Filed 3/28/12 Harrison v. Clark & Trevithick CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PAUL HARRISON, Plaintiff and Appellant, v. CLARK & TREVITHICK, Defendant and Respondent.	B230254 (Los Angeles County Super. Ct. No. BC426195)

APPEAL from a judgment of the Superior Court of Los Angeles County. Susan Bryant-Deason, Judge. Affirmed.

Taylor Sethi Lachowicz and Matthew D. Taylor for Plaintiff and Appellant.

Clark & Trevithick, Philip W. Bartenetti and Alisa S. Edelson for Defendant and Respondent.

Plaintiff and appellant Paul Harrison appeals from an order dismissing his complaint after the trial court sustained without leave to amend the demurrer of defendant and respondent Clark & Trevithick (Clark). Harrison contends: (1) the claims are not derivative and Harrison was entitled to pursue them as individual causes of action; and (2) the complaint is not time-barred.[1] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[2]

We recite the facts in accordance with the usual rules of appeal from dismissal following an order sustaining a demurrer. That is, we treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) Harrison, an engineer, developed laser technology used in creating laser markings such as barcodes and serial numbers. In 1996, Harrison founded the TherMark Corporation (TherMark) which

---

[1] Harrison also contends the demurrer should have been denied as untimely because it was not filed within 10 days after the amended complaint was filed, as he asserts is required by California Rules of Court, rule 3.1320(j) (defendant has 10 days to answer or otherwise plead after demurrer is overruled). Harrison misreads that rule, which applies to a complaint that has already been the subject of a demurrer. Generally, a defendant has 30 days to respond by answer or demur to an amended complaint. (Code Civ. Proc., § 471.5; see also § 586, subd. (a) ["[J]udgment shall be rendered in the same manner as if the defendant had failed to answer: [¶] (1) If the complaint has been amended, and the defendant fails to answer it, as amended, or demurer thereto . . . within 30 days after service thereof"].)

Clark contends the appeal should be dismissed as moot because Harrison has voluntarily dismissed the "entire action of all parties and all causes of action" with prejudice. But Clark cites no authority, and our independent research has found none, that stands for the proposition that a party may voluntarily dismiss a complaint with prejudice while an appeal is pending from the trial court's dismissal of one cause of action after it has sustained a demurrer without leave to amend. We need not decide this issue because, as we shall explain, the demurrer was properly sustained.

[2] This is the second appeal in this case. Previously, we reversed a trial court order dismissing the third and fourth causes of action of a cross-complaint filed against Harrison by defendants TherMark Holdings, Inc. (Holdings) and TherMark, LLC (LLC) as a Strategic Lawsuit Against Public Policy. (Mar. 7, 2011, B224664 [nonpub. opn.].)

encompassed various other TherMark entities, including LLC, which held the patent to the technology. In September 2005, TherMark retained Momentum Venture Management (MVM) and its founder, Matthew Ridenour, to help TherMark find outside investors; in exchange for these services, MVM was to receive a management fee and, after an investor was secured, an option to purchase a specified percentage of shares of TherMark. In November 2005, Harrison incorporated Holdings; LLC became a wholly owned subsidiary of Holdings. Ridenour located investors who, in exchange for their investment, received preferred shares of the newly formed Holdings, with a liquidation preference.

In November 2009, Harrison brought the instant action against TherMark, Ridenour and others, including the Clark law firm. Clark's demurrer to the third cause of action for attorney malpractice was sustained. Harrison was afforded leave to amend to show that the complaint was not time-barred because Harrison "did not learn of [Clark's] involvement in the error in the Certificate of Designation until January, 2009 . . . ."

Harrison filed the operative first amended complaint (the Complaint) on March 12, 2010, and served it by mail that same day. In relevant part, the Complaint alleges that together, with his wife, Harrison owns about 2 million shares of TherMark. At all relevant times, Ridenour was chief executive officer of TherMark (and previously of TherMark's predecessor companies). Ridenour retained the Clark law firm in January 2006 to perform legal services for TherMark's predecessor companies; Clark continued to provide such services for TherMark. Despite having no written agreement with Clark, Harrison believed that, because Clark was representing TherMark, it was "by extension" also representing Harrison's personal interests in the negotiations leading up to the first round of financing which culminated in the April 2006 agreement to sell 3.7 million Series A preferred shares of Holdings for $1.7 million to the "Angel investors." In connection with that first round of financing, Clark prepared a Certificate of Designation which incorrectly stated that the Series A preferred shares were convertible into common shares at a conversion price equal to $1; in fact, the correct conversion price was $0.50. At the closing of the first round of financing in April 2006,

