Filed 7/28/17 11742 Sherman Way v. Fenton & Nelson CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| 11742 SHERMAN WAY, LLC, et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>FENTON & NELSON LLP, et al.,<br><br>Defendants and Respondents. | B269398<br><br>(Los Angeles County Super. Ct. No. BC460311) |

APPEAL from an order of the Superior Court of Los Angeles County, Michelle R. Rosenblatt, Judge. Affirmed.

The Law Offices of Stan Stern, Stan Stern and Frederick Barak for Plaintiffs and Appellants.

Kaufman Dolowich Voluck, Andrew J. Waxler and Gretchen S. Carner for Defendants and Respondents.

Plaintiff Hany Malek (Malek), a chiropractor, was a principal owner of a number of entities, including 11742 Sherman Way LLC (Sherman Way)[1] and Ocean Blue Investments, Inc., dba Basque Night Club (Ocean Blue). Defendants, a law firm and several of its attorneys, represented Malek in litigation that resulted in Ocean Blue and Malek's chiropractic corporation, Malek & Chahayed Chiropractic, dba United Health Center (MC Chiropractic), being placed in receivership, and Malek being convicted of contempt and ordered to repay the receiver nearly two million dollars.

While the contempt judgment was on appeal, Malek, on behalf of himself and MC Chiropractic, brought the present action for professional negligence. The action was stayed for nearly four years. When the stay was lifted, Malek moved to file an amended complaint to add new causes of action on behalf of Sherman Way and Ocean Blue. The trial court denied the motion, concluding that the new claims did not relate back to the filing of the original complaint and thus were barred by the statute of limitations. Sherman Way and Ocean Blue appealed.

We affirm the order denying the motion to amend. Although trial courts have discretion pursuant to Code of Civil Procedure[2] section 473, subdivision (a) to grant leave to amend the pleadings at any stage, courts may not permit amendments to

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[1] On February 2, 2107, Sherman Way filed a request for judicial notice of a document showing that Sherman Way is currently in good standing with the Secretary of State. The request for judicial notice is granted.

[2] All subsequent undesignated statutory references are to the Code of Civil Procedure.

add otherwise untimely claims that " 'give rise to a wholly distinct and different legal obligation against the defendant.' " (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 243–244 (*Branick*).) Because the proposed amended complaint alleges claims based on new legal obligations, the claims do not relate back to the original complaint and, thus, are time-barred. The trial court therefore did not abuse its discretion in denying the motion to amend.

## FACTUAL AND PROCEDURAL BACKGROUND

### I.

### The First Amended Complaint

Malek, individually and on behalf of MC Chiropractic, filed the operative first amended complaint against attorneys Fenton & Nelson LLP, Henry Fenton, Harry Nelson, and Abbie Maliniak (collectively defendants) on August 22, 2011.[3] The complaint alleged as follows:

In October 2008, Malek was a principal shareholder of MC Chiropractic, a principal owner of Sherman Way and Ocean Blue, and a minority owner of Choice Providers Medical Group, Inc., doing business as Noble Community Medical Associates, Inc. (Choice Providers). In about November 2008, Malek retained defendants to represent him in a action filed by Michael Koshak

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[3] Apparently in an attempt to assert a derivative action on behalf of MC Chiropractic, which was then in receivership, the complaint named MC Chiropractic as both a plaintiff and a defendant. The complaint alleged that MC Chiropractic's shareholders had made a demand on the receiver to permit prosecution of this action on its behalf, but the receiver had "refused to consent to the prosecution of this action by said corporation after reviewing the initial complaint."

(*Michael M. Koshak, M.D., et al. v. Hany Malek, D.S.C.*, *et al.*, case No. LC083095). Defendants also represented MC Chiropractic, Sherman Way, and Ocean Blue, "notwithstanding that Defendants' fee agreement was with Plaintiff individually" and that "a conflict of interest existed" between Malek and those entities.

Choice Providers, MC Chiropractic, and Ocean Blue were placed in receivership in December 2008, September 2009, and August 2010, respectively. In 2009 or 2010, the receiver initiated a contempt proceeding against Malek for allegedly diverting Choice Providers' funds to himself. Immediately before the contempt trial began, defendants "coerced [Malek] into executing on behalf of himself and [Ocean Blue] a one million dollar attorney lien in Defendants' favor." Thereafter, defendants allegedly engaged in a variety of additional acts of professional negligence, as a result of which Malek was convicted of 10 counts of contempt, sentenced to 50 days in jail, fined $10,000, and ordered to pay $1.7 million plus attorney fees to the receiver.

