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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SCOT RICHARDSON,

Plaintiff and Appellant,

2d Civil No. B278259
(Super. Ct. No. 1466901)
(Santa Barbara County)

v.

RICHARD L. TAYLOR et al.,

Defendants and
Respondents.

Scot Richardson, M.D., appeals from a judgment after an order sustaining without leave to amend a demurrer to his fourth amended complaint against his former attorneys, Richard L. Taylor and Taylor, McCord, Praver & Cherry (collectively Taylor).

BACKGROUND

In 2011, Richardson retained Taylor to represent him in marital dissolution proceedings. The attorney-client relationship ended in 2013. Richardson alleges Taylor erroneously advised him that his temporary support obligation

was greater than it should have been, did not properly allocate support payments as tax deductions, did not track payments from separate property, overstated the costs of a “practice evaluation,” and gave him bad advice about use of an expert, his right to recover overpayments, and the ramifications of the sale of real property resulting in tax losses.

Richardson retained new counsel to replace Taylor and filed a substitution of attorneys.¹ Richardson signed the substitution form on April 26, 2013, Taylor signed but did not date it, new counsel signed it on April 29, and Richardson filed it on May 2, 2013.

On May 1, 2014, Richardson filed suit against Taylor for professional negligence and breach of fiduciary duty. He alleged Taylor “substituted out” as his attorney “[o]n or about May 3, 2013.” Taylor demurred several times on the grounds Richardson’s allegations were too vague to state a cause of action, and Richardson amended his complaint several times with leave of court.

In a demurrer to the second amended complaint, Taylor asserted the complaint was time-barred because the attorney-client relationship ended on April 26, when Richardson signed the substitution of attorney form. The trial court took judicial notice of the form and sustained the demurrer, finding that the relationship with Taylor ended on April 29, 2013, when Richardson’s new counsel signed the form. The court granted leave to amend to allege delayed discovery.

¹ In a related appeal, we recently affirmed an order confirming an arbitration award against Richardson in favor of his new counsel after their relationship ended. (*Richardson v. Hutchinson* (June 7, 2017, B277355) [nonpub. opn.])

In his third amended complaint, Richardson alleged that (1) he replaced Taylor on May 2, 2013, (2) he continued to rely on Taylor's advice "for a period of time" afterward, and (3) he did not discover Taylor's malfeasance until after May 2, 2013. He did not allege how he discovered the malfeasance, but alleged Taylor did not "timely" respond to an April 10, 2014, demand for Richardson's file.

The trial court sustained the demurrer with leave to amend to "explain why he did not discover the misfeasance until after 5/2/13 or how it was discovered, or any facts to explain how he could permissibly have believed that there was a continuing relationship . . . merely because he continued to rely on defendants' advice until at least 5/2/13." Richardson protested that he could not provide more detail without disclosing privileged attorney-client communications that could prejudice his interests in the underlying action and he asked the court to stay the case. The parties stipulated to stay the case 90 days for the stated purpose of conducting settlement discussions.

When the stay expired, Richardson filed a fourth amended complaint. He added a cause of action for negligent misrepresentation and two causes of action for fraud in which he alleged that Taylor concealed his professional negligence. He also added allegations that he continued to rely on Taylor "up until at least May 13, 2013," when Richardson signed a stipulation in the underlying action which Taylor "negotiated and had advised [Richardson] on." He alleged that his continuing reliance was reasonable "after May 1, 2013," because Taylor delayed release of his client file and "employed a similar tactic in April 2014" by failing "to promptly and timely release all client records as requested." Richardson alleged he continued to rely on

Taylor's "misrepresentations, omissions, and concealments" which he "did not discover until 2014." He did not allege how he eventually discovered the facts, or what the client file disclosed.

