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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

AMAR D. PATEL et al., Plaintiffs and Respondents, v. KEITH F. SIMPSON, Defendant and Appellant.	B282592 (Los Angeles County Super. Ct. No. VC064751)

APPEAL from an order of the Superior Court of Los Angeles County, Lori A. Fournier, Judge. Affirmed.

Baker, Keener & Nahra, Mitchell F. Mulbarger and Christopher K. Mosqueda, for Defendant and Appellant.

Caulfield & James, Jeffery L. Caulfield and Ryan M. Simone, for Plaintiffs and Respondents.

Civil Code section 1714.10,[1] is a "gatekeeping" statute that requires a plaintiff who wishes to pursue a "cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute" to first obtain a court order authorizing the pleading, which will issue only on a showing that the plaintiff has a reasonable probability of prevailing on the cause of action. (§ 1714.10, subd. (a).) The statute permits the prefiling order requirement to be "raised by . . . demurrer, motion to strike, or such other motion or application as may be appropriate" (§ 1714.10, subd. (b)), but it states the requirement does not apply to an attorney-client civil conspiracy cause of action "where . . . the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain" (§ 1714.10, subd. (c)). We consider whether reversal is warranted because the trial court in this action denied a section 1714.10 motion to strike solely because the court believed the moving attorney should have proceeded by way of a demurrer, not a motion to strike.

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[1] Undesignated statutory references that follow are to the Civil Code.

I. BACKGROUND

A. The Facts Alleged in the Operative Complaint

Plaintiffs[2] are investors in a corporation that runs and operates a number of nursing homes. Defendant James Preimesberger (Preimesberger) was an officer, shareholder, president, and chairman of the corporation. Defendant and appellant Keith Simpson was the corporation's general counsel, counsel for Preimesberger, and an actual or de facto officer or director of the corporation.

Before plaintiffs decided to invest, Preimesberger made assurances to plaintiffs regarding the financial stability of the corporation and promised the company would prudently and fairly distribute income to its investors. Plaintiffs relied on Preimesberger's representations and entered into debenture agreements with the corporation. The agreements provided plaintiffs would loan money to the corporation and the corporation would repay the principal with interest. As part of the deal, plaintiffs also entered into a stock purchase agreement by which they purchased a combination of series "A" preferred stock with each debenture. Though plaintiffs performed under the agreement, the corporation eventually stopped making interest payments and failed to repay the loan principal.

Unbeknownst to plaintiffs, Preimesberger and Simpson had entered into a scheme to maximize their profits at plaintiffs' expense. Preimesberger and Simpson created a number of business entities to buy or hold properties and lease them to the

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[2] The plaintiffs and respondents are Amar D. Patel, Jessal Patel, Amit Patel, Payal Patel, Renu Harlalka, Madhusudan Harlalka, Surendra Patel, and Bharatiben M. Patel.

corporation at artificially raised rental rates. By paying those higher rents, the corporation transferred its profits to the other entities and lowered its own profit margins, which came at plaintiffs' expense as investors in the corporation.

Simpson was actively involved in the scheme. He acted as a general counsel and/or an officer of the corporation and drafted a number of documents relevant to the scheme, including operating agreements, investor questionnaires and contracts, and lease agreements. Simpson assisted in the destruction of corporate records to cover up the fraudulent activities. In addition, Simpson was an investor in the other entities and derived investment profits from both his clients and the ongoing fraud. He was actively involved in soliciting prospective investors, he communicated with investors and made representations regarding the corporation's financial prospects, but he did not disclose the relationships among the corporation, the other entities, and the managing personnel of each.

B. Procedural History

Plaintiffs' original complaint alleged causes of action against Preimesberger, the corporation, and another Preimesberger-related entity in which some of the plaintiffs invested. Plaintiffs and defendants later stipulated to the filing of a first amended complaint. It added a cause of action for civil conspiracy naming Simpson, Preimesberger, and the corporation as defendants. The gist of the conspiracy claim is that Simpson assisted Preimesberger in perpetrating a Ponzi scheme to defraud the corporation's new investors.

Simpson demurred to, and moved to strike, the first amended complaint. Plaintiffs responded by filing a second

amended complaint that again asserted a cause of action for civil conspiracy against Simpson (and the others). Simpson again demurred, arguing plaintiffs had not complied with the prefiling requirements of section 1714.10 and that their civil conspiracy cause of action failed to state sufficient facts. Simpson also moved to strike the second amended complaint's prayer for punitive damages.

