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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

GRETA S. CURTIS, Plaintiff and Appellant, v. SALEH HASBUN et al., Defendants and Respondents.	B278552 c/w B275907 (Los Angeles County Super. Ct. Nos. BC602298/BC612413)

APPEAL from judgments of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Reversed and remanded with directions.

Greta S. Curtis, in pro. per, for Plaintiff and Appellant.

Law Office of John Nagle and John Nagle for Defendants and Respondents.

These consolidated appeals arise from two actions in which appellant Greta S. Curtis sought to recover unpaid legal fees from respondents. In the first action, after respondents demurred to the original complaint, Curtis filed a first amended complaint, which asserted claims for breach of contract, common counts, and fraud against respondents. Upon sustaining respondents' demurrers without leave to amend, the trial court struck the first amended complaint for noncompliance with Code of Civil Procedure section 472, subdivision (a). Curtis then initiated the second action, in which she filed as the original complaint the first amended complaint stricken in the first action. In the second action, the trial court sustained respondents' demurrer to that complaint without leave to amend. As explained below, we conclude the court erred in denying leave to amend in the first action and in sustaining a demurrer to several claims asserted in the second action. We therefore reverse the judgments in both actions.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

In November 2015, Curtis initiated the first action (L. A. Super. Ct. Case No. BC 602298) against respondents Saleh Hasbun, Amber Hasbun, Melissa Hasbun, and Boostz, Inc. (Boostz). The original complaint asserted claims against respondents for breach of contract, common count, and fraud, predicated on allegations that on June 20, 2013, respondents entered into a written agreement to pay for

Curtis's legal representation, and that on or about January 2014, they breached the agreement. The complaint specifically alleged that Saleh Hasbun failed to pay Curtis for legal services rendered during the arbitration of his medical malpractice claim against Kaiser Permanente, and that all the respondents failed to pay Curtis for legal services rendered in a quiet title action. Curtis sought to recover $200,000 in unpaid attorney fees and costs.

On December 22, 2015, respondents demurred to the complaint.[1] They contended, inter alia, that Curtis had failed to provide written notice of the arbitrability of attorney-client fee disputes (Bus. & Prof. Code, § 6201), that no written fee contract was submitted to establish compliance with statutory requirements (Bus. & Prof. Code, § 6148), that the complaint alleged facts insufficient to support the claims, that the fraud claim failed to specify the allegedly fraudulent activity, that it was unclear whether the contract was written or oral, and that the claims were time-barred under the two-year period applicable to oral contracts (Code Civ. Proc., § 339).

Curtis filed no opposition to the demurrers. On February 2, 2016, two days before the hearing on the demurrers, she filed a first amended complaint (FAC) against respondents, containing three claims for breach of

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[1] In connection with the demurrers, respondents asked the trial court to take judicial notice that in July 2014, Curtis was disbarred.

contract, three claims for common counts, and a claim for fraud. The FAC sought damages totaling $200,000.

In connection with the claims for breach of contract, the FAC alleged breaches of three oral attorney fee agreements established between January 2013 and April 2014. In connection with the fraud claim, which was asserted only against Saleh Hasbun, the FAC alleged that in June 2013, acting as an individual and as president of Boostz, he made misrepresentations relating to compensation and other matters in connection with Curtis's legal representation in a specific legal action. The FAC sought damages totaling $200,000.

On February 4, 2016, following the hearing on respondents' demurrers, the trial court (Judge Michael L. Stern) struck the FAC for noncompliance with Code of Civil Procedure section 472, subdivision (a). The court sustained the demurrers to the original complaint without leave to amend, stating "1) The contract is vague and ambiguous. [¶] 2) It is beyond the two year statute of limitations. [¶] 3) This type of case cannot proceed without first completing arbitration."

Following those rulings, neither side attempted to secure an appealable judgment in the first action.[2] On February 19, 2016, respondents filed a notice of the ruling

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[2] The rulings in respondents' favor on their demurrers to the original complaint are not appealable orders. (*Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1695.)

on the demurrers, which stated that demurrers had been asserted by Saleh Hasbun, Amber Hasbun, and Melissa Hasbun, as well as other parties not identified in the demurrers, namely, Scott Saltzman, Valley Trust Deed Services, Inc. and Baypoint Mortgage.

On March 2, 2016, Curtis commenced the second action (L.A. Super. Ct. Case No. BC 612413) by refiling the FAC as an original complaint.[3] The second action was assigned to the judge responsible for the first action (Judge Stern).[4]

In the second action, on April 4, 2016 respondents jointly demurred to the FAC. The demurrer asserted several objections to the FAC, including that Curtis had failed to provide written notice of arbitration rights (Bus. & Prof. Code, § 6201), and that there was no written fee contract (Bus. & Prof. Code, § 6148).

Curtis opposed the demurrer, contending, inter alia, that it appeared to be directed at the original complaint in the first action, not the FAC. Curtis further requested

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[3] For simplicity, we generally refer to the original complaint in the second action as the FAC.

[4] In the first action, at respondents' request, the trial court ordered it related to the second action and another lawsuit (L.A. Super. Ct. Case No. BC 610877), in which Amber and Melissa Hasbun, through a corporate entity, sought to recover an interest in real property that they alleged Curtis improperly acquired as compensation for her legal services.

judicial notice that on March 2, 2016, she served notices of a client's right to fee arbitration on Saleh Haslem and Amber Haslem. She also filed proofs of service of notices of arbitration rights on all the respondents.

On June 14, 2016, the trial court sustained the demurrer to the FAC without leave to amend, stating: "[Curtis] fails both to have a retainer agreement [Bus. & Prof. Code, § 6148] and did not properly serve a demand for arbitration before filing the lawsuit [Bus. & Prof. Code, § 6201]. The allegations of a contract and fraud are vague and without a factual basis." The court further ordered the second action dismissed. Curtis noticed a timely appeal from the order of dismissal (B275907), which was assigned to this court.

In the first action, in July 2016, Curtis filed a motion to set aside respondents' February 19, 2016 notice of the ruling on the demurrers, contending the notice incorrectly identified Scott Saltzman, Valley Trust Deed Services, Inc. and Baypoint Mortgage as moving parties with respect to the demurrers. In August 2016, after respondents filed a notice acknowledging that error, the trial court ruled that Curtis's pending motion to set aside the February 19, 2016 notice was moot.

On October 2016, Curtis noticed an appeal in the first action (B278552). On March 15, 2017, at the request of the Court of Appeal, the trial court filed an order of dismissal in

that action.[5] In October 2017, the appeal in the first action was transferred from Division Two of the Second Appellate District to this court and consolidated with the appeal in the second action for purposes of the oral argument and decision.[6]

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[5] The order of dismissal contains a typographical error, as it states that demurrers to "the First Amended Complaint" -- rather than the original complaint -- were sustained without leave to amend. In our discussion of Curtis's contentions on appeal, we do not treat the typographical error as reflecting the basis for the order of dismissal.

