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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

CERTAIN UNDERWRITERS AT LLOYD'S UNDER POLICY NO. N330039 11 54826, Plaintiff and Appellant, v. CPE HR, INC., et al., Defendants and Respondents.	B275828 (Los Angeles County Super. Ct. No. BC583061)

APPEAL from a judgment of the Superior Court of Los Angeles County, Holly E. Kendig, Judge. Affirmed.

Robinson Di Lando, Michael C. Robinson, Mark Kane, and Michael B. Yee for Plaintiff and Appellant.

Law Office of David G. Freedman and David G. Freedman for Defendants and Respondents.

Certain Underwriters at Lloyd's Under Policy No. N330039 11 54826 (Lloyd's) appeal from a judgment entered after the trial court sustained demurrers filed by CPE HR, Inc. (CPE) and Joshua Sable without leave to amend.[1] We independently conclude that the causes of action in Lloyd's complaint were not assignable and that they were time-barred. We further conclude that the trial court did not abuse its discretion by denying Lloyd's leave to amend its complaint. We therefore affirm the trial court's judgment.

BACKGROUND

Factual Background

CPE advertises itself as a human resources outsourcing and professional employer organization. Rockport Administrative Services, LLC (Rockport) engaged CPE by way of a Human Resources Consulting Agreement to provide human resources outsourcing services for itself and for other entities to which Rockport provided professional services, including Pinegrove Health and Wellness Center (Pinegrove).

Janett Hertel, a Licensed Vocational Nurse at Pinegrove, injured her knee in June 2012. From September 24 to October 23, 2012, Hertel was off work and then on modified duty because of her knee injury. On October 23, 2012, Hertel's supervisor,

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[1] On May 23, 2017, Lloyd's filed a motion to augment the record and a separate request for judicial notice. We granted Lloyd's motion to augment on June 23, 2017. In its request for judicial notice, Lloyd's requested we judicially notice a printout of a page from CPE's Web site and a law review article entitled The Emergence of "Law Consultants." We grant Lloyd's request for judicial notice as to the Web site printout pursuant to Evidence Code section 452, subdivision (h), but deny it as to the law review article pursuant to Evidence Code section 450.

Emily Sedillo, sent Hertel a letter placing her on Family and Medical Leave Act (FMLA) leave.

On January 29, 2013, Hertel's doctor told Pinegrove that Hertel would be able to return to work without restrictions on January 31, 2013. Rather than allowing her to return to work, however, Pinegrove placed Hertel on "on-call" status, but never called her in to work.

Before designating Hertel's leave as FMLA leave, Sedillo contacted CPE's general counsel, Joshua Sable, and told him that she did not want Hertel to return to work because Hertel was not a good employee. Sable advised Sedillo that when Hertel was ready to return to work, Pinegrove should tell her there were no positions open, place Hertel on "on-call" status, and never call her to work. Sable also told Sedillo to send Hertel a termination letter after three months passed telling Hertel Pinegrove no longer needed Hertel's services.

In May 2013, Hertel sent Pinegrove a demand letter alleging disability discrimination, failure to accommodate her disability, retaliation for her FMLA leave, and intentional infliction of emotional distress. Pinegrove and Rockport settled Hertel's claims. Pinegrove sought—in December 2013—and received payment under a Lloyd's insurance policy for the settlement amount and legal expenses incurred in defending Hertel's claim.

Procedural Background

On May 27, 2015, Lloyd's filed suit against CPE and Sable, alleging causes of action for negligence, professional negligence, breach of fiduciary duty, and breach of contract/express indemnity. The operative paragraphs of the complaint allege:

"17. Plaintiff is informed and believes, and on that basis alleges, that Hertel was entitled to reinstatement to her position or a comparable position upon returning from her FMLA designated leave.

"18. Plaintiff is further informed and believes and on that basis alleges that PINEGROVE had an affirmative duty to reasonably accommodate Hertel's disability under the [Fair Employment & Housing Act (FEHA)] . . . by providing her leave and returning her to work once her leave ended.

"19. Plaintiff is further informed and believes and on that basis alleges that SABLE, a human resources professional, and CPE, knew or should have known of PINEGROVE'S legal obligations under the FMLA and the FEHA.

"20. Defendants' advice failed to properly or accurately advise PINEGROVE of their legal obligations and, in fact, advised and solicited PINEGROVE to violate the laws of California.

"21. But for Defendants['] advice PINEGROVE would not have placed Hertel 'on-call' and never called her back to work and instead would have returned her to work upon the cessation of her leave of absence. As a result, Hertel would not have had standing to sue PINEGROVE for either disability discrimination or failure to accommodate or violation of the FMLA."

In July 2015, Lloyd's filed a notice of errata to the complaint attaching CPE's Human Resources Consulting Agreement with Rockport.