The trial court rejected Simpson's contention that the prefiling requirements of section 1714.10 (i.e., the requirement to obtain an order authorizing a conspiracy action based on a showing of a probability of success) barred plaintiffs' suit. It was undisputed plaintiffs had not obtained a section 1714.10 prefiling order, but the court held plaintiffs were excused from the need to obtain such an order because section 1714.10's "financial gain" exception applied. (§ 1714.10, subd. (c) ["This section shall not apply to a cause of action against an attorney for a civil conspiracy with his or her client, where . . . the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain"].) Specifically, the court found plaintiffs adequately alleged that Simpson served as counsel and an actual or de facto officer of the corporation, and that his acts went beyond the performance of a duty to Preimesberger or the corporation and instead involved a conspiracy to violate his legal duties for his own financial gain.

The trial court, however, sustained Simpson's demurrer to the civil conspiracy cause of action, finding the conspiracy allegations were too conclusory to state a proper conspiracy cause of action. Although the court sustained the demurrer, it granted plaintiffs leave to amend.

Plaintiffs thereafter filed a third amended complaint (the operative complaint). It continued to allege a cause of action for civil conspiracy against Simpson (as well as Preimesberger and the corporation), and the paragraphs comprising the cause of action were substantively unchanged from the second amended complaint.

Simpson filed a motion to strike the operative complaint, but not a demurrer. The principal argument in support of the motion to strike was the same section 1714.10 argument raised and rejected in connection with the second amended complaint: "[T]he allegations against attorney SIMPSON amount to a civil conspiracy claim arising out of SIMPSON's representation of a client" and "[a]s such, they fall squarely within the ambit of . . . section 1714.10 . . . which requires a plaintiff to obtain a court order before suing an attorney for civil conspiracy, or to show that the claim falls within one of its narrow exceptions. Because [p]laintiffs have failed to satisfy section 1714.10's prefiling or pleading mandates, their claim must fail and the [operative complaint] must be stricken in its entirety." Plaintiffs opposed Simpson's motion and argued, among other things, (a) the court "previously ruled on this same exact [section 1714.10] issue" and (b) Simpson's motion to strike was improper because it could only properly be brought as a demurrer.

The trial court denied Simpson's motion to strike. In rejecting Simpson's section 1714.10 argument, the court's denial order did not refer to its prior ruling finding the statute's financial gain exception excused plaintiffs from the need to obtain a prefiling order. Nor did the trial court's order cite or discuss section 1714.10. Instead, this was the entirety of court's rationale in its denial order: "Motions to strike are used to reach

defects or objections to pleadings that are not challengeable by demurrer (i.e., words, phrases, prayer for damages, etc.) (See [Code Civ. Proc.,] §§435, 436, and 437.) An attack on an entire cause of action is grounds for demurrer, not a motion to strike. Thus, defendants improperly seek to strike an entire cause of action. (See *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1683.) A motion to strike is properly denied if the asserted defect is one that should have been raised by demurrer. (*Warren v. Atchison, Topeka & Santa Fe Railway Co[.]* (1971) 19 Cal.App.3d 24, 41.) [¶] Here, Simpson's arguments pertain to the sufficiency of Plaintiffs' allegations in the [operative complaint]—particularly with respect to Plaintiffs' entire sixth cause of action for civil conspiracy against Simpson. As indicated by *Warren*, a plaintiff's failure to state facts sufficient to constitute a cause of action is grounds for demurrer, and not a proper ground for a motion to strike the entire cause of action. Despite Simpson's initial inclination to file a demurrer to the [operative complaint], Simpson ultimately elected not to do so. . . . Therefore, Simpson's motion to strike is procedurally defective, and denied on that basis."

II. DISCUSSION

Simpson appeals the trial court's order denying his motion to strike. As a threshold matter, we hold the appeal is properly before us. Though the trial court decided the motion—which expressly invoked section 1714.10—without citation to or discussion of that statute, its order is nonetheless one made under section 1714.10 because it determines the rights of an attorney against whom a pleading has been filed. As such, the order is immediately appealable under the terms of section

1714.10. We further hold the motion to strike was properly denied, but not for the reason (most recently) given by the trial court. Rather, we conclude (as the trial court found in ruling on the demurrer to the second amended complaint) that plaintiffs' complaint adequately alleges Simpson's acts go beyond the performance of a professional duty to serve his clients and involve a conspiracy to violate a legal duty in furtherance of his own financial gain—which excuses the need to comply with section 1714.10's prefiling requirements.

A. Appealability

We asked the parties to address whether this appeal is taken from an appealable order. Simpson contends the order is appealable because the trial court's order "effectively concerns the interpretation and application" of section 1714.10 and thus invokes a special appealability provision in section 1714.10. Plaintiffs assert the order is not appealable because the trial court decided Simpson's motion on a procedural ground rather than on the merits, and thus never made an order "under" section 1714.10.