[6] In July 2017, in the appeal from the second action, Curtis filed a motion to augment the record, which was denied without prejudice for want of a declaration sufficient to authenticate the accompanying documents. Generally, the appellate record may be augmented only with "document[s] filed or lodged in the case in superior court." (Cal. Rules of Court, rule 8.155(a)(1)(A).) Under the local appellate rules of court, "[t]he requested augmented materials shall have been filed or lodged with the trial court and the [accompanying] declaration shall so state." (Ct.App., 2d Dist., Local Rules, rule (2)(c), Augmentation of record.)

On September 5, 2017, Curtis filed a renewed motion to augment the record with documents filed in several actions. Accompanying the renewed motion is a declaration stating that she participated in the actions in which the documents were filed or lodged. We deny the motion with respect to (1) all documents not filed or lodged in the

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DISCUSSION

Curtis presents overlapping contentions in her appeals. In connection with the first action, she maintains that the trial court erred in striking the FAC, disregarding the FAC in ruling on the demurrers to the original complaint, and denying leave to amend the original complaint. Those challenges rely in part on contentions she also raises in connection with the second action, namely, that the arbitration right notice requirement (Bus. & Prof. Code, § 6201) did not bar her action, and that the FAC states tenable claims.

At the outset, we observe that due to the unusual circumstances of these consolidated appeals, we review rulings in two separate actions in which Curtis attempted to assert essentially the same claims. Generally, when a plaintiff alleges similar claims in two actions, the defendants may seek to abate one of the actions, thereby compelling the plaintiff to resolve the claims to finality in the other action. (5 Witkin, Cal. Procedure (5th ed. 2008)

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underlying two actions, and (2) all documents already included within the records of the consolidated appeals. Accordingly, the motion is granted only with respect to exhibit 17 (with the exception of the proof of service of the notice of arbitration rights on Amber Hasbun) and exhibit 22 (entitled "Request for Judicial Notice by Plaintiff by Revivor," and misidentified as exhibit 21 in the motion's index of exhibits).

Pleading, § 971, pp. 383-385.)[7] Because respondents did not pursue that remedy, we must examine each action.

For the reasons discussed below, we conclude that Curtis has shown no error in the rulings in the first action, with the exception of the trial court's denial of leave to file an amended complaint. Regarding the second action, we conclude that the trial court improperly sustained the demurrers to the FAC with respect to one of her three claims for breach of contract, two of her three claims for common counts, and her fraud claim. We further conclude that Curtis has demonstrated no error in denying leave to amend the other claims in the FAC. In so concluding, we determine that noncompliance with the arbitration rights notice requirement (Bus. & Prof. Code, § 6201) was not a proper basis for denying leave to amend in the first action and sustaining the demurrers to the FAC in the second action.

A. *Standard of Review*

"Because a demurrer both tests the legal sufficiency of the complaint and involves the trial court's discretion, an appellate court employs two separate standards of review on

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[7] As Witkin explains, when a plea of abatement based on a pending prior action is established in a second action, the result is the entry of an interlocutory judgment postponing trial, rather than dismissal of the action. (5 Witkin, Cal. Procedure, *supra*, Pleading, § 971, pp. 383-385.)

appeal. [Citation.] . . . Appellate courts first review the complaint de novo to determine whether or not the . . . complaint alleges facts sufficient to state a cause of action under any legal theory, [citation], or in other words, to determine whether or not the trial court erroneously sustained the demurrer as a matter of law. [Citation.]" (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879 (*Cantu*).) "Second, if a trial court sustains a demurrer without leave to amend, appellate courts determine whether or not the plaintiff could amend the complaint to state a cause of action. [Citation.]" (*Id.* at p. 879, fn. 9.)

Under the first standard of review, "we examine the complaint's factual allegations to determine whether they state a cause of action on any available legal theory. [Citation.] We treat the demurrer as admitting all material facts which were properly pleaded. [Citation.] However, we will not assume the truth of contentions, deductions, or conclusions of fact or law [citation], and we may disregard any allegations that are contrary to the law or to a fact of which judicial notice may be taken. [Citation.]" (*Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 947.) For purposes of evaluating the demurrer, we may treat as judicial admissions facts the plaintiff has admitted in opposing the demurrer. (*Scafidi v. Western Loan & Bldg. Co.* (1946) 72 Cal.App.2d 550, 560-562 (*Scafidi*).)

Under the second standard of review, the burden falls upon the plaintiff to show what facts he or she could plead to

cure the existing defects in the complaint. (*Cantu, supra,* 4 Cal.App.4th at p. 890.)

B. *First Action*

Curtis challenges the rulings in the first action on several grounds. As explained below, we conclude that her contentions fail, with the exception of her challenge to the denial of leave to amend.

1. *Striking of the FAC*

Curtis contends the trial court improperly struck the FAC under Code of Civil Procedure 472, subdivision (a). She maintains that the trial court relied on an amended version of the statute inapplicable to the FAC. She thus argues that the filing of the FAC mooted the demurrers to the original complaint, and that the trial court erred in ruling on them.

Prior to January 1, 2016, Code of Civil Procedure section 472 provided in pertinent part that "[a]ny pleading may be amended once by the party of course . . . at any time before the answer or demurrer is filed, or entered in the docket, or *after demurrer and before the trial of the issue of law thereon*." (Stats. 1977, c. 1257, §13, p. 4760, italics added.) Effective January 1, 2016, subdivision (a) of Code of Civil Procedure section 472 stated: "A party may amend its pleading once without leave of the court at any time before the answer or demurrer is filed, or after a demurrer is filed but before the demurrer is heard if the amended complaint . . . is *filed and served no later than the date for filing an*

opposition to the demurrer . . . ." (Stats. 2015, ch. 418, § 2, p. 3756, italics added.) Under Code of Civil Procedure section 1005, subdivision (b), an opposition to a demurrer must be filed and served nine court days before the hearing on the demurrer.

Here, respondents filed their demurrers to the original complaint on December 22, 2015, and the hearing on the demurrers was set for February 4, 2016. Under the amended version of the statute, Curtis was obliged to exercise her right to file an amended complaint without leave of court no later than nine court days before the hearing. Because Curtis filed and served the FAC two days before the hearing, the trial court struck the FAC.[8]

Curtis contends the FAC was timely filed because the applicable version of Code of Civil Procedure section 472 was the version in effect when the demurrers were filed. However, she has forfeited that contention, as she never asserted it before the trial court.[9]

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[8] Generally, the trial court "may . . . at any time in its discretion . . . [¶] . . . [¶] . . . strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state." (Code Civ. Proc., § 436, subd. (b).)