Ridenour and Clark tricked Harrison into signing two documents prepared by Clark: (1) a Written Consent of Sole Director dated January 20, 2006; and (2) a Written Consent of Majority Shareholders dated February 1, 2006. Although Harrison had never knowingly transferred stock to MVM, both documents stated that MVM owned 583,903 shares of Holdings common stock. Ridenour and Clark "slipped [the two documents] in, knowing that Harrison would be signing dozens of documents at the closing, would be relying on Ridenour and [Clark] to protect his interests, and that given the flurry of paperwork, Harrison was unlikely to notice their inclusion." In January 2007, Clark drafted documents for a second round of financing on the same terms as the first round, including the $1 conversion price. In March 2008, Harrison first became aware that the $1 conversion price stated in the Certificates of Designation was incorrect. At a March 20, 2008 meeting, the board of directors voted to file a Certificate of Correction, changing the Series A preferred shares conversion price from $1 to $0.50, over Harrison's objection. The correction "effectively doubl[ed] the number of votes of the preferred shareholders at the expense of the common shareholders . . . ." Harrison did not know about Clark's involvement in the preparation of the incorrect Certificate of Designation until January 2009, when he obtained documents in discovery from TherMark shareholder William Maybaum.

The only cause of action alleged against Clark was the third cause of action for "Attorney Negligence." It alleged two theories of attorney-client relationship: (1) Clark prepared legal documents that directly benefitted Harrison or companies in which he was an owner; and (2) because Harrison was an intended beneficiary of the Certificate of Designation, it was foreseeable that an error in the Certificate of Designation would adversely affect Harrison's financial interest, and Clark concealed its involvement in preparing and filing the Certificate of Designation. Harrison relied on the incorrect Certificate of Designation in agreeing to the second round of financing and was harmed by the reduction in value of the common shares and the loss of voting control by the common shareholders that resulted from the correction of the Certificates of Designation.

To the extent Harrison discovered the mistake in March 2008, Clark's continued representation of Holdings and Harrison tolled the statute of limitations.

In response to Clark's requests for admission, Harrison admitted that he never entered into a written or oral agreement with Clark; Harrison did not hire Clark to render legal advice; Clark was hired to represent Holdings in connection with the first round of financing; Ridenour told Harrison that Clark was representing Holdings in connection with the first round of financing; the complaint sought legal redress from Clark only for Clark's actions relating to preparation of the Certificate of Designation; Harrison first learned of the mistake in the Certificate of Designation in March 2008; Harrison never demanded that the board of directors pursue a claim against Clark in connection with the damages Harrison alleges in the Complaint.

Clark demurred to the third cause of action on the grounds that it failed to allege an attorney-client relationship, was time-barred, and Harrison was without legal capacity to sue because the claims were derivative. In support of its demurrer, Clark obtained judicial notice of Harrison's admissions. (*Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 485 [when considering a demurrer, trial court may take judicial notice of answers to requests for admission].) Harrison opposed Clark's demurrer (as well as those filed by other defendants) on the grounds that it had not been timely filed (Cal. Rules of Court, rule 3.1320(j) [defendant has 10 days to plead to complaint or remaining causes of action following overruling of demurrer, expiration of time to amend or sustaining of demurrer without leave to amend]) and that the Complaint alleged sufficient facts to state a cause of action.

On July 9, 2010, the trial court sustained Clark's demurrer without leave to amend "on the ground that [Harrison] is asserting an improper shareholder derivative malpractice action . . . . Moreover, the claim is time-barred under the provisions of [Code of Civil Procedure section] 340.6. [¶] Accordingly, [Clark] is dismissed from this action." Notice of entry of judgment was served on November 15, 2010. Harrison timely appealed and elected to proceed by appendix.

On April 7, 2011, Harrison filed in the trial court a Notice of Settlement of Entire Case, which stated that "the entire case" had been unconditionally settled and a request for dismissal would be filed within 45 days after the date of settlement. On April 25, 2011, a Request for Dismissal with prejudice of the "Entire action of all parties and all causes of action," signed by Harrison's attorney, was filed.

