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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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

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| REYES VALENZUELA,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>ALMA DELIA BARNES et al.,<br><br>Defendants and Respondents. | B279048<br><br>(Los Angeles County Super. Ct. No. BC585933) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Affirmed.

Reyes Valenzuela, in pro. per., for Plaintiff and Appellant.

Lobb & Plewe and Uliana Kozeychuk for Defendants and Respondents.

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Plaintiff Reyes Valenzuela, an attorney, appeals from a judgment in favor of his former clients, defendants and respondents Alma Delia Barnes and 700 So. Broadway Bldg., LLC. The trial court ruled that plaintiff's claim for unpaid fees and costs was barred by the statute of limitations. We affirm.

## BACKGROUND

### 1. Facts

Defendants retained plaintiff in December 2010 to defend them in a civil lawsuit and to prosecute an unlawful detainer complaint.[1] They executed a written retainer agreement; it stated that "[a]ny additional services will be the subject of another retainer agreement," but "[i]n the event another agreement is not made in writing, this agreement will govern all future services" plaintiff would perform for defendants.

The trial court stayed the unlawful detainer proceeding on February 22, 2011, finding it to be related to the civil lawsuit.

Over the next few months, plaintiff represented defendants in several other proceedings. As relevant to this appeal, this included bringing a second unlawful detainer action, filed March 23, 2011, and initiating two appeals, filed March 17 and March 24, 2011. The appeals were combined under a single case number and docket.

Defendant Barnes testified that she terminated plaintiff as defendants' attorney on May 25, 2011. That day, defendants and plaintiff signed substitution of attorney forms in the civil lawsuit and the second unlawful detainer action.

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[1] The retainer agreement also stated that plaintiff was to "[p]rovide legal services in relation to code violations with the City of Los Angeles." The record contains no further information about this matter.

Defendants, through a new attorney, filed papers to abandon the two appeals on September 8, 2011. Prior to abandonment, the last filing by any party had been a civil case information statement on May 12, 2011.

Defendants filed substitution of attorney forms in the first unlawful detainer action on October 4, 2011. This was the first filing by any party since the matter had been stayed in February. According to Barnes, she did not substitute a new attorney for plaintiff earlier because the case "had stayed in court dormant, so we overlooked that." She gave a similar explanation for waiting until September to abandon the appeals: "It just stayed dormant in court. We forgot all about it."

**2. Proceedings below**

Plaintiff filed a complaint against defendants on June 23, 2015, more than four years after he had been substituted out of the civil lawsuit and second unlawful detainer action. Plaintiff sought $88,254.43 in unpaid costs and attorney fees. Plaintiff asserted causes of action for breach of written contract, account stated, open book account, and declaratory relief. The complaint alleged that after plaintiff was substituted out in May 2011, plaintiff sent defendants an invoice of unpaid costs on June 13, 2011, resent it via fax on June 20, 2011, and then sent a final invoice that included both costs and unpaid attorney fees on June 30, 2011. The complaint alleged that during the course of the representation from December 2010 to May 2011 defendants had paid $56,600 in attorney fees (a fact plaintiff confirmed at trial), but since that time had refused to pay the outstanding balance.

Defendants answered the complaint and asserted as an affirmative defense that plaintiff's claim was barred by the

statute of limitations. The trial court conducted a bench trial solely on that issue and ruled that all causes of action were time-barred. The court found that defendant Barnes "fired plaintiff Reyes Valenzuela on 05/25/11. [¶] The testimony of plaintiff's witnesses was unpersuasive. Invoices produced provided insufficient evidence for legal work after 05/25/11." Judgment was entered November 8, 2016, awarding defendants costs of $17,392.98 and attorney fees in an amount to be determined at a future hearing. The parties did not request a statement of decision.

Plaintiff timely appealed.

## DISCUSSION

### 1. Mootness

Defendants claim the judgment from which plaintiff appeals has been superseded, and therefore this appeal is moot. We disagree.

The trial court entered an amended judgment on February 17, 2017, that added the precise amount of attorney fees owed to defendants and deleted the precise amount of costs owed, instead directing defendants to set a noticed hearing on costs. The judgment was otherwise substantively unchanged. Defendants argue that plaintiff should have appealed from the amended judgment, which defendants claim superseded the original judgment. But "[i]t is well settled . . . that '[w]here the judgment is modified merely to add costs, attorney fees and interest, the original judgment is not substantially changed and the time to appeal [from that judgment] is therefore not affected.' " (*Torres v. City of San Diego* (2007) 154 Cal.App.4th 214, 222 (*Torres*).) Thus, plaintiff properly appealed from the original November 8, 2016 judgment; had he appealed from the

amended judgment instead, his challenge to the substance of the original judgment likely would have been time-barred.