Taylor filed a demurrer to all causes of action and a motion to strike the three new causes of action. Richardson opposed on the ground the demurrer was untimely because it was filed more than 30 days after his amended pleading and Taylor did not meet and confer as required by Code of Civil Procedure section 430.41, subdivision (a)(3)(A).² Richardson asked for a continuance to meet and confer. He asked the court to take judicial notice of an arbitration award in an action between himself and his new counsel in which the arbitrator wrote that Richardson retained new counsel on May 1, 2013. His opposition brief did not propose any curative amendment. At the hearing, his counsel offered to amend to allege that another attorney who Richardson retained in January 2014 discovered that Taylor's support calculations were based on inaccurate information.

The trial court sustained the demurrer without leave to amend. The court found Taylor did not comply with statutory meet and confer requirements but that meet and confer would be futile. It exercised its discretion to hear the demurrer on the merits. It found all causes of action were time-barred because Richardson did not allege the time and manner of discovery or why he was unable to discover the facts sooner despite reasonable diligence. It found the misrepresentation causes of action were a "sham" recasting of the negligence claims to avoid the statute of limitations and did not allege fraud with sufficient specificity.

² All statutory references are to the Code of Civil Procedure unless otherwise stated.

DISCUSSION

We treat the demurrer as admitting all material facts properly pled, but not contentions, deductions, or conclusions of fact, and we consider matters which may be judicially noticed. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126 (*Zelig*).) We disregard allegations that are contrary to facts of which judicial notice may be taken. (*Wolfe v. State Farm Fire & Casualty Ins. Co.* (1996) 46 Cal.App.4th 554, 560.) When a demurrer is sustained without leave to amend, we decide whether there is a reasonable possibility that it can be cured by an amendment. It is the plaintiff's burden to show such a reasonable possibility. (*Zelig*, at p. 1126.) We review the order sustaining the demurrer de novo. (*Ibid.*)

Statute of Limitations

Richardson contends his claims are not time-barred because (1) he alleged that he discovered Taylor's wrongful acts and omissions after May 1, 2013, and (2) the limitations period was tolled until at least May 1, while Taylor continued to represent him. We disagree.

An action against an attorney for violation of a professional obligation (other than an action for fraud) must 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, but not later than four years after the wrongful act or omission. (§ 340.6, subd. (a).) The limitation applies to claims for negligent misrepresentation but not actual fraud. (*Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 69-70.) The limitation period is tolled while the attorney continues to represent the client in the same subject matter. (§ 340.6, subd. (a)(2).)

Accrual (Discovery)

Although it is generally the defendant's burden to establish when the plaintiff should have discovered the facts constituting malpractice (*Samuels v. Mix* (1999) 22 Cal.4th 1, 7-8 (*Samuels*)), the rule is different where, as here, the complaint shows on its face that it is time-barred absent delayed discovery. In such cases, it is the plaintiff's burden to specifically plead facts to show the time and manner of discovery and the inability to have made earlier discovery despite reasonable diligence. (*Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 174-175 (*Czajkowski*); *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 808 (*Fox*).)

For example, in *Czajkowski, supra*, 208 Cal.App.4th 166, it appeared from the face of the complaint in a professional negligence action against auditors that the plaintiff CEO should have known of a potential claim against the auditors who failed to report unpaid taxes. A demurrer was properly sustained without leave to amend where the plaintiff learned about the unpaid taxes outside the limitations period. The court held his claim that he did not discover that the auditors knew about and failed to report the unpaid taxes until he saw their workpapers did not explain his lack of diligence in discovering the factual basis for the claim.

It appears from the face of the complaint that Taylor's alleged wrongdoing occurred during the representation and Richardson should have discovered the factual basis for his claim by the time he replaced Taylor. Richardson alleges that Taylor miscalculated support obligations, did not properly track Richardson's payments and advances, gave bad tax advice, and misrepresented the cost of a practice evaluation. Richardson

alleges he suffered injury immediately when he was forced to pay excessive temporary support, among other things. He does not allege he was unaware of these acts or omissions before he decided to terminate and replace Taylor, or that he could not have discovered them with reasonable diligence.