[9] Curtis maintains that she raised the contention in her motion to set aside respondents' February 19, 2016 notice of the ruling on the demurrers. We disagree. In that motion, Curtis raised a contention -- which she has reasserted on appeal, and which we discuss below (see pt. B.2. of the Discussion, *post*) -- regarding the improper "retroactive"
(*Fn. is continued on the next page.*)

Furthermore, the contention also lacks merit. In *In re Vaccine Cases* (2005) 134 Cal.App.4th 438, 454-457, the appellate court confronted a similar issue arising from an amendment to a statute (Health & Saf. Code, § 25249.6) that became effective on January 1, 2002. Prior to the amendment, the statute required parties intending to assert a claim under the Safe Drinking Water and Toxic Enforcement Act of 1986 (Health & Saf. Code, § 25249.5 et seq.) to provide notice to enumerated public entities 60 days before filing the complaint; as amended, the statute additionally required that the notice contain a certificate of merit. (*In re Vaccine Cases, supra,* at pp. 454-457.) On November 19, 2001, prior to the effective date of amended statute, the plaintiffs served 60-day notices without certificates of merit, and then filed their complaints after the effective date of the amended statute. (*Ibid*.) In affirming demurrers to the complaints sustained without leave to amend, the appellate court concluded that the amended statute governed the filing of the complaints. (*Ibid*.) The court stated: "'A statute addressing procedures to be utilized in legal proceedings not yet concluded operates prospectively for acts to be performed after the effective date

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application of Code of Civil Procedure section 430.41. Although Curtis's motion noted that Code of Civil Procedure section 430.41 was enacted when Code of Civil Procedure section 472 was amended, the motion did not argue that the trial court improperly struck the FAC under the amended version of the latter statute.

of the statute.' [Citation.] . . . Parties do not have vested rights in existing rules of procedure. [Citations.]" (*Id.* at pp. 455-456, quoting *Florence Western Medical Clinic v. Bonta* (2000) 77 Cal.App.4th 493, 503.) In view of *In re Vaccine Cases*, the trial court did not err in striking the FAC for noncompliance with the amended version of Code of Civil Procedure section 472.[10]

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[10] Curtis's reliance on *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388 (*Aetna*), *Bullard v. California State Automobile Assn.* (2005) 129 Cal.App.4th 211 (*Bullard*), and *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232 (*Western Security Bank*) is misplaced. In *Aetna*, after injured workers sought worker's compensation benefits, the worker's compensation statutes were amended in a manner that limited the amount of benefits to which they were entitled. (*Aetna*, *supra*, 30 Cal.2d at pp. 391-396.) The California Supreme Court determined that the amendment was inapplicable to their claims because it effectively altered their substantive rights. In contrast, the right at issue here is purely procedural.

In *Bullard*, the appellate court held that an amendment extending a statutory limitations period governing arbitration did not encompass the appellants' otherwise untimely request for arbitration, relying on the principle that amendments enlarging limitations periods generally encompass only "'matters pending but not already barred.'" (*Bullard*, *supra*, 129 Cal.App.4th at p. 217, quoting *Douglas Aircraft Co. v. Cranston* (1962) 58 Cal.2d 462, 465.) That rationale is inapplicable here, as the amended version

(*Fn. is continued on the next page.*)

2. *Rulings on the Demurrers*

We turn to Curtis's challenges to the sustaining of the demurrers to the original complaint. Generally, a reviewing court may affirm an order of dismissal following the sustaining of a demurrer on any correct ground properly supported by the record, regardless of whether the trial court relied on this ground. (*Hogen v. Valley Hospital* (1983) 147 Cal.App.3d 119, 125-127.)

We conclude that Curtis has shown no error in the trial court's ruling. Respondents' demurrers asserted that the claims in the original complaint failed to allege facts sufficient to support them, no written contract was submitted to establish compliance with statutory requirements (Bus. & Prof., Code, § 6148), and the fraud claim failed to specify the fraudulent activity. On appeal, Curtis offers no argument (supported by legal authority and citations to the record) aimed at showing that the claims in the original complaint are free of these defects.

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of Code of Civil Procedure section 472 enlarged no limitations period.

In *Western Security Bank*, the California Supreme Court concluded that an amended statute enacted during a pending action applied to the action because the amendment was intended to clarify existing law, not alter it. (*Western Security Bank*, *supra,* 15 Cal.4th at p. 242.) As explained above, the amended version of Code of Civil Procedure section 472 is applicable here for a different reason.

In our view, the rulings on the demurrers are properly affirmed on the grounds noted above. The claim for breach of a written contract failed, as the complaint neither alleged the material terms of the contract nor incorporated the contract as an exhibit. (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307.) In view of the defective claim for breach of contract, the related claim for common counts -- which effectively sought recovery in quasi-contract on a theory of quantum meruit -- also was subject to demurrer. (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 568, pp. 693-694.)[11] Although the tersely pleaded fraud claim relies on a theory of promissory fraud based on the allegation that respondents "had no intention" of honoring their contractual representations, the claim appears to allege that their false promises were negligent, that is, that respondents "had no reasonable ground for believing the representations were true." As there is no cause of action for negligent promissory fraud (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 159), the claim's potentially inconsistent allegations render

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[11] As discussed further below (see pt. C.2.d. of the Discussion, *post*), a common count in a complaint is an appropriate manner of asserting a claim for the recovery of the reasonable value of services provided under a theory of quantum meruit. (*Weitzenkorn v. Lesser* (1953) 40 Cal.2d 778, 793-794 (*Weitzenkorn*); *Jogani v. Superior Court* (2008) 165 Cal.App.4th 901, 906 (*Jogani*).)

it uncertain (*Miller v. Brown* (1951) 107 Cal.App.2d 304, 305).

Curtis maintains that the trial court, in ruling on the demurrers and dismissing the first action, made an improper retroactive application of Code of Civil Procedure section 430.41, which first became effective on January 1, 2016. In 2015, upon adopting the version of Code of Civil Procedure section 472 that the trial court applied to the FAC, the Legislature also enacted Code of Civil Procedure section 430.41, which establishes a "meet and confer" process relating to the amendment of pleadings. (Stats. 2015, ch. 418, § 1, p. 3754.) During the proceedings below, Curtis first raised a contention under Code of Civil Procedure section 430.41 approximately five months after the demurrers were sustained to the original complaint, in connection with her motion to correct the notice of the rulings on the demurrers. In that motion, she asserted that the trial court had improperly sustained the demurrers on the ground that she had failed to satisfy the "meet and confer" requirement, which she argued was inapplicable to the proceedings.