Defendants are also incorrect that plaintiff "had to file two separate appeals, one from the judgment and the second from the amended judgment containing a fee order." Such a procedure is only necessary " '[w]hen a party wishes to challenge both a final judgment *and* a postjudgment costs/attorney fee order.' " (*Torres, supra*, 154 Cal.App.4th at p. 222.) Here, plaintiff has raised no challenge to the court's ruling on costs and fees.

**2. Statute of limitations**

Plaintiff challenges the trial court's legal conclusion that the statute of limitations on his breach of contract claim began to run upon the termination of plaintiff's services to defendants. He also challenges the trial court's factual conclusion that plaintiff's services ended on May 25, 2011.[2] We reject these challenges.

We review the trial court's legal determinations de novo and its factual determinations for substantial evidence. (*Westfour Corp. v. California First Bank* (1992) 3 Cal.App.4th 1554, 1558.) When reviewing for substantial evidence, "all conflicts must be resolved in favor of the prevailing party, and all legitimate and reasonable inferences must be indulged in order to uphold the trial court's finding. [Citation.] In that regard, it is well established that the trial court weighs the evidence and determines issues of credibility and these determinations and assessments are binding and conclusive on the appellate court."

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[2] Plaintiff does not challenge the court's ruling on his causes of action for account stated and open book account, nor does his briefing address his claim for declaratory relief.

(*In re Marriage of Hill & Dittmer* (2011) 202 Cal.App.4th 1046, 1051-1052.)[3]

The parties do not dispute that the applicable statute of limitations is four years for breach of a written contract. (Code Civ. Proc., § 337.) Thus, to prevail, plaintiff must establish that his cause of action accrued on or after June 23, 2011, four years before he filed his complaint.

***a. Accrual of cause of action***

Plaintiff's first contention is that the trial court wrongly concluded that the end of his services to defendants triggered the statute of limitations. We disagree.

It is well established that an attorney's cause of action to recover payment for services rendered accrues when those services end. (*Osborn v. Hopkins* (1911) 160 Cal. 501, 507 (*Osborn*) ["[T]he attorney's right of action for services . . . accrues with the completion of his services[,] [namely] at the termination of the suit, or other sooner termination of his employment therein."]; *Brooks v. Van Winkle* (1958) 161 Cal.App.2d 734, 743 (*Brooks*) [attorney's cause of action for payment accrues when " 'the services are completed, or until completion is prevented by an event beyond his control' "]; see *E.O.C. Ord, Inc. v. Kovakovich*

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[3] Plaintiff argues that in the absence of a jury trial this court is entitled to make its own factual determinations contrary to those of the trial court, citing Code of Civil Procedure section 909. But this authority " 'should be exercised sparingly. [Citation.] *Absent exceptional circumstances, no such findings should be made*.' " (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.) Plaintiff makes no argument as to how this case presents "exceptional circumstances." We decline his request to engage in factfinding, which is "patently . . . not a proper function of this court." (*In re A.G.* (2012) 204 Cal.App.4th 1390, 1399.)

(1988) 200 Cal.App.3d 1194, 1206 [resolving statute of limitations question by looking at when attorney's services were completed].) Under this rule, plaintiff's cause of action accrued when his services to defendants ended, whether because he was terminated or the matters in which he represented defendants were resolved.

Plaintiff argues that this general rule should not apply in this case because the retainer agreement contained a clause reading: "All moneys are due within 10 days after an invoice is sent by Attorney via first class mail. Should client not make timely payments, she instructs Attorney to immediately cease in providing all legal services." Plaintiff argues that under this clause his sending an invoice was a condition precedent of defendants' duty to pay, and therefore defendants could not breach their promise to pay until after the invoices were sent in June 2011.[4] He further argues that defendants did not breach the agreement until July 10, 2011, 10 days after he sent the invoices, as this was the time payment was due.

Plaintiff's arguments lack merit. When a party is owed money under a contract and all that is left to do is make a request for payment, the statute of limitations begins to run from the time the debt is incurred, not from the time the request is

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[4] It was disputed at trial whether defendants received the June 30 invoice. Also, plaintiff testified that he sent invoices to defendants in January, February, and possibly March 2011, which by his own argument would have triggered the statute of limitations as to those fees well before June 2011. The trial court made no specific findings as to whether or when any invoices were sent. For purposes of this appeal we will assume the relevant fees invoice was sent June 30, 2011, and received by defendants.

made. (See *Carrasco v. Greco Canning Co.* (1943) 58 Cal.App.2d 673, 675 (*Carrasco*) [" 'Where a right has fully accrued except for some demand to be made as a condition precedent to legal relief, which the claimant can at any time make, if he chooses, the cause of action has accrued for the purpose of setting the statute of limitations running.' "]; *Miguel v. Miguel* (1920) 184 Cal. 311, 314 (*Miguel*) ["That a cause of action for money payable on demand accrues with the inception of the obligation and without the necessity for any demand hardly requires the citation of authority."].) This rule prevents a claimant from " 'indefinitely prolong[ing] his right to enforce his claim or right by neglecting to make the demand until it suit[s] his convenience so to do.' " (*Taketa v. State Board of Equalization* (1951) 104 Cal.App.2d 455, 460.)

