) whether the facts known to Beacon prior to June 2011 gave it adequate notice of respondents' alleged misconduct, and (2) whether Beacon suffered actual injury prior to June 2011 (see pt. A.7., *ante*). Nothing in the proposed discovery regarding the Nossaman attorneys' views and discussions was material to those determinations, which rely crucially on facts known to Beacon before June 2011.

Furthermore, as we elaborate below (see pt. B., *post*), the proposed discovery was also immaterial to Beacon's request for leave to amend its complaint, as the proffered amendments pleaded claims that were also time-barred (or otherwise defective).

For the same reasons, the trial court did not abuse its discretion in denying the continuance. In the absence of a showing mandating a continuance, "[t]he trial court need not grant a continuance where the proposed discovery is focused on matters beyond the scope of the dispositive issues framed by the pleadings." (*Ace American Ins. Co. v. Walker* (2004) 121 Cal.App.4th 1017, 1023.) Because the proposed discovery concerned matters beyond the dispositive issues -- that is, when Beacon had notice of its claims and sustained actual injury -- the continuance was properly denied.

B. *Denial of Leave to Amend Complaint*

Beacon contends the trial court erred in denying its request for leave to amend its complaint. Ordinarily, it is an abuse of discretion to deny leave to amend if there is a "'reasonable possibility that the plaintiff can state a good cause of action . . . .'" (*Sanai v. Saltz* (2009) 170 Cal.App.4th 746, 768, quoting *Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 245.) Nonetheless, leave to amend is properly denied if the proposed amendment does not, in fact, cure the defect in the complaint. (*Soderberg v. McKinney* (1996) 44 Cal.App.4th 1760, 1773.) Here, in denying leave to amend, the trial court stated that the proposed amendments merely reflected Beacon's evidentiary showing in opposition to summary judgment, which established "no viable cause of action." We agree.

Beacon requested leave to amend its complaint prior to filing its opposition to summary judgment, stating that it "d[id] not seek to name new parties, or to

change the issues in the case." The proposed complaint contained new allegations of misconduct tracking Beacon's evidentiary showing in opposition to summary judgment. The proposed complaint alleged that when Parkhurst discussed the impending ground lease action with respondents, Nossaman conducted a "conflict check" and identified NHC's principals as opposing parties; that respondents represented both Beacon and NHC without explaining the risks of joint representation, revealing their conflicts of interest, or obtaining a written waiver; that Emanuel knew that NHC enjoyed a substantial "profit margin" on the sublease, and that the prevailing economic conditions provided a basis for negotiating a lower rent for Beacon, but failed to do so; that Emanuel failed to advise Beacon that it need not pay NHC's legal fees; that Emanuel drafted the amended ground lease without reviewing the 1993 sublease and its written amendments; and that the amended ground lease favored NHC over Beacon. In an apparent effort to defeat the application of the one-year limitations period, the proposed complaint also alleged that Beacon first discovered the misconduct reflected in the new allegations in 2012.

We conclude the trial court did not err in denying leave to amend. When a defendant's summary judgment motion demonstrates that the plaintiff's claims are time-barred under section 340.6, leave to amend is properly denied if the proposed amendments do not cure that defect. (*Foxborough*, *supra*, 26 Cal.App.4th at pp. 230-231.) That is the case here. As explained above (see pt.A.7., *ante*), respondents' summary judgment motion established that Beacon's claims were time-barred, despite Beacon's evidence of acts of misconduct not alleged in the complaint, as Beacon had notice of respondents' fundamental course of misconduct over a year before it filed the underlying action, and the additional acts that Beacon identified constituted aspects of that misconduct. Because the new allegations described above merely elaborate the original complaint's account of

the fundamental course of misconduct, and all the purported damages flowing from the newly alleged acts are properly attributed to that course of misconduct, the amended claims are also time-barred. (See C*rouse*, *supra*, 67 Cal.App.4th at p. 1526, fn. 2.) In sum, leave to amend was properly denied.[15]

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[15] In addition to the allegations described above, the proposed complaint also cited a wrongful act that may not fall with the fundamental course of conduct, namely, respondents' purported failure to advise Beacon regarding the lot line adjustment reflected in the amended ground lease. Because the proposed complaint's allegations regarding that purported act precisely track Beacon's opposition to summary judgment, they state no claim against respondents, for the reasons we have discussed (see fn. 11, *ante*).

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.