Filed 8/30/17 Patel v. Simpson 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

DALSUKHBHAI K. PATEL, Plaintiff and Respondent, v. KEITH F. SIMPSON, Defendant and Appellant.	B278224 (Los Angeles County Super. Ct. No. VC064586)

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

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

Caufield & James, Jeffery L. Caufield and Ryan M. Simone for Plaintiff and Respondent.

Defendant and appellant Keith F. Simpson (Simpson), an attorney, appeals an order overruling his demurrer to a second amended complaint filed by plaintiff and respondent Dalsukhbhai Patel (Patel). The basis of the demurrer was that Patel's causes of action against Simpson for breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty were subject to the prefiling requirement of Civil Code section 1714.10 [attorney-client civil conspiracy claim] and that Patel's failure to seek a prefiling order required dismissal.[1] [2]

We conclude section 1714.10, by its terms, is inapplicable to Patel's claims against Simpson because Patel's claims did not arise from an "attempt [by Simpson] to contest or compromise a claim or dispute." (§ 1714.10, subd. (a); *Stueve v. Berger Kahn* (2013) 222 Cal.App.4th 327, 331–333 (*Stueve*).)[3] Therefore, the order overruling Simpson's demurrer is affirmed.

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[1] Civil Code section 1714.10 requires a party, in specified circumstances, to petition for a judicial determination of a reasonable probability of prevailing as a condition precedent to filing an action against an attorney for conspiring with his or her client based on the attorney's representation of the client. (*Westamco Investment Co. v. Lee* (1999) 69 Cal.App.4th 481, 483.)

All further statutory references are to the Civil Code, unless otherwise specified.

[2] The order overruling Simpson's demurrer is appealable. (§ 1714.10, subd. (d); *Klotz v. Milbank, Tweed, Hadley & McCloy* (2015) 238 Cal.App.4th 1339, 1348–1349 (*Klotz*).)

[3] Pursuant to Government Code section 68081, the parties were advised to be prepared to address *Stueve* at the time of oral

FACTUAL AND PROCEDURAL BACKGROUND

1. *Patel's operative second amended complaint.*

Patel pled in relevant part: Meridian Health Services Holdings Inc. (Meridian) is a holding company that owns the common stock of various entities that owned and operated nursing home businesses. James Preimesberger (Preimesberger) was an officer, shareholder, president, and chairman of Meridian. Simpson was Meridian's in-house counsel and an actual and/or de facto officer/director of Meridian.

Patel owned preferred stock in Meridian. In 2011, Patel agreed to sell his shares to Meridian. Simpson drafted two promissory note contracts, in which Meridian promised to pay Patel the sums of $245,000 and $310,000 for his shares. Preimesberger signed the contracts, but Meridian only made two payments totaling $35,000 on the principal balance.

Patel further alleged that Preimesberger and Simpson entered into lease agreements for nursing facilities on behalf of Meridian, which obligated Meridian to pay above-market rates, so as to transfer money from Meridian to other entities they owned and controlled.

The first cause of action for breach of contract, which named Simpson as well as Preimesberger and Meridian, alleged breach of the promissory note contracts, and that Preimesberger and Simpson used Meridian as a shell corporation to deny Meridian's investors, including Patel, the benefits of the contracts that Meridian entered into with its investors.

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argument, and were also given the opportunity to file supplemental letter briefs to address the impact of that decision.

The second cause of action, which named Simpson and other defendants, alleged a breach of the implied covenant of good faith and fair dealing, and that defendants frustrated Patel's right to receive the benefit of the promissory note contracts.

Lastly, Simpson was named in the sixth cause of action for breach of fiduciary duty, together with Preimesberger. Patel alleged that Simpson assisted Preimesberger in breaching his fiduciary duties so as to further the scheme to defraud investors, including Patel, and that Simpson personally benefitted from this scheme.

2. *Simpson's demurrer*.

Simpson demurred, asserting that all of Patel's claims against him were barred by section 1714.10 because Patel failed either to satisfy the statute's prefiling requirements for bringing a conspiracy claim against an attorney, or to plead an applicable exception to the prefiling requirements.

3. *Patel's opposition to the demurrer*.

In opposition, Patel argued that pursuant to section 1714.10, a court order is not required if the plaintiff alleges that either (1) the attorney has an independent legal duty to the plaintiff (§ 1714.10, subd. (c)(1)), or (2) 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)(2)). Patel asserted that he met both of these exceptions.

4. *Trial court's ruling*.

On October 6, 2016, the trial court entered an order overruling the demurrer and granting Simpson 20 days to file and serve a responsive pleading.

The trial court addressed Patel's arguments that the statutory exceptions to section 1714.10 were applicable. It found the first exception, "where (1) the attorney has an independent legal duty to the plaintiff" (§ 1714.10, subd. (c)(1)), did not apply, because an attorney representing a corporation does not owe a duty to a minority shareholder, absent actual fraud.

However, the trial court found that the second exception, 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)(2)), did apply. Here, Patel pled that Simpson's actions went beyond the performance of a professional duty to serve Meridian and involved a conspiracy to violate a legal duty in furtherance of Meridian's and Simpson's financial gain. The trial court found these allegations were sufficient to excuse Patel from the statute's prefiling requirement.

On October 12, 2016, Simpson filed a timely notice of appeal from the order.