Malek alleged that defendants' conduct gave rise to four causes of action: (1) professional negligence; (2) breach of fiduciary duty; (3) cancellation of attorney lien; and (4) restitution of excessive legal fees.

## II.
## Defendants' Demurrer and Motion to Stay Proceedings

*A. Motion and Opposition*

Defendants demurred to the first amended complaint. They asserted that Malek could not lawfully pursue an action on behalf of MC Chiropractic because (1) MC Chiropractic was in receivership, and the receiver had refused to prosecute the action, and (2) as a suspended corporation, MC Chiropractic lacked the

capacity to sue. Defendants additionally asserted that the third cause of action for cancellation of attorney lien asserted claims on behalf of Ocean Blue, an indispensible party, but Ocean Blue had not and could not be named in the action because it was in receivership.

In support of the demurrer, defendants sought judicial notice of a December 2008 order placing Choice Providers in receivership; a September 2009 order adding MC Chiropractic to the receivership; an August 2010 order adding Ocean Blue to the receivership; and a public notice that the corporate status of MC Chiropractic had been suspended.

Concurrently with the filing of the demurrer, defendants moved to stay the action pending final resolution of the underlying contempt proceeding against Malek. Defendants noted that Malek had filed a writ petition with regard to the contempt findings, and had filed an appeal of the order to repay diverted funds. Both the petition and appeal were still pending. Accordingly, defendants urged the court to exercise its discretion to stay the legal malpractice action against them until the judgment in the underlying action was final.

Malek opposed the demurrer and the request to stay proceedings.

*B. Order Staying the Action and Sustaining the Demurrer*

Following a November 11, 2011 hearing, the trial court issued an order sustaining the demurrer in part and staying the action, as follows.

With regard to MC Chiropractic's claims, the court noted that MC Chiropractic was in receivership and thus could bring suit only through the receiver, but the receiver had refused to authorize the present suit. Accordingly, the court sustained the

demurrer to all of MC Chiropractic's claims and denied leave to amend "absent an authorization by the receiver to bring suit."

With regard to the attorney lien claim, the court noted that the complaint sought cancellation of the lien on behalf of both Malek and Ocean Blue, but that Ocean Blue was not a party to the action. Accordingly, the court sustained the demurrer to the attorney lien claim and granted Malek leave to amend the first amended complaint to remove the references to Ocean Blue.

Finally, as to the motion for a stay, the court explained that damages and causation, which are essential elements of a legal malpractice claim, require the resolution of the underlying litigation on which the malpractice claim is based. Accordingly, the court stayed the action pending resolution of "issues regarding damages, in particular the contempt judgments and the $1.7 million turnover order."

## III.
## Malek's Motion for Leave to Amend Complaint to Include "Real Parties in Interest"

The trial court lifted the stay on July 14, 2015.[4] On August 3, 2015, Malek filed a motion for leave to file an amended complaint to add four additional plaintiffs—H. Malek Chiropractic Professional Corporation (HM Chiropractic), MC Chiropractic, Sherman Way, and Ocean Blue—whom Malek characterized as "real parties in interest." Malek asserted that California law permits the amendment of a complaint "to substitute in real parties in interest for parties who themselves lack standing;" thus, he suggested, the court should permit him to amend the complaint to add the four additional entities "to

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[4] It appears that the stay imposed by the trial court had been extended by Malek's federal bankruptcy filing.

permit the claims for which he himself lacks standing to be asserted by the subject entities."

Concurrently with the motion, Malek lodged a proposed second amended complaint that, in addition to the four additional plaintiffs, also added seven new causes of action. As relevant to the present appeal, the third, fourth, and ninth causes of action alleged breach of fiduciary duty, cancellation of attorney lien, and professional negligence on behalf of Ocean Blue; and the eighth cause of action alleged professional negligence on behalf of Sherman Way. The proposed second amended complaint also amended the prayer for relief to add requests for compensatory damages on behalf of Sherman Way and Ocean Blue, and cancellation of attorney liens on behalf of Ocean Blue.