CPE and Sable demurred to the complaint. They argued the gravamen of Lloyd's complaint was legal malpractice. The causes of action in the complaint, they argued, were therefore not assignable from Pinegrove to Lloyd's and were barred by the one

year statute of limitations on legal malpractice actions. The trial court sustained the demurrer without leave to amend at a hearing on April 19, 2016 and entered judgment for CPE and Sable on May 9, 2016.

Lloyd's timely appealed.

DISCUSSION

A. *Standard of Review*

"In determining whether plaintiff[] properly stated a claim for relief, our standard of review is clear: ' "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.' " (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

B. *Demurrer*

Lloyd's boiled its complaint against CPE and Sable down to one central allegation: Sable gave Pinegrove bad advice for which Sable and CPE are liable. The complaint's paragraphs 19 and 20 succinctly recount Lloyd's grievance with CPE and Sable: "SABLE, a human resources professional, and CPE, knew or

should have known of PINEGROVE'S legal obligations under the FMLA and the FEHA[, but their] advice failed to properly or accurately advise PINEGROVE of [its] legal obligations and, in fact, advised and solicited PINEGROVE to violate the laws of California."

Lloyd's restated the basis of its complaint in each of the four causes of action. Alleging negligence, Lloyd's claimed that Sable, "a human resources professional and attorney admitted to the practice of law holding himself out as an attorney with special knowledge in employment law, and CPE, a company that held itself out as having special personnel and skill in providing advi[c]e concerning employment law knew or should have known of PINEGROVE'S legal obligations under the FMLA and the FEHA," and that Sable and CPE "failed to exercise reasonable care" by "failing to properly or accurately advise PINEGROVE of their legal obligations and, in fact, advis[ing] and solicit[ing] PINEGROVE to violate State and Federal law."

Lloyd's professional negligence cause of action alleges that Sable "failed to exercise reasonable care and skill and acted in a negligent manner by, among other things, providing inaccurate advice as to what would be a lawful manner of treating Hertel." "As a direct . . . result of SABLE'S wrongful conduct," Lloyd's continued, "and but for SABLE'S professional[ly] negligent advice PINEGROVE would not have placed Hertel 'on-call' and never called her back to work and instead would have returned her to work upon the cessation of her leave of absence. As a result, Hertel would not have had standing to sue PINEGROVE for either disability discrimination or failure to accommodate or violation of the FMLA."

In its breach of fiduciary duty cause of action, Lloyd's alleged that "[i]n rendering advice to PINEGROVE, SABLE took unfair advantage of PINEGROVE for the benefit of a third party, namely, [Emily Sedillo] of PINEGROVE who desired to terminate the services of Hertel. [¶] . . . As a Human Resources professional, SABLE further breached his fiduciary duty by failing to exercise reasonable care and skill and acting in a reckless manner by, among other things, providing patently inaccurate advice as to what would be a lawful manner of treating Hertel."

And Lloyd's breach of contract cause of action alleged that "CPE's advice by and through SABLE, its general counsel, directly and indirectly through the errant and omissive advice provided by SABLE directly and proximately damaged PINEGROVE."

In their demurrer and here, Sable and CPE characterize the bad advice alleged in Lloyd's complaint as legal advice. Lloyd's, on the other hand, contends that these allegations concerned CPE's and Sable's human resources consulting services. Lloyd's relies on the Human Resources Consulting Agreement as evidence that it "specifically pled that [CPE and Sable] were only retained as consultants to render human resources consulting services." Lloyd's acknowledges that Sable is an attorney, but argues that he was "not representing Pinegrove as a lawyer at the time he provided consulting advice as an employee of [CPE]." We must determine, then, whether Lloyd's allegations are of legal malpractice or something else.

Lloyd's contends that it could not have alleged legal malpractice because it did not allege an attorney-client relationship and because no such relationship could have existed

under the pled facts. The Human Resources Consulting Agreement was not an attorney-engagement agreement, Lloyd's argues, but rather was an agreement for the performance of human resources consulting services. Further, Lloyd's contends, "[t]he California Rules of Professional Conduct . . . make clear that Sable could not have been rendering legal services to Pinegrove through [CPE], a non-law firm . . . ."

We are not persuaded by Lloyd's arguments. Individuals and companies break rules; branches of governments and disciplinary bodies exist to determine whether rules have been broken. That a rule exists prohibiting certain conduct is a different question than whether that conduct was alleged.[2]

Furthermore, the factual underpinning of Lloyd's argument is incorrect. In its complaint, Lloyd's *did*, in fact, allege that Sable had acted as an attorney for Pinegrove. "By virtue of SABLE'S role as a professional consultant *and attorney* for PINEGROVE," Lloyd's alleged, "they entered into a relationship in which SABLE possessed superior knowledge and skill and in which SABLE controlled the affairs of PINEGROVE relating to employer/employee relations." Lloyd's complaint identifies Sable as "an individual, and attorney admitted to the Bar of the State of California and general counsel to CPE" and refers to him as "a human resources professional and attorney admitted to the practice of law holding himself out as an attorney with special knowledge in employment law . . . ." The complaint alleges that "[i]n 2013, PINEGROVE, on the one hand, and SABLE, an

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[2] Whether CPE's and Sable's conduct as alleged would have violated any ethical rule or law prohibiting the practice of law in certain contexts is not before us and we express no opinion on that question.

attorney, on the other hand, were in a professional relationship pursuant to the [Human Resources Consulting Agreement.]"