We conclude that Curtis's belated assertion of the contention failed to preserve the error on appeal. Furthermore, nothing before us suggests that the trial court relied on Code of Civil Procedure section 430.41 in rendering its rulings in the first action.

3. *Denial of Leave To Amend*

Curtis's remaining contention is that the trial court, upon sustaining the demurrers to the original complaint, improperly denied leave to amend. Ordinarily, such a denial is an abuse of discretion when the defects in the complaint reflect poor pleading, rather than an inherent lack of facts to state a cause of action. (*M. G. Chamberlain & Co. v. Simpson* (1959) 173 Cal.App.2d 263, 267.) As discussed below, we conclude the trial court erred in denying leave to amend.

Generally, to establish that leave to amend has been improperly denied, "a plaintiff must submit a proposed amended complaint or, on appeal, enumerate the facts and demonstrate how those facts establish a cause of action." (*Cantu*, *supra*, 4 Cal.App.4th at p. 890.) Under the unusual circumstances of these consolidated appeals, Curtis's burden on appeal regarding the denial of leave to amend in the first action is effectively equivalent to the burden she confronts in showing that the demurrer to the FAC was improperly sustained in the second action. As explained further below (see pt. C.2. of the Discussion, *post*), in the second action, the demurrer to the FAC was erroneously sustained with respect to several claims. Accordingly, the denial of leave to amend in the first action cannot be affirmed on the ground that Curtis lacked tenable claims.

It appears that the trial court's key reason for denying leave to amend was not that Curtis could not state causes of action, but that she failed to demonstrate compliance with

Business and Professions Code section 6201, subdivision (a), which obliges attorneys to provide notice to clients of their right to arbitrate fee disputes. We conclude that failure does not support the denial of leave to amend.

Business and Professions Code section 6201 is a provision of the California Mandatory Fee Arbitration Act (MFAA) (Bus. & Prof. Code, § 6200 et seq.), which "was enacted to require, at the option of the client, that the attorney arbitrate any fee dispute." (*Law Offices of Dixon R. Howell v. Valley* (2005) 129 Cal.App.4th 1076, 1087 (*Law Offices*).) The MFAA requires attorneys to provide clients with timely notice of their arbitration rights, and specifies ways in which clients may waive those rights. (Bus. & Prof. Code, § 6201, subds. (a), (d).) "The policy behind the mandatory fee arbitration statutes [was] . . . to alleviate the disparity in bargaining power in attorney fee matters which favors the attorney by providing an effective, inexpensive remedy to a client which does not necessitate the hiring of a second attorney. [Citation.]" (*Manatt, Phelps, Rothenberg & Tunney v. Lawrence* (1984) 151 Cal.App.3d 1165, 1174.)

Pertinent here is the notice requirement. Subdivision (a) of Business and Professions Code section 6201 provides: "[A]n attorney shall forward a written notice to the client prior to or at the time of service of summons or claim in an action against the client . . . . The written notice . . . shall include a statement of the client's right to arbitration under this article. *Failure to give this notice shall be a ground for*

the dismissal of the action or other proceeding." (Italics added.)

Although the sentence italicized above uses the term "shall," it is well established that dismissal of an attorney's action for failure to provide the requisite notice is discretionary, not mandatory. (*Richards, Watson & Gershon v. King* (1995) 39 Cal.App.4th 1176, 1180 (*Richards*); *Wager v. Mirzayance* (1998) 67 Cal.App.4th 1187, 1191; *Law Offices*, *supra*, 129 Cal.App.4th at pp. 1087-1088; *Philipson & Simon v. Gulsvig* (2007) 154 Cal.App.4th 347, 366 (*Philipson*).) That is because only discretionary dismissal affords the trial court an opportunity to determine, upon consideration of the relevant facts, that dismissal will promote the policy underlying the MFAA. (*Richards*, *supra*, at p. 1180.) Relevant to the decision, for example, is whether the client is sophisticated and aware of the arbitration right in the absence of the notice, and whether the client has waived the arbitration right by pursuing an action against the attorney. (*Richards*, at p. 1180; *Philipson*, *supra*, at p. 366.)[12] Thus, the trial court may deny

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12 As explained in *Law Offices*, subdivision (d) of Business and Professions Code section 6201 "identifies two instances in which the client waives arbitration, irrespective of whether the attorney gave written notice informing the client of its arbitration rights, namely, where the client commences 'an action or fil[es] any pleading seeking either of the following: [¶] (1) Judicial resolution of a fee dispute to which this article applies. [¶] (2) Affirmative relief against

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dismissal even though the attorney never provided adequate notice (*Philipson*, *supra*, at p. 366), or provided it after filing the original complaint (see *Richards*, *supra*, at p. 1180).

The trial court's denial of leave to amend thus implicated two distinct aspects of its discretionary powers, namely, its authority to dismiss an action for noncompliance with the notice requirement, and its authority to determine that the original complaint's defects were incurable. In our view, the court erred in exercising each aspect of its discretionary authority.

Under subdivision (a) of Business and Professions Code section 6201, a dismissal constitutes an abuse of discretion when based on the misperception that dismissal is required for noncompliance with the notice requirement. (*Richards*, *supra*, 39 Cal.App.4th at p. 1180; *Law Offices*, *supra*, 129 Cal.App.4th at pp. 1090-1091.) Such a misapprehension is reflected here. In sustaining the demurrers to the original complaint, the court stated: "This type of case *cannot* proceed without first completing arbitration." (Italics added.)

Furthermore, it is improper for the trial court to sustain a demurrer without leave to amend on the basis of extrinsic factual matters. (*Griffith v. Department of Public Works* (1956) 141 Cal.App.2d 376, 381 ["Neither trial nor

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the attorney for damages or otherwise based upon alleged malpractice or professional misconduct.'" (*Law Offices*, *supra,* 129 Cal.App.4th at p. 1094.)

appellate courts should be distracted from . . . the only issue involved in a demurrer hearing, namely, whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action"].) As nothing in the MFAA requires that compliance with the notice requirement be alleged in the attorney's complaint, noncompliance constitutes an affirmative defense, that is, a defense that the defendant must affirmatively plead and establish.[13] Thus, in *Law Offices,* the appellate court concluded that an attorney set forth the facts necessary to state a breach of contract claim against a client without requiring that he allege satisfaction of the notice requirement, and then examined the client's assertion of noncompliance as an affirmative defense. (*Law Offices, supra,* 129 Cal.App.4th at pp. 1092-1093.)