The trial court denied the motion to amend. It rejected Malek's contention that the first amended complaint had asserted claims on behalf of HM Chiropractic, Sherman Way, and Ocean Blue, finding that the complaint "makes clear that the only parties Plaintiff Malek was representing were himself and [MC Chiropractic] . . . . Nowhere in the first amended complaint does Plaintiff Malek assert that he is bringing claims on behalf of the three new parties." As such, "the second amended complaint is not an addition of real parties in interest, but rather is a request to add entirely new parties." The court therefore concluded that the claims of HM Chiropractic, Sherman Way, and Ocean Blue did not relate back to the filing of the original complaint, and thus they were barred by the statute of limitations.

Notice of the court's order denying the motion to amend was served on November 6, 2015. On January 4, 2016, Sherman Way and Ocean Blue (collectively, appellants) filed a notice of appeal "from the order of November 4, 2015 denying as to said parties the motion of Plaintiff Hany Malek, D.C. for leave to

amend the first amended complaint herein to include real parties in interest."

## DISCUSSION

### I.

### Appealability

We begin with the issue of appealability. An order on a motion for leave to amend a pleading ordinarily is not immediately appealable; the right of appeal is from the final judgment. (*Schaefer v. Berinstein* (1960) 180 Cal.App.2d 107, 114, disapproved on another ground in *Jefferson v. J. E. French Co.* (1960) 54 Cal.2d 717, 719.) Some cases, however, have carved out a limited exception to the general rule where the order denying leave to amend is, in effect, a final determination of a party's rights—i.e., where the order "has the effect of eliminating all issues between the plaintiff and a defendant so that there is nothing left to be tried or determined." (*Figueroa v. Northridge Hospital Medical Center* (2005) 134 Cal.App.4th 10, 12; see also *Dominguez v. City of Alhambra* (1981) 118 Cal.App.3d 237, 241-242.) Because the order denying Malek's motion to amend arguably had the effect of a final adjudication of the dispute between defendants, on the one hand, and Sherman Way and Ocean Blue, on the other, we will reach the merits of the order denying leave to amend.

### II.

### The Trial Court Did Not Abuse Its Discretion in Denying the Motion for Leave to Amend

Appellants contend that the trial court erred in denying Malek's motion to amend the complaint because appellants are "real parties in interest" who may be "substitute[d]" for "parties who lack standing." Appellants also contend that all the claims

asserted in the second amended complaint were asserted in the first amended complaint: "That appellants' claims were asserted previously by Dr. Malek is quite apparent from the contents of his prior pleadings—which, upon examination, *did in fact previously assert appellants' claims*." (Italics added.)

As we now discuss, in appropriate circumstances courts may permit plaintiffs who have been determined to lack standing, or who have lost standing after the complaint was filed, to substitute as plaintiffs the true real parties in interest. However, the substitution or addition of parties and the addition of new claims will "relate back" to the original pleading—thus avoiding the bar of the statute of limitations—only if the additions allege the violation of the *same* legal obligation and the *same* injury. If a new party seeks damages not previously pleaded on a different obligation, the new claims do not relate back, and thus they may be added to the complaint only if they are timely.

As set forth below, appellants' claims were not asserted in the original complaint, and thus they do not relate back. Thus, the trial court did not abuse its discretion in denying the motion to amend.

*A. Legal Standards*

A motion for leave to amend the complaint is directed to the sound discretion of the trial court. We review the trial court's denial of a motion for leave to amend the complaint for abuse of discretion. (*Royalty Carpet Mills, Inc. v. City of Irvine* (2005) 125 Cal.App.4th 1110, 1124 (*Royalty Carpet*), citing *Record v. Reason* (1999) 73 Cal.App.4th 472, 486.)

A trial court may grant leave to amend the pleadings at any stage of the action. (§ 473, subd. (a)(1) ["The court may, in

furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code."].) Generally, motions for leave to amend are liberally granted, but "[w]hen amendment would be futile because the [new claims] would be barred by the statute of limitations, the trial court does not abuse its discretion in denying the motion for leave to amend." (*Royalty Carpet*, *supra*, 125 Cal.App.4th at p. 1124.)