In *Fox, supra*, 35 Cal.4th 797, it appeared from the face of a complaint in a products liability action that the plaintiff knew she had been injured by a gastric bypass surgery outside the limitations period. The trial court concluded that allegations of delayed discovery were insufficient and sustained a demurrer without leave to amend. The Supreme Court reversed, holding that she should have been given an opportunity to amend to allege that she could not have discovered that a medical device was a cause of her injury until a treating doctor so testified in deposition. But Richardson's reliance on *Fox* is misplaced. Here, Richardson had at least two opportunities to amend and did not explain his lack of diligence in discovering Taylor's alleged malfeasance. Richardson alleges that Taylor did not deliver his client file until after May 1, 2013, but does not allege what, if anything, he discovered upon receipt of the file. He does not allege when or how he discovered anything.

Discovery occurs when the aggrieved client knows or should know of facts constituting the wrongful act or omission and suffers appreciable harm. (*Samuels, supra*, 22 Cal.4th at p. 11.) When discovery should have occurred is generally a question of fact. (*McCann v. Welden* (1984) 153 Cal.App.3d 814, 822.) But when there is no room for a reasonable difference of opinion, the question of when a plaintiff reasonably should have discovered facts for purposes of accrual should be decided as a matter of law by evaluating the allegations in light of matters that are properly

subject to judicial notice. (*Czajkowski, supra*, 208 Cal.App.4th at p. 175.)

Because it appears from the face of Richardson's complaint and the substitution form that he knew or should have known of Taylor's alleged acts and omissions by the time he hired counsel to replace him, Richardson's conclusory allegation that he did not discover his claims "until 2014" was insufficient without additional facts to explain the time and manner of discovery, or his inability to have made earlier discovery despite reasonable diligence. He "had to allege not only late discovery, but also inability to discover the relevant facts earlier." (*Czajkowski, supra*, 208 Cal.App.4th at p. 178.)

Tolling (Continuing Representation)

Continuing representation tolls the limitation period even after the client discovers or should have discovered the wrongful acts or omissions, but Richardson does not allege facts to support his conclusion that Taylor continued to represent him after April 29. Representation ends for purposes of section 340.6 when the client retains replacement counsel in the matter where the wrongful act or omission occurred, unless the first attorney continues to advise the client. (*Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1069 [demurrer properly sustained where client sued more than one year after retaining substitute counsel and did not allege continuing advice on the same subject matter]; cf. *Nielsen v. Beck* (2007) 157 Cal.App.4th 1041, 1051-1052 [triable issues of fact existed where the client retained substitute counsel more than a year before filing suit, but continued to consult with the first attorney by telephone for advice].)

Richardson alleges that both he and his new counsel continued to rely on Taylor's prior advice after April 29, 2013, but

he does not allege that they sought or received advice from Taylor after that date. This case is like *Henlsey v. Caietti* (1993) 13 Cal.App.4th 1165, 1171, in which summary judgment for an attorney was proper where the client discovered malfeasance and retained substitute counsel more than a year before filing suit, although she did not give the defendant attorney notice of discharge until later.

Richardson contends that a determination of when he replaced Taylor presents a factual question, because he did not sign the retainer agreement with his new counsel until May 1, and because the arbitrator in a case between them wrote that the substitute representation began on May 1. But Taylor was not a party to the arbitration, and Richardson's new counsel agreed to replace him on April 29, whether or not their retainer agreement was signed. Richardson challenged the authenticity of the substitution of attorney form, but in opposition to an earlier demurrer he admitted that he signed it on April 26, and that his new counsel signed it on April 29, 2013.

Leave to Amend

Denial of leave to amend was not an abuse of discretion because Richardson had prior opportunities to amend to allege delayed discovery or tolling and he did not propose any curative amendment in his opposition to the final demurrer. The burden is on the plaintiff to demonstrate a reasonable possibility the defect can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) He did not do so.