Here, under the rule stated in *Osborn* and *Brooks*, defendants' obligation to pay arose when plaintiff's services were terminated or completed; at that point all that was left to do was provide an invoice or otherwise inform defendants of the amount owed. As this was a " 'demand' " that plaintiff " 'c[ould] at any time make, if he ch[ose],' " the limitations clock began to run when the debt was incurred, not when he actually made the demand. (*Carrasco, supra*, 58 Cal.App.2d at p. 675.) Preparation of an invoice was not a condition precedent "but merely . . . an indication of the immediate maturity of the debt." (3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 533, p. 684.) The fact that the retainer agreement granted defendants 10 days to pay after receiving an invoice does not affect our analysis, because the ability to trigger that clock was still within the discretion of plaintiff—that is, the 10-day provision did not prevent plaintiff from making a demand at any time he chose.

Plaintiff cites *Drake v. Martin* (1994) 30 Cal.App.4th 984 for the proposition that when a contract does not state a time for performance, "a demand is 'usually necessary' in order to give the promissor an opportunity to perform and may be a condition precedent to the obligation to perform." (*Id.* at pp. 998-999.) *Drake* addressed whether an agreement required one party to make a demand before the other party conveyed certain property. (*Id.* at pp. 987, 997.) It is factually inapposite to the case here where the only obligation was payment of money, which under *Carrasco* and *Miguel* does not require a demand to trigger the statute of limitations. (*Carrasco, supra*, at p. 675; *Miguel, supra*, 184 Cal. at p. 314.)

In the alternative, plaintiff argues that the retainer agreement was an "executory contract," and asserts that breach of such a contract does not occur until the "time of performance by the party who caused the breach."[5] This is simply a rehashing of plaintiff's condition precedent argument, similarly relying on the notion that defendants had no duty to perform (that is, pay) until 10 days after the invoice was sent. But as discussed, defendants' obligation to pay arose upon termination or completion of plaintiff's services, regardless of whether or when the invoices were sent.

Plaintiff notes that the rule stated in *Osborn* and *Brooks* applies only "in the absence of any provision . . . as to time or amount of payment." (*Osborn, supra*, 160 Cal. at p. 507; see *Brooks, supra*, 161 Cal.App.2d at p. 743.) Plaintiff asserts that the invoice clause in the retainer agreement constitutes a

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[5] "An executed contract is one, the object of which is fully performed. All others are executory." (Civ. Code, § 1661.)

provision regarding time of payment, namely, 10 days after an invoice has been sent. Again, we disagree. To interpret *Osborn* and *Brooks* in this way would grant plaintiff the right to delay accrual of his action to suit his convenience, contravening the rationale of *Carrasco* and *Miguel*. The better reading of *Osborn* and *Brooks* is that the rule does not apply when payment is tied to a fixed date or to an event not within the sole discretion of the attorney, such as the receipt of funds from an opposing party or an order or judgment resolving the matter. Such is not the case here, where the agreement allowed plaintiff to request payment whenever he saw fit.

The trial court correctly concluded that plaintiff's claim accrued at the time his services ended.

***b. Sufficiency of the evidence***

Plaintiff argues that even if the trial court properly concluded that the termination of his services triggered the statute of limitations, he disputes the court's factual findings as to when that occurred.

We reject this argument. Sufficient evidence supports the trial court's finding that plaintiff's services to defendants ended on May 25, 2011. Defendant Barnes testified that she terminated plaintiff on that date. Plaintiff and defendants signed substitution of attorney forms that same day in the two active cases. Although defendants did not immediately substitute plaintiff out in the stayed unlawful detainer action or the two appeals, the dockets in those cases indicate no further activity after May 25, 2011, until the appeals were abandoned in September 2011 and plaintiff was substituted out of the unlawful detainer action in October 2011. Plaintiff testified that he performed further work after May 25, including requesting and

reviewing a clerk's transcript for the appeal and conducting legal research, but the court expressly found this testimony unpersuasive, a conclusion we are bound by on appeal. Nor does an e-mail plaintiff sent to Barnes in July 2011 provide evidence of post-May 25 services, when that e-mail simply demanded unpaid monies, and Barnes replied by complaining about plaintiff's previous work and directing him to "forward all the rest of my file a.s.a.p. to my [new] attorneys."