Similar rules govern amendments to add new plaintiffs to a complaint. As our Supreme Court has explained: "[C]ourts have permitted plaintiffs who have been determined to lack standing, or who have lost standing after the complaint was filed, to substitute as plaintiffs the true real parties in interest. (*Klopstock v. Superior Court* [(1941)]17 Cal.2d 13, 19–21 [administrator of deceased shareholder's estate substituted as plaintiff in corporate derivative action]; see also *Haley v. Dow Lewis Motors, Inc.* [(1999)] 72 Cal.App.4th 497, 506–509 [trustee in bankruptcy substituted for bankrupt debtors]; *California Air Resources Bd. v. Hart* (1993) 21 Cal.App.4th 289, 300–301 [Attorney General substituted for state administrative agency]; *Jensen v. Royal Pools* (1975) 48 Cal.App.3d 717, 720–723 [condominium owners substituted for owners' association]; *Powers v. Ashton* (1975) 45 Cal.App.3d 783, 790 [trustees

substituted for nontrustee administrator].)" (*Branick*, *supra*, Cal.4th at pp. 243–244.) Amendments for this purpose are liberally allowed; however, proposed new plaintiffs "may not 'state facts which give rise to a wholly distinct and different legal obligation against the defendant.' [Citation.]" (*Ibid*.)

For purposes of determining whether a wholly different cause of action is introduced by a proposed amendment, " 'technical considerations or ancient formulae are not controlling; nothing more is meant than that the defendant not be required to answer a wholly different legal liability or obligation from that originally stated.' [Citation.] Similar principles govern the question whether an amendment relates back, for purposes of the statute of limitations, to the date on which the original complaint was filed. 'The relation-back doctrine requires that the amended complaint must (1) rest on the *same general set of facts*, (2) involve the *same injury*, and (3) refer to the *same instrumentality*, as the original one. [Citations.]' [Citation.]" (*Branick*, *supra*, 39 Cal.4th at pp. 243–244; see also *Bridgeman v. Allen* (2013) 219 Cal.App.4th 288, 296 ["The relation back doctrine allows an amendment filed after the statute of limitations has run to be deemed filed as of the date of the original complaint ' "provided recovery is sought in both pleadings on the same general set of facts." ' "].)

*B. Illustrative Cases*

The court discussed the principles outlined above in *Bartalo v. Superior Court* (1975) 51 Cal.App.3d 526 (*Bartalo*). There, the plaintiff sued the defendant for personal injuries she suffered in a car accident. After the California Supreme Court recognized a cause of action for loss of consortium, plaintiff and her husband filed a motion to amend the complaint to add

plaintiff's husband as an additional plaintiff and to add a cause of action for loss of consortium. The trial court permitted the amendment and overruled defendant's demurrer to the loss of consortium claim, concluding that although the husband's claim was filed more than one year after the accident, it "relate[d] back" to his wife's personal injury claim and thus was not barred by the statute of limitations. (*Id.* at p. 529.)

Defendant filed a petition for writ of mandate, and the Court of Appeal reversed. It explained: "Husband's claim to a loss of consortium is a wholly different legal liability or obligation. The elements of loss of society, affection and sexual companionship are personal to him and quite apart from a similar claim of the wife. True, in a sense it is derivative because it does not arise unless his wife has sustained a personal injury, however, his claim is not for her personal injuries but for the separate and independent loss he sustained. [Citation.]

"The general rule governing the permissibility of the bringing in of additional plaintiffs after the period of the statute of limitations has elapsed, or of the assertion of the defense of limitations against them, is that where the additional party plaintiff, joining in a suit brought before the statute of limitations has run against the original plaintiff, seeks *to enforce an independent right*, the amended pleading does not relate back, so as to render substitution permissible or to preclude the defense of the statute of limitations. [Citation.]

"If a husband and wife were both injured in the same accident and the wife sued but the husband did not, the one-year statute of limitations would run on husband's cause of action, and if he tried to sue after the year had run defendant's demurrer that the claim was barred would be sustained. Surely if wife

then tried to amend her complaint to include his cause of action, it would be disallowed. Except for the fact that *Rodriguez* [*v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382] subsequently gave husband a cause of action [for loss of consortium], the above hypothetical example is exactly what husband is seeking to do here. . . .

"We are not unaware of cases that have allowed the addition of a new party by an amendment to the complaint. However, these cases on analysis are clearly distinguishable. Generally, a different plaintiff was substituted in because there was a technical defect in the plaintiff's status (an administrator for a deceased plaintiff; a stockholder in place of a corporation; etc.); a necessary party was joined; or a nominal plaintiff was removed and the real party in interest took his place. A new and additional party—such as husband here—*seeking damages not previously pleaded on a different obligation* after the statute of limitation[s] has passed is not a factual situation that fits into this category. Once the statute of limitation[s] has passed as to other possible plaintiffs, a defendant is entitled to dismiss them from his considerations." (*Bartalo*, *supra*, 51 Cal.App.3d at pp. 533–534, italics added, fn. omitted.)