At the hearing, Richardson's counsel offered to amend to allege that he did not replace Taylor until May 1, when Richardson signed his new counsel's retainer agreement; that Taylor did not produce the client file until after May 2, 2014; that

new counsel never discovered Taylor’s alleged support miscalculation or inaccurate tax advice; and that Richardson was “totally unaware” of it until he hired another lawyer in January 2014. But Richardson did not allege these facts when the trial court gave him leave to amend his third amended complaint “to plead his best case, specifically alleging facts that establish delayed accrual under the statute, or establishing applicability of one or more of the statutory tolling provisions.”

“[W]hen a plaintiff is given the opportunity to amend his complaint and elects not to do so, strict construction of the complaint is required and it must be presumed that the plaintiff has stated as strong a case as he can.” (*Gonzales v. State of California* (1977) 68 Cal.App.3d 621, 635, disapproved on other grounds in *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 740.) Richardson’s causes of action for negligence, breach of fiduciary duty, and negligent misrepresentation are time-barred.

Specificity of Fraud Allegations

The one-year limitation period of section 340.6 does not apply to causes of action for fraud, but Richardson did not plead fraud with sufficient particularity to withstand demurrer and did not demonstrate that he could do so if given leave to amend.

Fraud must be pled specifically, with facts that show how, when, where, to whom, and by what means the false representations were tendered. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) Richardson’s allegations in support of his causes of action for “Fraud: concealment,” and “Fraud: Deceit” do not meet these requirements, and he did not show that he could amend to cure these defects.

Richardson alleges that Taylor told him on May 24, 2011, that his temporary support calculations were correct when he knew they were based on erroneous information; that “defendants” misrepresented “material facts with respect to [Richardson’s] purported right to recover overpayment” of temporary support; that in 2012 and 2013 Taylor misrepresented the cost of a practice evaluation as being between \$50,000 to \$100,000, knowing it would cost less than that; that at meetings on specific dates in 2011 to 2013 “defendants” concealed “material facts relative to” the need to use a qualified forensic expert to opine on income available for temporary support; that “defendants misstated facts” to “cover up . . . their improper actions”; and “concealed” their failure to properly track payments and advancements to Richardson’s ex-wife.

These allegations amount to no more than failure to disclose professional negligence. As Richardson acknowledged in opposition to the demurrer: “Each of these allegations was present in the Third Amended Complaint,” before he added fraud causes of action. He does not allege how Taylor knew his support calculations were based on erroneous information and assumptions, what “material facts” defendants misrepresented about an expert, how Richardson was damaged by the cost overestimate, or what “facts” defendants misstated to cover up and conceal their negligence. Recasting the allegations as fraud did not overcome the limitations period for professional negligence.

Request for Continuance

Richardson contends the trial court abused its discretion when it denied his request to continue the hearing on the demurrer. We disagree.

Taylor did not sufficiently comply with a statutory requirement to meet and confer before filing the demurrer. (§ 430.41, subd. (a).) But a finding that a party has not sufficiently complied with section 430.41 is not grounds to overrule a demurrer. (§ 430.41, subd. (a)(4).)

Richardson also contends the demurrer was untimely because Taylor filed it more than 30 days after the amended pleading. But a trial court has discretion to consider an untimely demurrer. (*McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 280.) Richardson was not prejudiced by resolution on the merits because Taylor could have raised the same defects by motion for judgment on the pleadings (§ 430.80) and Richardson did not demonstrate that he could cure the defects if the court had continued the hearing. The decision to deny his request for continuance was well within the trial court's sound discretion. (*Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1126.) There was no abuse of discretion here.

DISPOSITION

The judgment is affirmed. Taylor is awarded costs on appeal.

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TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Colleen K. Sterne, Judge

Superior Court County of Santa Barbara

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