Plaintiffs are, of course, correct that an order denying a motion to strike is not ordinarily appealable. (See, e.g., *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 207; *Warden v. Brown* (1960) 185 Cal.App.2d 626, 629.) Section 1714.10, however, specifically makes appealable "[a]ny order made under subdivision (a), (b), or (c) which determines the rights of a petitioner or an attorney against whom a pleading has been or is proposed to be filed." (§ 1714.10, subd. (d).) Courts have relied on this language to find a variety of orders raising section 1714.10 issues appealable. (See, e.g., *Klotz v. Milbank,*

Tweed, Hadley & McCloy (2015) 238 Cal.App.4th 1339, 1348-1349 [order on demurrer] (*Klotz*); *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 818-819 [order on motion for leave to amend] (*Berg*).)

Berg is particularly relevant here. In that case, the plaintiff filed a motion for leave to amend a complaint to add the defendant's attorney as a defendant. Though the attorney did not file a motion to strike or a demurrer under section 1714.10, both parties addressed the applicability of the section in connection with the motion for leave to amend. (*Berg*, *supra*, 131 Cal.App.4th at p. 819.) The trial court declined to address the merits of the proposed pleading, treated the motion as a normal motion for leave to amend, and granted it over the attorney's section 1714.10 objection. (*Id.* at pp. 814, 818.) The Sixth Appellate District held the order was appealable because it determined the attorney's rights in connection with claims that were potentially governed by section 1714.10. (*Id.* at p. 819.)

Similarly here, section 1714.10 was the basis of Simpson's motion to strike and both parties addressed its applicability in their briefing. Though the trial court's order denying the motion to strike did not cite or discuss the statute the parties invoked in their briefing, the court's order denying Simpson's motion to strike nonetheless "determine[d] the rights of . . . an attorney against whom a pleading [potentially governed by section 1714.10] has been . . . filed," and is appealable under subdivision (d) of the statute.

B. Denial of the Motion to Strike Is the Correct Result

Simpson argues the trial court improperly denied his motion to strike because it found his challenge under section

1714.10 was improperly presented in a motion to strike rather than a demurrer. "'We review the trial court's interpretation of section 1714.10 de novo.'" (*Stueve v. Berger Kahn* (2013) 222 Cal.App.4th 327, 330 (*Stueve*); accord *Central Concrete Supply Co., Inc. v. Bursak* (2010) 182 Cal.App.4th 1092, 1098.) Although we are not convinced by the trial court's reasoning, we will affirm the order because the trial court reached the proper result. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19 [trial court's decision which is correct in result will not be disturbed on appeal merely because given for a wrong reason]; see also Cal. Const., art. VI, § 13.)

1. The procedural issue

It is true that "a motion to strike is generally used to reach defects in a pleading which are not subject to demurrer. A motion to strike does not lie to attack a complaint for insufficiency of allegations to justify relief; that is a ground for general demurrer." (*Pierson v. Sharp Memorial Hospital, Inc.* (1989) 216 Cal.App.3d 340, 342.) It oversimplifies matters, however, to assert that a motion to strike may never appropriately target an entire pleading or cause of action.

The plain language of section 1714.10 indicates that at least in this specific context, a motion to strike may broadly attack a pleading or an entire cause of action. (§ 1714.10, subd. (b) ["The defense shall be raised by the attorney charged with civil conspiracy . . . by demurrer, motion to strike, or such other motion or application as may be appropriate"].) The general motion to strike statute is not to the contrary; it states a motion to strike may properly target (a) "any irrelevant, false, or improper matter inserted in any pleading" or (b) "*all or any part*

of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (Code Civ. Proc., § 436, italics added; see also *Community Water Coalition v. Santa Cruz County Local Agency Formation Com.* (2011) 200 Cal.App.4th 1317, 1329 [affirming trial court's decision striking cause of action that exceeded scope of leave to amend because it was "'not drawn or filed in conformity with . . . an order of the court'"].) Indeed, the rule governing motions to strike contemplates a motion to strike an entire cause of action, as it specifies "[a] notice of motion to strike a portion of a pleading must quote in full the portions sought to be stricken except where the motion is to strike an entire paragraph, cause of action, count, or defense." (Cal. Rules of Court, rule 3.1322(a).)

The cases on which plaintiffs rely to argue the contrary do not compel a different conclusion. While a motion to strike is not the proper vehicle by which to challenge the sufficiency of a complaint's allegations, that does not mean a motion to strike may never appropriately dispose of an entire cause of action.