Because noncompliance is an affirmative defense, Curtis was not obliged to allege compliance in her complaint. Ordinarily, a plaintiff is required to state facts sufficient to avoid an affirmative defense -- that is, "'plead around'" the defense -- only when the complaint's allegations or the judicially noticeable facts reveal its potential

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[13] An affirmative defense relies on a fact that is independent of the factual allegations essential for the plaintiff's claim. (*Bevill v. Zoura* (1994) 27 Cal.App.4th 694, 698.) We note that generally, "a motion to dismiss is the proper vehicle for a client to put at issue his former attorney's failure to give notice." (*Richards*, *supra*, 39 Cal.App.4th at p. 1180.)

existence. (*Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 824-825.) Here, even if Curtis acknowledged at the hearing that she had not then complied with the requirement, the trial court could not properly find that she was unable to satisfy it, as any proper exercise of the authority to dismiss for noncompliance required an assessment of all the relevant facts. As explained in *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 605, "[t]he hearing on demurrer may not be turned into a contested evidentiary hearing . . . ." In sum, the trial court erred in denying leave to amend in the first action.

C. *Second Action*

We turn to Curtis's challenges relating to the second action. She contends the trial court erred in sustaining the respondents' joint demurrer to the FAC without leave to amend. In so ruling, the court stated that Curtis failed to provide arbitration right notices before filing "the lawsuit" (Bus. & Prof. Code, § 6201), that Curtis lacked written agreements with respondents (Bus. & Prof. Code, § 6148), and that the claims for breach of contract and fraud were "vague" and "without a factual basis."

1. *Arbitration Rights Notice Requirement*

As the outset, we observe that one of the trial court's grounds for the ruling -- namely, Curtis's noncompliance with the notice requirement in Business and Professions Code section 6201, subdivision (a) -- is unsound. Although

Curtis filed proofs of service of the required notices in opposing the demurrer, the trial court sustained the demurrer without leave to amend, stating that she had failed to satisfy the notice requirement before commencing the second action. For the reasons discussed above (see pt. B.3. of the Discussion, *ante*), we conclude that the court misapprehended its discretion in so ruling. Curtis was not obliged to plead compliance with the notice requirement in the FAC; furthermore, the demurrer proceeding relating to the FAC was an inappropriate forum in which to resolve the affirmative defense based on the notice requirement. Accordingly, we limit our review to the existence of other proper grounds to support the ruling on the demurrer.[14]

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[14] In examining the trial court's ruling, we also disregard three other defective objections set forth in the demurrer that respondents have not reasserted on appeal. Respondents asserted that the doctrine of res judicata barred the second action. That doctrine was inapplicable, however, as there was no final judgment in the first action. (*Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1146.)

Respondents further contended that Curtis was precluded from recovering her fees in the second action because she had undertaken litigation in another forum to recover those fees. In support of the contention, they asked the trial court to take judicial notice of court records showing that Curtis had commenced an action as a creditor against Baypoint Mortgage, Inc., in that entity's chapter 7 bankruptcy proceeding (11 U.S.C. § 701 et seq.). However,
(*Fn. is continued on the next page.*)

2. *Ruling on the Demurrer*

In evaluating the rulings on the demurrer to the FAC, we focus on the facts alleged in the FAC or otherwise properly subject to judicial notice. We thus disregard other facts not satisfying those requirements asserted in the parties' briefs.

a. *FAC*

The FAC contains seven claims, namely, three claims for breach of contract, three related claims for common counts, and a claim for fraud. In connection with claims for breach of contract, the FAC identifies three distinct oral fee agreements. Under the first cause of action, the FAC alleges that in September 2015, Saleh Hasbun and Boostz breached a January 2013 agreement to pay Curtis $250 per hour for services relating to their defense in Los Angeles Superior Court Case No. BC 476061. Under the second cause of action, the FAC alleges that in February 2014, Saleh Hasbun breached a September 2013 agreement to pay

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those court records do not establish the relationship, if any, of her creditor action to her claims in the second action.

Respondents also maintained that Curtis was barred from recovering her fees because she improperly represented respondents in matters in which they had a conflict of interest. As nothing in the FAC suggests Curtis provided legal services without complying with the rules of professional conduct relating to conflicts of interest, she was not required to plead around any such defense.

Curtis $250 per hour for services relating to the arbitration of his medical malpractice action against Kaiser Permanente. Under the fifth cause of action, the FAC alleges that in July 2015, Amber and Melissa Hasbun breached a representation agreement established between January 2013 and April 2014, relating to legal services in Los Angeles Superior Court Case No. BC 476061 and the defense of their ownership interest in some real property. The related claims for common counts (third, fourth, and sixth causes of action) seek recovery for services that the pertinent defendants allegedly requested and for which they allegedly promised compensation.

In connection with the fraud claim (seventh cause of action), which is asserted only against Saleh Hasbun, the FAC alleged that in June 2013, acting as an individual and as president of Boostz, he told Curtis that he would pay $100,000 if she continued to represent them through the second trial in Los Angeles Superior Court Case No. BC 476061. As compensation for Curtis's services, Saleh Hasbun transferred to her an interest in real property that he valued at $32,544, and stated that he would assist her in selling the interest to an investor. However, according to the FAC, the property was not worth $32,544, and Saleh Hasbun paid Curtis no further compensation; instead, Saleh Hasbun initiated a lawsuit against Curtis to recover the property interest. After he obtained her legal services and she lost her attorney license, he told her that she was entitled to no compensation. The FAC further alleged that

Saleh Hasbun "strung [Curtis] along" in order to induce her to provide legal services, "knew he would not assist [Curtis] in the sale of the property[,] and [knew] he would demand the return of the real property in a quiet title action."

b. *Defects In Respondents' Demurrer*

Before the trial court and on appeal, Curtis has contended that respondents' joint demurrer contains defects precluding rulings in their favor. Her principal contention is that the demurrer attacked the three claims set forth in the first action's original complaint, rather than the seven claims set forth in the FAC. Additionally, she contends the demurrer failed to set forth cognizable objections of uncertainty to particular claims. As explained below, we reject her contentions, with the exception of her challenge to the demurrer's objection that the fraud claim was uncertain.[15]

Demurrers are subject to procedural requirements regarding the assertion of defects in a complaint. Code of Civil Procedure section 430.60 provides: "A demurrer shall distinctly specify the grounds upon which any of the

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[15] In a related contention, Curtis argues on appeal that the demurrer was defective because it failed to state any of the nine grounds for a demurrer. That contention fails, as the demurrer relies on three of those grounds, failure to state a cause of action, uncertainty, and failure to establish whether the pertinent contract is written or oral. (Code Civ. Proc., § 430.10, subds. (e), (f), (g).)

objections to the complaint . . . are taken. Unless it does so, it may be disregarded."[16] Under the California Rules of Court, a party asserting a demurrer must provide an adequate memorandum of points and authorities supporting the challenges raised in the demurrer. (Cal. Rules of Court, rule 3.1113, subds. (a), (b).) The rules state: "The court may construe the absence of a memorandum as an admission that the . . . special demurrer is not meritorious and cause for its denial and, in the case of a demurrer, as a waiver of all grounds not supported." (*Id.*, subd. (a).) As the requirements provide that the court "may" disregard objections insufficiently specified or supported by a memorandum, they consign those determinations to the court's discretion. (See *Johnson v. Sun Realty Co.* (1934) 138 Cal.App. 296, 299.)