The court similarly concluded in *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256 (*Quiroz*). There, after a man died in an adult care facility, his mother brought a wrongful death action against the care facility and its owners and employees. Thirteen months after the decedent's death, the plaintiff filed an amended complaint adding a survivor cause of action.[5] Plaintiff urged that the survivor cause of action related

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[5] A wrongful death cause of action "compensate[s] specified persons—heirs—for the loss of companionship and for other

back to the date of the timely-filed wrongful death claim because both causes of action were based on the same underlying facts. The trial court disagreed and struck the survivor claim, concluding it was barred by the statute of limitations. (*Id.* at pp. 1266–1275.)

The Court of Appeal affirmed. It explained: "Here, we readily conclude, as did the court below, that the survivor cause of action pleaded a *different injury* than the initial complaint. We also conclude that the two claims in the amended pleading were asserted by different plaintiffs, [decedent's mother] acting in two separate capacities with respect to each, and that the addition of fresh allegations concerning her representative capacity in pursuit of the new survivor claim was not just the mere technical substitution of the proper party plaintiff on a previously existing claim. This survivor claim, which plaintiff pursued as the decedent's successor in interest, pleaded injury to the decedent . . . . In contrast, the earlier-filed wrongful death claim pleaded only injury to [decedent's mother], acting for herself, as the decedent's heir. As a matter of law, these distinct claims are technically asserted by different plaintiffs and they seek compensation for different injuries. [Citations.] Accordingly, the doctrine of relation back does not apply and the entire survivor claim is barred by the statute of limitations.

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losses suffered as a result of a decedent's death." (*Quiroz*, *supra*, 140 Cal.App.4th at p. 1263.) In contrast, "a survivor cause of action is not a new cause of action that vests in the heirs on the death of the decedent. It is instead a separate and distinct cause of action which belonged to the decedent before death but, by statute, survives that event." (*Id.* at p. 1264.)

"On the same reasoning, courts have reached the opposite result—permitting the relation-back doctrine to save a cause of action from the bar of the statute of limitations—in cases in which the converse scenario is presented. A claim that is first asserted by amendment after the limitations period has passed will not be barred so long as the amendment is based on the same general set of facts and involves the *same injury*. This holds true even where the amendment names or substitutes a new party plaintiff, as long as the new plaintiff is not seeking to enforce an independent right or to impose a greater liability on the defendant. [Citations.]

"The trial court here correctly viewed the untimely survivor cause of action as pleading a different injury than the original cause of action for wrongful death. The survivor cause of action was asserted by a technically different plaintiff asserting an independent and greater liability against the defendants. This new claim was first asserted after the running of the statute of limitations, and because the injuries to be compensated by the two claims are different, the relation-back doctrine does not apply. The survivor cause of action, whether construed as a claim for negligence or for statutory dependent-adult abuse, is therefore barred." (*Quiroz*, *supra*, 140 Cal.App.4th at pp. 1278–1279.)

*C. Appellants' Claims Do Not Relate Back to the Original Complaint Because They Allege Different Torts and Different Injuries*

Appellants contend that all the claims alleged in the second amended complaint were also alleged in the first amended complaint—that is, that the first amended complaint alleged causes of action for professional negligence on behalf of Ocean

Blue and Sherman Way, and alleged causes of action for breach of fiduciary duty and cancellation of attorney lien on behalf of Ocean Blue. Appellants thus assert that the second amended complaint relates back to the filing of the first amended complaint and, therefore, is timely.[6]

An examination of the two complaints plainly demonstrates that appellants' contention is without merit. As the following examples illustrate, the first amended complaint includes references to Ocean Blue and Sherman Way, but it alleges breach of duty and damages only as to "plaintiff"—which the complaint defines as Malek, individually and on behalf of MC Chiropractic:

"As *Plaintiff's* attorneys, Defendants had a duty to exercise the reasonable skill, care, expertise and diligence customarily possessed by attorneys in the community. . . . [¶] . . . [¶] . . . As a proximate result of Defendants' professional negligence[,] *Plaintiff* sustained damages [¶] . . . [¶] [and] is entitled to recover . . . reasonable attorney fees."