Warren v. Atchison, T. & S. F. Ry. Co. (1971) 19 Cal.App.3d 24, for instance, does state "counts [that do] not state facts sufficient to constitute a cause of action" are "a ground for demurrer" and not "a proper ground for a motion to strike." (*Id.* at p. 41.) But this does not mean it is improper to strike a cause of action where it is "not drawn or filed in conformity with the laws of this state." (Code Civ. Proc. § 436, subd. (b).) Nor does the maxim that "[a] demurrer does not lie to a portion of a cause of action" (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682) compel the conclusion that a motion to strike only lies as to *portions* of a cause of action.

The determinative question in this circumstance is whether Simpson's motion challenged plaintiffs' conspiracy cause of action because it was not "filed in conformity with the laws of this state," which is a proper ground for a motion to strike, or because it did not allege sufficient facts to justify relief, which is not. Simpson's motion to strike advanced the former theory; a claim for civil conspiracy filed against an attorney without complying with the pre-filing procedures is "not . . . filed in conformity with the laws of this state." (Code Civ. Proc. § 436, subd. (b); § 1714.10, subd. (a).) We accordingly see no basis to uphold the denial of the motion on the ground cited by the trial court.

2. Plaintiffs were not required to comply with section 1714.10's prefiling requirements

Though we do not find procedural fault with Simpson's motion to strike, we nevertheless affirm the order denying the motion because plaintiffs' conspiracy claim falls within one of the exceptions that renders section 1714.10's prefiling requirements inapplicable.

"The purpose of section 1714.10 is to discourage frivolous claims that an attorney conspired with his or her client to harm another." (*Klotz*, *supra*, 238 Cal.App.4th at p. 1350.) "[T]he statute performs a 'gatekeeping' function and requires a plaintiff to establish a reasonable probability of prevailing before he or she may pursue a 'cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute.' [Citation.]" (*Stueve*, *supra*, 222 Cal.App.4th at p. 329.) "Applying section 1714.10 thus requires the court to initially determine whether the pleading falls either within the coverage of the statute or,

instead, within one of its stated exceptions." (*Berg*, *supra*, 131 Cal.App.4th at p. 818.)

Section 1714.10, subdivision (c) makes the other provisions of the statute inapplicable to causes of action against an attorney for a civil conspiracy with his or her client if "the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain." In other words, where a lawyer acted "in excess of his or her official representative capacity in service to his or her client" and conspired to "violate[ ] a legal duty running to the plaintiff . . . in furtherance of the lawyer's own financial advantage," the prefiling requirements do not apply. (*Berg*, *supra*, 131 Cal.App.4th at p. 833; see also § 1714.10, subd. (c).)

Courts have interpreted the statute's reference to a financial advantage to be "a personal advantage or gain that is over and above ordinary professional fees earned as compensation" for the legal representation. (*Berg*, *supra*, 131 Cal.App.4th at p. 834; see also *Panoutsopoulos v. Chambliss* (2007) 157 Cal.App.4th 297, 306.) For example, an attorney who has "a personal financial interest in the outcome of the litigation separate and apart from customary fees" acts in furtherance of his own financial advantage. (*Berg*, *supra*, at p. 834, citing *Evans v. Pillsbury, Madison & Sutro* (1998) 65 Cal.App.4th 599, 605-607.)

Here, the complaint adequately alleges facts triggering the subdivision (c) exception. The complaint alleges Simpson was not only the corporation's general counsel and Preimesberger's attorney, but was also an actual or de facto officer or director of the corporation and an officer, agent, director, shareholder, or

fiduciary of at least some of the other entities. It alleges Simpson was actively involved in soliciting prospective investors for both the corporation and the other entities, and communicated with investors regarding the corporation's financial prospects. It further alleges Simpson assisted in the destruction of corporate records in order to cover up the alleged fraud. And it alleges Simpson invested money in the other entities and derived investment profits from the fraud. In short, the complaint sufficiently alleged Simpson was acting in excess of his duties as an attorney for the corporation and Preimesberger, was involved in a conspiracy to violate duties owed to plaintiffs (by at least the corporation and Preimesberger), and was acting to further his financial gain as an investor in the other entities. These allegations are sufficient to excuse plaintiffs from complying with section 1714.10's prefiling requirements. (See *Berg*, *supra*, 131 Cal.App.4th at pp. 833-836 [evaluating whether exceptions to section 1714.10 prefiling requirements apply by analyzing the allegations of the plaintiff's complaint].)

DISPOSITION

The challenged order is affirmed. Respondents shall recover their costs on appeal.

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BAKER, J.

We concur:

KRIEGLER, Acting P.J.

DUNNING, J.*

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