Here, respondents filed a joint demurrer to the FAC. Although the FAC contained seven claims, the demurrer's objections appeared to target the claims in the original complaint; the demurrer characterized the first cause of action as one for breach of contract, the second as one for a common count, and the third as one for fraud. Additionally,

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16 Code of Civil Procedure section 430.80, subdivision (a), further provides that failure to raise an objection in a demurrer constitutes a waiver of the objection, unless it relates to the trial court's jurisdiction or the adequacy of the complaint to state a cause of action.

the notice of motion mentioned an undescribed negligence claim found in neither complaint.

Respondents' notice of motion asserted challenges to "the complaint" in its entirety and to specified causes of action. In addition to contending that Curtis's failure to comply with the notice requirement of Business and Professions Code section 6201 barred the action, the notice maintained that the entire complaint was time-barred under the two-year limitations period applicable to oral contracts. The notice further asserted that the cause of action for breach of contract was uncertain and "fatally defective," that the cause of action for common counts was uncertain because, inter alia, it identified "no billing at all," and that the cause of action for fraud was uncertain because it alleged only a fraudulent action by Curtis against Amber and Melissa Hasbun.

Respondents' memorandum in support of the demurrer focused on Curtis's alleged failure to comply with the notice requirement of Business and Professions Code section 6201 and the requirement for a written fee agreement set forth in Business and Professions Code section 6148. The memorandum did not expressly discuss the causes of action for common counts and fraud, but stated: "The statute of limitations . . . is two years for oral contracts, where work done by . . . Curtis, if any, for Amber or Melissa Hasbun was done more than two years prior to filing."

In opposing the joint demurrer, Curtis contended the demurrer was procedurally defective because it asserted

objections to the claims in the original complaint, rather than to the claims in the FAC, and otherwise failed to assert cognizable objections relating to the claims for common counts and fraud. Respondents' reply maintained that the second action involved effectively the same claims as the first action. Upon sustaining the demurrer, the trial court impliedly rejected Curtis's procedural contentions

In our view, the trial court did not abuse its discretion in disregarding the defects in the demurrer, to the extent the demurrer failed to differentiate the three claims in the original complaint from the seven claims in the FAC. Viewed in context, the claims for breach of contract in the FAC reflect Curtis's attempt to refine her original claim for breach of contract into three separate counts; similarly, the three claims for common counts in the FAC reflect her attempt to do the same for her original claim for common counts. Curtis was not prejudiced by the demurrer's references to "the first cause of action" for breach of contract, "the second cause of action" for common counts, or "the third cause of action" for fraud, as her opposition addressed the demurrer's objections, insofar as they potentially applied to the FAC's claims.

We further conclude that the trial court did not err in rejecting Curtis's other procedural contentions, with the exception of her contention regarding the fraud claim. The crux of those contentions was that respondents' objections to the claims for common counts and fraud -- namely, that they were uncertain -- were insufficiently specified and

unsupported by legal authority. Generally, when a demurrer asserts that a complaint is uncertain, it must set forth how the complaint manifests that defect. (*Johnson v. Clark* (1936) 7 Cal.2d 529, 537; see *Coons v. Thompson* (1946) 75 Cal.App.2d 687, 690.)

Although respondents' memorandum did not discuss the claims for common counts, the trial court reasonably could have disregarded that defect, as the notice of motion set forth the particular objection, namely, that there were no supporting allegations regarding the amount of money owed or the existence of billing. That objection -- even if mistaken -- was sufficient to apprise Curtis of the purported defect.

The same is not true of the demurrer's objection of uncertainty relating to the fraud claim, which is asserted against Saleh Hasbun. Like the analogous objection to the claims for common counts, the objection of uncertainty is set forth solely in the notice. However, aside from contending the fraud claim had "no pleading to support it" and was "simply brought to harass [respondents]," the notice merely asserted that the claim "identifies or relates only a fraud by [Curtis] when she took deeds to property owned by . . . Amber and Melissa Hasbun . . ." Apart from ignoring the numerous factual allegations pled in support of the fraud claim, the objection identified no specific pleading defect in the FAC, as it simply attributed misconduct to Curtis. The demurrer's objection of uncertainty in the fraud claim is thus deficient. Accordingly, we decline to affirm the ruling

on the demurrer regarding the fraud claim on the ground of uncertainty.

c. *Breach of Contract Claims*

We conclude that the breach of oral contract claims fail, with the exception of the claim against Boostz (first cause of action). Because the claims involve fee agreements for legal representation, they are subject to Business and Professions Code section 6148. "Business and Professions Code section 6148 generally requires attorneys in noncontingent fee cases to procure signed, written contracts from clients reflecting rates, fees, and charges whenever it is reasonably foreseeable that their legal expenses will exceed $1,000." (*Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, 460 (*Huskinson & Brown*).) Under that statute, absent specified circumstances, when an attorney has only an oral fee agreement with a client, the attorney is barred from asserting a claim for breach of the agreement, and is permitted to recover only in quantum meruit. (*Ibid.*; *Leighton v. Forster* (2017) 8 Cal.App.5th 467, 490 (*Leighton*).)

Subdivision (a) of Business and Professions Code section 6148 specifies that an adequate written agreement must state the fee arrangements, the general nature of he legal services to be provided, and the parties' responsibilities. Subdivision (c) further provides that "[f]ailure to comply with any provision of this section renders the agreement voidable at the option of the client,

and the attorney shall, upon the agreement being voided, be entitled to collect a reasonable fee." Subdivision (d) of the statute sets forth four exceptional circumstances in which no written agreement is required: "(1) Services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client or where a writing is otherwise impractical. [¶] (2) An arrangement as to the fee implied by the fact that the attorney's services are of the same general kind as previously rendered to and paid for by the client. [¶] (3) If the client knowingly states in writing, after full disclosure of this section, that a writing concerning fees is not required. [¶] (4) If the client is a corporation." The statute further states that it applies only prospectively to fee agreements established after its operative date of January 1, 2000. (Bus. & Prof. Code, § 6148, subds. (e), (f).)