That the agreement was entitled "Human Resources Consulting Agreement" rather than "Attorney-Client Engagement Agreement" does not change the analysis. The agreement specifies that among other "consulting services," CPE was to "[c]onsult on an as needed basis regarding compliance with federal, state and local laws and ordinances regarding employment" and "[a]ssist[] with preparation of employment contracts, independent contractor agreement and severance agreements." "It is established that the practice of law in California includes the giving of 'legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation.' " (*Simons v. Steverson* (2001) 88 Cal.App.4th 693, 712.)

Moreover, both Pinegrove (through Rockport) and CPE contemplated the provision of some legal services via the "consulting agreement," because Rockport and CPE amended the consulting agreement to subject all communications between CPE and Pinegrove "to the attorney-client and work product privileges." Lloyd's contention that there was no attorney-client relationship because it alleged no attorney-client relationship is unavailing.[3]

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[3] Lloyd's also argues that the formation of an attorney-client relationship is a question of fact that cannot be decided on demurrer. Lloyd's argument is misplaced. First, neither did the trial court nor do we decide whether an attorney-client relationship was alleged or actually existed between Sable and/or CPE on the one hand and Pinegrove on the other. Whether Lloyd's artfully pled a legal malpractice cause of action is not the

Lloyd's asserts, and we acknowledge, that if the allegations in the complaint are about consulting services *other than* legal services, then the allegations may be assignable and may *not* be time-barred. (See *Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 64.) Calling legal advice something else, however, does not make it so, particularly so where the parties have attempted to ascribe the legal protections afforded attorneys and their clients to the communications and work performed. " 'Whether a person gives advice as to (local) law, Federal law, the law of a sister State, or the law of a foreign country, he is giving legal advice . . . .' " (*Bluestein v. State Bar* (1974) 13 Cal.3d 162, 173.)

Each of the operative allegations here is about advice Sable gave or should have given, and about his and CPE's liability for the legal advice he gave or failed to give. There is no difference between "legal advice" and the "consulting advice" Lloyd's argues it alleged in the complaint. Lloyd's alleged that Sable and CPE "knew or should have known of PINEGROVE'S legal obligations under the FMLA and the FEHA" and that they "failed to properly or accurately advise PINEGROVE of [its] legal obligations and, in fact, advised and solicited PINEGROVE to violate the laws of California." That is the basis of every cause of action in the complaint. We conclude, therefore, that the gravamen of the complaint is legal malpractice. "Accordingly, all counts in the complaint are subject to the same rules governing assignability of legal malpractice claims." (*Kracht v. Perrin, Gartland & Doyle* (1990) 219 Cal.App.3d 1019, 1023.) Those claims are not

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question before us. The question before us is whether—based solely on what Lloyd's alleged—the gravamen of the complaint is for legal malpractice or something else.

assignable (*id.* at p. 1025) and are time-barred by Code of Civil Procedure section 340.6.[4]

C. *Leave to Amend*

The trial court did not abuse its discretion when it denied leave to amend. Lloyd's contends it can amend the complaint to preclude any mention that Sable was an attorney or that CPE as a consulting firm had opted out of any regulatory scheme governing attorney-client relationships or attorney conduct and can plead that the capacity in which the services were rendered was a consulting relationship as opposed to an attorney-client relationship. Nevertheless, the sole grievance Lloyd's complaint alleges is about legal advice. Pleading around key words will not change the conduct alleged. Lloyd's has suggested myriad ways it could amend the complaint to plead something other than legal malpractice. Based on the nature of the facts alleged, we disagree.

"[A]n abuse of discretion could be found, absent an effective request for leave to amend in specified ways, only if a potentially effective amendment were both apparent and consistent with the plaintiff's theory of the case." (*Camsi IV v. Hunter Technology Corp.* (1991) 230 Cal.App.3d 1525, 1542.) Plaintiff's theory of the case is that Sable gave Pinegrove bad legal advice; any amendment must be consistent with that theory. Denying leave to amend was, under the circumstances, no abuse of discretion.

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[4] It does not change our analysis that the complaint contains causes of action sounding in both tort and contract; section 340.6 applies to both if the allegation is legal malpractice. (*Southland Mechanical Constructors Corp. v. Nixen* (1981) 119 Cal.App.3d. 417, 427, fn. 4, superseded by statute on another ground.)

DISPOSITION

The trial court's judgment is affirmed. CPE and Sable are awarded their costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

JOHNSON, J.

BENDIX, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.