Plaintiff argues that defendants did not "unambiguously communicate" to him that they were terminating him as to all matters and also terminating the retainer agreement, which he claims he continued to honor by "perform[ing] his duty to provide invoices." Similarly, plaintiff claims that Barnes was unclear at trial as to whether she terminated plaintiff on all matters. But the court reasonably could infer from Barnes's testimony, in which she stated that she "terminated" plaintiff but did not specify particular matters, that it was clear on May 25 that plaintiff was terminated as to all matters. Plaintiff asserts this testimony is undercut by the fact that defendants did not immediately substitute him out of the stayed unlawful detainer proceeding and two appeals, but we presume the court accepted Barnes's explanation, supported by the case dockets, that these matters were "dormant" and she therefore neglected to take formal action to remove plaintiff from them until later.[6]

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[6] Plaintiff argues that defendants provided no evidence that they terminated him from the matter involving code violations, which was referenced in the retainer agreement. Again, the trial court could reasonably infer from Barnes's testimony that plaintiff was terminated as to all matters. Moreover, it is unclear from the record if plaintiff performed any services in relation to

### *c. Plaintiff's additional arguments*

Plaintiff raises a number of additional arguments challenging the trial court's findings and conclusions. None are persuasive.

Plaintiff asserts that preparing invoices and signing substitution of attorney forms constitutes legal services, and since he performed some of these acts as late as September or October 2011, his services did not end on May 25. Plaintiff cites no authority in support of this proposition, and we reject it. The evidence was clear that defendants ended the attorney-client relationship on May 25 and therefore any actions by plaintiff after that could not have been in his capacity as defendants' attorney.[7]

Plaintiff argues that his right to compensation for working on the appeals did not accrue until the appeals were resolved, citing *Atchison v. Hulse* (1930) 107 Cal.App. 640 (*Atchison*). *Atchison* held that an attorney's cause of action for fees pertaining to an appeal did not accrue until the appeal was decided. (*Id.* at p. 645.) In that case, however, the court rejected the client's argument that the attorney had been terminated before the appeal ended. (*Id.* at p. 644.) Here, in contrast, there was a finding, supported by substantial evidence, that plaintiff was terminated months before the appeals were abandoned. Thus, *Atchison* is inapposite.

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this matter; there is certainly no evidence that he performed services after May 25, 2011.

[7] We note that plaintiff has not sought payment for any purported services after May 25; his monetary claims all arise from actions taken before he was terminated.

Also inapposite are plaintiff's citations to the statutes and rules of court concerning attorney substitution, based on which plaintiff asserts he remained the attorney of record in the appeals and the stayed unlawful detainer action after May 25. To the extent plaintiff is arguing that defendants' failure immediately to substitute him out of these inactive matters somehow continued the attorney-client relationship or led him to believe the relationship was continuing, we reject this as implausible, particularly in light of the court's finding that defendants unequivocally fired plaintiff on May 25.[8] Although plaintiff argues that he continued to perform work as the attorney of record after May 25, the trial court found the evidence of this unpersuasive, and we are bound by that determination.

Plaintiff asserts that even if his services were terminated on May 25, in light of the policy that "attorneys cannot sue their clients during the representation" the statute of limitations should have been tolled until the appeals were abandoned or he was substituted out of the stayed unlawful detainer action. Plaintiff cites no authority for this policy. Regardless, the evidence showed that plaintiff was not representing defendants after May 25, so assuming this policy exists there was no impediment to him suing them for his fees at that time.

Plaintiff argues that the statute of limitations should have been tolled during the 30 days in which defendants could request arbitration of the fee dispute under Business and Professions

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[8] In *Atchison, supra*, 107 Cal.App. at page 644, the court held that a client's failure to substitute out an attorney reinforced the conclusion that the attorney had not been fired. In that case, however, there was no clear evidence that the client had fired the attorney. (*Ibid.*) Here, in contrast, there was such evidence.

Code section 6201, subdivision (a), a time period triggered after plaintiff demanded payment and provided notice of the right to arbitrate in June 2011.[9] Plaintiff cites no authority for this proposition, which again would grant plaintiff discretion as to when his cause of action would accrue, in contravention of the principle underlying the holdings of *Carrasco* and *Miguel*. In light of those authorities, we reject this argument.

**DISPOSITION**

The judgment is affirmed. Defendants are entitled to their costs on appeal.[10]

FLIER, J.

WE CONCUR:

BIGELOW, P. J. RUBIN, J.

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[9] The trial exhibit plaintiff purported to be his June 30, 2011 demand included a notice of defendants' right to arbitrate fee and cost disputes. For purposes of this appeal we will assume the notice was provided as plaintiff claims.

[10] Defendants have requested attorney fees on appeal pursuant to a clause in the retainer agreement. The trial court is in a better position to determine both entitlement to and amount of attorney fees in this case. (See *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1267.) Defendants may seek appellate attorney fees through an appropriate motion in the trial court.