In view of Business and Professions Code section 6148, the FAC states a tenable claim for breach of contract only against Boostz. Because the FAC disclosed on its face that Curtis sought damages for breaches of oral representation agreements, she was obliged to "plead around" a defense based on the statute, as the allegations that respondents had failed to pay under the agreements were sufficient to establish that the agreements were void (*Leighton*, *supra*, 8 Cal.App.5th at p. 467). However, aside from identifying Boostz as a corporation, the FAC contains no allegations triggering an exception to the requirement for a written agreement.

The breach of oral contract claim against Boostz is otherwise not defective. To state a cause of action for breach of contract, a party must plead the existence of a contract, his or her performance of the contract, the defendant's breach, and resulting damage. (*Otworth v. Southern Pac. Transportation Co.* (1985) 166 Cal.App.3d 452, 458-459.) Furthermore, "[a]n oral contract may be pleaded generally as to its effect, because it is rarely possible to allege the exact words." (*Scolinos v. Kolts* (1995) 37 Cal.App.4th 635, 640.) The claim against Boostz satisfies those requirements. Although respondents' demurrer asserted that the FAC's claims were time-barred under the two-year limitations period applicable to breaches of oral contracts (Code Civ. Proc, § 339), the claim in question alleges that the breach occurred in September 2015, less than two years before the commencement of the second action in March 2016.[17]

Although Curtis acknowledges on appeal that she had no written fee agreement with respondents, she contends

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[17] For the first time on appeal, respondents contend the breach of contract claim against Boostz fails under the statute of frauds (Civ. Code, § 1624, subds. (a)(1), (a)(7)), arguing that the alleged oral agreement was for a period of more than one year -- from January 2013 to April 2014 -- and involved compensation exceeding $100,000. However, that statute does not apply to a fully executed oral argument, as is alleged in the FAC. (*Nesson v. Moes* (1963) 215 Cal.App.2d 655, 658; *Bonaccorso v. Kaplan* (1962) 218 Cal.App.2d 63, 65, 69.)

her claims required no such agreement in order to avoid a defense predicated on Business & Professions Code section 6148. She maintains that the FAC adequately invokes the exception set forth in subdivision (d)(2) of the statute, namely, that there was "[a]n arrangement as to the fee implied by the fact that the attorney's services are of the same general kind as previously rendered to and paid for by the client." She relies on a written "settlement and release" agreement attached to the FAC. (Capitalization omitted.) That agreement states that in December 2014, Charles Hasbun -- who is not identified as a defendant in the FAC -- agreed to pay Curtis $3,000 for legal services she rendered to several parties -- including Saleh Hasbun, Amber Hasbun, and Boostz -- in Los Angeles Superior Court Case No. BC 538134, a case not mentioned in the FAC allegations. Curtis argues that the settlement agreement in question establishes that her relationship with respondents fell outside the requirement for a written fee agreement imposed by Business & Professions Code section 6148. We disagree.

The evident intent of the exception in question is to permit attorneys to recover in contract for services akin to those provided under a previous written contract (see *Leighton*, *supra*, 8 Cal.App.5th at p. 488) or under a contract predating the operative date of Business and Professions Code section 6148. As Curtis states on appeal (1) that she represented respondents in various actions beginning in December 2012 and (2) that she had no written fee

agreement, the settlement agreement accompanying the FAC is nothing more than evidence that she rendered representation pursuant to oral contracts. To conclude the exception in question permits Curtis to recover in contract merely because she provided legal representation pursuant to oral contracts would negate Business & Professions Code section 6148.

Before the trial court and on appeal, Curtis also has suggested that her representation of respondents fell within a different exception to the requirement for a written agreement, namely, that applicable to "[s]ervices rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client or where a writing is *otherwise impractical*." (Bus. & Prof. Code, § 6148, subd. (d)(1), italics added.) She identifies two episodes of allegedly "emergency" representation. On one occasion, while representing respondents in a specific action, her co-counsel was disbarred, and respondents asked her to step into his role as lead counsel during an impending trial. On a second occasion, after having represented respondents on specific terms, she agreed to provide them with new services on the same terms, namely, "emergency relief from stay motions" in several bankruptcy proceedings and other actions.

Curtis's contention fails for two reasons. Neither episode is alleged in the FAC. Furthermore, the episodes, as described, do not support application of the exception. In both episodes, Curtis agreed to provide services by modifying or extending an existing oral contract that she

never sought to embody in a written contract. In the first episode, Curtis took up the responsibilities of her co-counsel in the course of an existing representation relationship; in the second episode, she enlarged an existing representation relationship by agreeing to provide "emergency relief," when necessary, in some pending actions.

In our view, neither episode presents circumstances rendering "a writing . . . impractical." (Bus. & Prof. Code, § 6148, subd. (d)(1).) The episodes appear to reflect a common feature of legal representation in litigation, namely, that attorneys, in agreeing to represent clients, ordinarily undertake responsibility to respond to unexpected developments regarding trial and "emergency" hearings. That feature of legal representation, by itself, cannot reasonably be regarded as sufficient to trigger the exception, as the exception would then encompass most attorneys providing litigation services pursuant to an oral agreement. In sum, the demurrer to the claims for breach of contract were properly sustained, except for the demurrer to the breach of contract claim against Boostz (first cause of action).

d. *Claims for Common Counts*

Notwithstanding the defects in the breach of contract claims, we conclude that the FAC states claims for common counts, with the exception of the claim against Saleh Hasbun, insofar as it seeks recovery for Curtis's services during the arbitration of his medical malpractice action

against Kaiser Permanente (fourth cause of action). As noted above, when an agreement is voided under subdivision (c) of Business and Professions Code section 6148, "the attorney shall, upon the agreement being voided, be entitled to collect a reasonable fee." That provision of the statute "codifies the general rule that when legal services have been provided without a valid written fee agreement, the attorney may recover the reasonable value of the services she performed in the action pursuant to a common count for quantum meruit." (*Leighton*, *supra*, 8 Cal.App.5th at p. 490.)

Generally, the assertion of a "common count" in a complaint is sufficient to state a cause of action upon an implied-in-fact contract or an implied-in-law contract, that is, a "[q]uasi-contract[]." (*Weitzenkorn*, *supra*, 40 Cal.2d at pp. 793-794.) Under a quasi-contract, a plaintiff who provides services may recover the reasonable value of those services on a theory of quantum meruit. (*Jogani, supra,* 165 Cal.App.4th at p. 906.) "To recover in quantum meruit, a party need not prove the existence of a contract [citations], but it must show the circumstances were such that 'the services were rendered under some understanding or expectation of both parties that compensation therefor was to be made [citations].'" (*Huskinson & Brown, supra,* 32 Cal.4th at p. 458.)