Six months after dismissing the "entire action" with prejudice, Harrison filed an appellant's appendix on October 14, 2011, and his opening brief three days later, on October 17. Clark did not move to dismiss the appeal. But in its respondent's brief, it argued that the appeal was moot because the entire action had been dismissed with prejudice. Harrison did not file a reply brief responding to Clark's mootness argument. In response to our request for supplemental briefing on the issue, Harrison states that the dismissal with prejudice was not intended to apply to Clark, but only to the other defendants with whom Harrison had reached a settlement; Harrison did not expressly exclude Clark from its voluntary dismissal because Clark had already been involuntarily dismissed by the trial court.

DISCUSSION

A. The Complaint Does Not State a Cause of Action for Attorney Negligence

1. Standard of Review

We begin with the standard of review. "In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. '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." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

2. The Complaint Did Not Plead Facts Sufficient to Support a Finding of an Attorney-Client Relationship

Harrison contends his malpractice claim against Clark is not derivative because the alleged malpractice harmed only a subset of the corporation's shareholders. We conclude that Harrison failed to establish an attorney-client relationship with Clark because Clark represented the corporation, not Harrison.

The elements of a claim for legal malpractice are (1) the attorney's duty to use such skill as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the plaintiff's injury; and (4) actual loss or damage resulting from the attorney's negligence. (*Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 572.) The duty element arises from an attorney-client relationship. (*Fox v. Pollack* (1986) 181 Cal.App.3d 954. 959.) Thus, the absence of an attorney-client relationship is fatal to a legal malpractice claim. (*Ibid*.)

"An attorney representing a corporation does not become the representative of its stockholders merely because the attorney's actions on behalf of the corporation also benefit the stockholders; as attorney for the corporation, counsel's first duty is to the corporation. [Citation.] Corporate counsel should, of course, refrain from taking part in any controversies or factional differences among shareholders as to control of the corporation, so that he or she can advise the corporation without bias or prejudice." (*Skarbrevik v. Cohen, England & Whitfield* (1991) 231 Cal.App.3d 692, 703 (*Skarbrevik*).) "[C]orporate counsel's direct duty is to the client corporation, not to the shareholders individually, even though the legal advice rendered to the corporation may affect the shareholders." (*Id*. at p. 704.)

Here, Harrison has not pled facts sufficient to show that he had an attorney-client relationship with Clark. Harrison admitted he did not enter into any written or oral agreement with Clark, he did not hire Clark to render legal advice, Clark was hired to represent Holdings, Ridenour told Harrison that Clark represented Holdings, and no one affiliated with Holdings told Harrison that Clark was representing Harrison in connection

with the first round of financing. Under *Skarbrevik*, an attorney-client relationship did not arise out of Clark's representation of TherMark or any of its entities. To the extent Clark's errors on the Certificates of Designation amounted to attorney negligence, that claim belonged to its client, TherMark, and not to Harrison. Accordingly, Harrison appears not to have stated a cause of action for attorney negligence.

3. The Attorney Negligence Claim Is Time-barred

An action for attorney negligence must be brought within one year after the plaintiff discovers or through use of reasonable diligence should have discovered the facts constituting the act or omission. (Code Civ. Proc., § 340.6.)

Harrison's claim is based solely on Clark's involvement in the preparation of the erroneous Certificate of Designation. Harrison admits he discovered the error on the Certificate of Designation in March 2008 when a Certificate of Correction was filed. He did not file the action against Clark until November 17, 2009, over one year later. Harrison explains the delay with the allegation that he did not "become aware of [Clark's] involvement in the preparation and filing [of the Certificate of Designation] until January 2009," when he received discovery responses from another shareholder. But in response to request for admission No. 5, Harrison admitted that Ridenour told Harrison that Clark was representing Holdings in connection with the first round of financing. Thus, when he discovered the error on the Certificate of Designation in March 2008, Harrison knew that Clark had represented the corporation in connection with the first round of financing. If he did not know of Clark's authorship of the Certificate of Designation, through reasonable diligence Harrison should have been able to discover Clark's involvement in creating the claimed incorrect Certificate of Designation for the corporation.

DISPOSITION

The judgment of dismissal following the sustaining of the demurer without leave to amend is affirmed. Each party shall bear their own costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.