"As *Plaintiff's* attorneys, Defendants owed a fiduciary duty of the highest loyalty in keeping with *Plaintiff's* best interests [¶] . . . . [¶] . . . In coercing Plaintiff to execute on behalf of himself and [Ocean Blue] a one million dollar attorney lien in Defendants' favor, by threatening to withdraw as *Plaintiff's* attorneys if he failed to do so, and in failing and refusing to testify at Plaintiff's contempt trial . . . , Defendants breached their fiduciary duty *as Plaintiff's* attorneys. [¶] . . . [¶] . . . As a proximate result of Defendants' breach of fiduciary duty, *Plaintiff*

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[6] Appellants appear to concede that if the new parties/causes of action alleged in the second amended complaint do not relate back to the original pleadings, they are barred by the applicable statutes of limitations.

sustained damages . . . and suffered conviction on 10 counts of contempt."

"*Plaintiff* is entitled to cancellation of the attorney lien. . . ."[7]

"Defendants charged and received from *Plaintiff* . . . excessive legal fees for Defendants' services over and above the reasonable value of their services on *Plaintiff's* behalf. . . . [¶] . . . *Plaintiff* is entitled to reduction and restitution of the legal fees charged for and received by Defendants over and above the reasonable value of Defendants' services to *Plaintiff*."

In contrast, the second amended complaint alleges that defendants owed duties not only to Malek, but also to appellants, and that appellants suffered damages as a result of defendants' breaches of those duties:

"As *Ocean Blue's* attorneys, Defendants owed a fiduciary duty of the highest loyalty in keeping with *Ocean Blue's* best interests. [¶] . . . [¶] . . . As a proximate result of Defendants' breach of fiduciary duty, *Ocean Blue* sustained damages."

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[7] The first amended complaint alleged that Malek was entitled to cancellation of the attorney lien on behalf of himself and Ocean Blue. However, the trial court's order of November 18, 2011 sustained the demurrer as to Ocean Blue, and ordered Malek to file an amended complaint that removed Ocean Blue from the third cause of action. Thus, when Malek moved to file the second amended complaint, there was no cause of action seeking cancellation of attorney lien as to Ocean Blue to which the second amended complaint could relate back. (See *Bridgeman v. Allen*, *supra*, 219 Cal.App.4th at p. 296 [amended petition could not "relate back" to dismissed petition; as the first petition was no longer pending, "there was nothing for the instant petition to 'relate back' to"].)

"*Ocean Blue* is entitled to cancellation of the one million dollar attorney lien that Dr. Malek executed in Defendants' favor on behalf of Ocean Blue."

"As *Ocean Blue's* attorneys Defendants owed a duty to exercise the reasonable skill, care, expertise and diligence customarily possessed by attorneys in the community. . . . As a proximate result of Defendants' professional negligence, *Ocean Blue* sustained damages."

"As the attorneys for [*Sherman Way*] Defendants owed a duty to exercise the reasonable skill, care, expertise and diligence customarily possessed by attorneys in the community. [¶] . . . [¶] As a proximate result of Defendants' professional negligence, [*Sherman Way*] sustained damages."

It is clear, therefore, that the second amended complaint alleged breaches of duties and damages *on behalf of Sherman Way and Ocean Blue* that were not alleged in the first amended complaint. And, although appellants' alleged losses arguably arose out of the same *conduct* as did Malek's, Sherman Way's and Ocean Blue's claims are for the separate and independent losses these entities allegedly sustained, *not* for Malek's losses.

Appellants would have us assume that the second amended complaint did not expand defendants' potential liability because some of Malek's damages were derivative of appellants'. For example, appellants urge that the first amended complaint necessarily asserted a cause of action for professional negligence on behalf of both Malek and Sherman Way because it alleged "that being deprived of such rental income resulted in [Sherman Way] losing its commercial office building by foreclosure, which resulted in a loss to Dr. Malek." But Malek's loss, even if it is derivative of Sherman Way's loss, was not, as a logical matter,

necessarily coextensive with it—that is, Sherman Way's loss, on the facts pled in the first amended complaint, could have been greater or different than Malek's.

Accordingly, as in *Bartalo* and *Quiroz*, Sherman Way's and Ocean Blue's claims do not relate back to the filing of the first amended complaint. Thus, the new claims were time-barred, and the trial court did not abuse its discretion by denying the motion to amend.[8]

**DISPOSITION**

The order denying the motion to amend the complaint is affirmed. Sherman Way's request for judicial notice, filed February 2, 2017, is granted. Defendants are awarded their appellate costs.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

EDMON, P. J.

We concur:

ALDRICH, J.[9] LAVIN, J.

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[8] Having so concluded, we do not address the additional grounds for affirmance raised in the respondents' brief.

[9] Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, Section 6 of the California Constitution.