To plead recovery in quantum meruit, the complaint must ordinarily allege that the services were provided at the defendant's request, or that they were rendered to the

defendant personally, thus raising the inference that the defendant impliedly requested them or impliedly promised to pay for them while they were being delivered. (*Smith v. Bentson* (1932) 127 Cal.App.Supp. 789, 793-794.) Viewed in conjunction with the claims for breach of contract, the FAC's claims for common counts satisfy those requirements.

The claim against Saleh Hasbun relating to the services rendered in the Kaiser Permanente arbitration fails for another reason, namely, that it is time-barred. The two-year limitations period applicable to breach of an oral contract is also applicable to a related claim in quantum meruit. (See *Leighton*, *supra*, 8 Cal.App.5th at p. 488.) "Where the claim of quantum meruit is based upon services performed under a contract that was void or voidable, the limitations period commences to run on either the date the last payment was made toward the attorney fees, or the last date that the attorney performed services in the case." (*Id.* at p. 498.) Because the FAC alleges that Saleh Hasbun breached the oral fee agreement in February 2014, more than two years before the second action commenced in March 2016, the claim is untimely.

Curtis contends the payment promised her in the December 2014 settlement agreement accompanying the FAC delayed the commencement of the two-year limitations period until December 2014. Generally, when a claim is predicated on nonpayment of a contractual debt, "part payment of [the] debt . . . is sufficient to extend the bar of the statute." (*Martindell v. Bodrero* (1967) 256 Cal.App.2d

56, 59 (*Martindell*); *Foristiere v. Alonge* (1929) 98 Cal.App. 563.) In order to toll the limitations period, the payment must be by the debtor, or someone acting on behalf of the debtor. (*Martindell*, *supra*, at p. 60.)

Curtis's contention fails, as the payment made under the December 2014 settlement agreement did not relate to the services she provided to Saleh Hasbun during the arbitration of his medical malpractice action against Kaiser Permanente. Before the trial court and on appeal, Curtis has stated that the payment made under the settlement agreement concerned legal fees that respondents accrued in other actions.

In a related contention, pointing to *Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 786, Curtis contends the December 2014 settlement agreement delayed the commencement of the limitations period to December 2014. We disagree. *Wyatt* stands for the proposition that when a tort claim is accompanied by an allegation of civil conspiracy, the limitations period applicable to the tort claim does not run until "'the last overt'" act of the conspiracy has been completed. (*Wyatt*, *supra*, 24 Cal.3d at p. 786.) That proposition is inapplicable here, as the FAC alleges no conspiracy. In sum, the FAC's third and sixth causes of action -- but not the fourth cause of action -- state claims for common counts.

e. *Fraud Claim*

We conclude the trial court erred in sustaining the demurrer to the fraud claim, as the demurrer identified no defect in it. In view of the defects in the demurrer discussed above (see pt. C.1. & 3.b. of the Discussion, *ante*), the only cognizable objection it asserted against the fraud claim was that the claim was time-barred under the two-year limitations period applicable to breach of an oral contract. However, fraud claims are subject to a three-year limitations period (Code Civ. Proc., § 338, subd. (d)). As the FAC asserts that Saleh Hasbun made several misrepresentations in and after June 2013, less than three years before Curtis commenced the second action in March 2016, the fraud claim is not time-barred.

We further note that had respondents' demurrer asserted a cognizable objection of uncertainty to the fraud claim, we would reject it. In order to state a fraud claim, "'[i]t is essential that the facts and circumstances which constitute the fraud should be set out clearly, concisely, and with sufficient particularity to apprise the opposite party of what he is called on to answer, and to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud.'" (*Scafidi*, *supra*, 72 Cal.App.2d at p. 553.) In our view, the claim is pleaded with specific facts sufficient to inform Saleh Hasbun of the misconduct asserted against him.

3. *Denial of Leave to Amend*

The remaining question concerns the denial of leave to amend. We conclude that Curtis has failed to demonstrate error in that ruling. Generally, "[i]t is the plaintiff's burden on appeal to show in what manner it would be possible to amend a complaint to change the legal effect of the pleading; we otherwise presume the pleading has stated its allegations as favorably as possible." (*Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 962.) Before the trial court, Curtis's opposition to the demurrer did not seek leave to amend, and nothing suggests that she requested it at the hearing on the demurrer. On appeal, Curtis has not expressly asked for leave to amend the FAC, and to the extent her briefs may suggest potential amendments, those amendments would not cure the FAC's defects (see pt. C.3.b. & e. of the Discussion, *ante*). Accordingly, she has shown no error in the denial of leave to amend.

D. *Summary*

Due to the unusual circumstances of the consolidated appeals, we determine the relief in the appeals in light of the proceedings in both actions. For the reasons discussed above (see pt. C.2.c.-e. of the Discussion, *ante*), in the second action, the trial court erred in sustaining the demurrer to the FAC with respect to the first cause of action for breach of contract (insofar as it is asserted against Boostz), the third and sixth causes of action for common counts, and the

seventh cause of action for fraud. The judgment in the second action must therefore be reversed with respect to those claims.

In view of our conclusions regarding the second action, the trial court erred in denying Curtis leave to amend in the first action. Because the FAC -- which Curtis attempted to file in the first action -- was tested by demurrer in the second action, our determinations regarding the sufficiency of the FAC necessarily control the relief appropriate in the first action.

Under those determinations, Curtis may assert no claim in the first action properly subject to demurrer in the second action, with the exception of the fourth cause of action for common counts. As explained above, in the context of the second action, that claim was time-barred; because the alleged breach occurred in February 2014, more than two years before the second action commenced in March 2016, the claim is untimely under the applicable two-year limitations period. However, in the context of the first action, that defect does not exist, as the first action commenced in November 2015. Accordingly, the judgment in the first action must be reversed, with directions to the trial court to grant Curtis leave to amend, restricted to filing a complaint containing the first cause of action for breach of contract (insofar as it is asserted against Boostz); the third, fourth, and sixth causes of action for common counts; and the seventh cause of action for fraud.

Nothing in this decision precludes respondents from seeking abatement of one of the actions or consolidation of the two actions.

DISPOSITION

In the appeal in the first action (B278552), the judgment is reversed, and the matter is remanded with directions to the trial court to grant Curtis leave to file a complaint containing the following claims in her first amended complaint: the first cause of action for breach of contract (insofar as it is asserted against Boostz); the third, fourth, and sixth causes of action for common counts; and the seventh cause of action for fraud. In the appeal in the second action (B275907), the judgment is reversed with respect to the following claims asserted in her complaint in that action: the first cause of action for breach of contract (insofar as it is asserted against Boostz), the third and sixth causes of action for common counts, and the seventh cause of action for fraud. Curtis is awarded her costs in both appeals.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J. WILLHITE, J.