CONTENTIONS

Simpson contends: section 1714.10 applies to Patel's claims against him; the trial court erred in finding that Patel's conclusory allegations triggered the statute's "beyond the performance of a professional duty to serve the client" exception; and the trial court properly found that the statute's "independent legal duty" exception was inapplicable to Patel's claims.

DISCUSSION

1. *Standard of appellate review*.

"Since the section 1714.10 special proceeding procedure operates like a demurrer . . . and since it involves only questions of law, it follows that our review of the order under that section is de novo." (*Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 822 (*Berg*).)

Likewise, the interpretation of section 1714.10 presents a question of law that we review de novo. (*Berg*, *supra*, 131 Cal.App.4th at p. 822; *Bodega Bay Concerned Citizens v. County of Sonoma* (2005) 125 Cal.App.4th 1061, 1069 [interpretation of statute is subject to de novo review].)

2. *General principles*.

Section 1714.10 was enacted to combat "the use of frivolous conspiracy claims that were brought as a tactical ploy against attorneys and their clients and that were designed to disrupt the attorney-client relationship. [Citations.]" (*Berg*, *supra*, 131 Cal.App.4th at p. 816.) To achieve its goal, the statute performs a gatekeeping function and requires a plaintiff in certain circumstances 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. (Civ. Code, § 1714.10, subd. (a); *Stueve, supra*, 222 Cal.App.4th at p. 329.)[4]

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[4] Claims against an attorney may fall within the scope of section 1714.10, even if the word "conspiracy" does not appear in the pleading. (*Berg*, *supra*, 131 Cal.App.4th at p. 824.) The statute is implicated where counsel is alleged to have engaged in conspiratorial conduct with a client. (*Ibid.*)

As originally enacted in 1988, section 1714.10 provided in relevant part that "[n]o cause of action against an attorney *based upon a civil conspiracy with his or her client* shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes a claim for civil conspiracy to be filed after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action." (Stats. 1988, ch. 1052, § 1, italics added.)

The scope of section 1714.10 was narrowed by a 1991 amendment, which stated in pertinent part that "[n]o 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*, and which is based upon the attorney's representation of the client, shall be included in a complaint or other pleading unless" the court enters a prefiling order. (Stats. 1991, ch. 916, § 1, italics added.) The 1991 amendment limited the reach of the statute to "civil conspiracies between an attorney and a client *arising from any attempt to contest or compromise a claim or dispute*, and which involve the attorney's representation of the client." (Legis. Counsel's Dig., Sen. Bill No. 820 (1991–1992 Reg. Sess.) Stats. 1991, ch. 916, italics added.)

The present version of section 1714.10, subdivision (a), contains the same key language as the 1991 amendment. It now provides in pertinent part: "No 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*, and which is based upon the attorney's representation of the client, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes the

claim for civil conspiracy to be filed after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action." (§ 1714.10, subd. (a), italics added.)

Subdivision (b) of the statute states in pertinent part: "Failure to obtain a court order where required by subdivision (a) shall be a defense to any action for civil conspiracy filed in violation thereof." (§ 1714.10, subd. (b).)

Subdivision (c) of section 1714.10 provides: "This section shall not apply to a cause of action against an attorney for a civil conspiracy with his or her client, where (1) the attorney has an independent legal duty to the plaintiff, or (2) 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."

As is apparent from the face of the statute, " '[a]pplying 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.' [Citation.] Once it is determined that the pleading falls within the coverage of subdivision (a) of section 1714.10, the next step is to ascertain whether the pleaded claims fall within either of the exceptions set forth in subdivision (c) of the statute. [Citation.]" (*Stueve*, *supra*, 222 Cal.App.4th at p. 331.)

Accordingly, the threshold issue is whether a plaintiff's complaint falls within the coverage of subdivision (a), that is to say, does the complaint allege conduct by counsel "arising from any attempt to contest or compromise a claim or dispute"? (§ 1714.10, subd. (a).) If section 1714.10 is inapplicable, based upon "the plain wording of subdivision (a) thereof, [a court] need

not . . . address whether any of the exceptions of subdivision (c) apply." (*Stueve*, *supra*, 222 Cal.App.4th at p. 333.)[5]

3. *Trial court properly overruled Simpson's demurrer because section 1714.10 is inapplicable, pursuant to the plain language of subdivision (a).*

Simpson acknowledges that subdivision (a) of section 1714.10 applies to civil conspiracy claims, *arising from any attempt to contest or compromise a claim or dispute*, but argues the "attempt to contest or compromise a claim or dispute" language must be given a "manifestly broad interpretation," so as to reach "the pivotal issue raised by attorney-client conspiracy claims under section 1714.10: whether the conspiracy claim is based on an attorney's representation of a client, and if so, whether the claim is viable as a matter of law." Simpson cites a series of decisions that either disregarded subdivision (a) entirely or conducted only a minimal analysis under subdivision (a), and he reasons that those decisions require subdivision (a) to be applied broadly to conspiracy claims based on an attorney's representation of a client.

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[5] *Stueve* found the claims alleged therein did not fall within the plain wording of subdivision (a), as they did not arise from an attempt to contest or compromise a claim or dispute. Rather, as the plaintiffs argued, the claims arose from transactional activities—the alleged siphoning off of assets through fraudulent estate planning, including the misappropriation of the plaintiffs' assets through the diversion of those assets to entities created and controlled by the defendants, including counsel's other clients. (*Stueve*, *supra*, 222 Cal.App.4th at p. 331.)

The *Stueve* court was presented with a similar argument, based on many of the same cases on which Simpson relies, and addressed it as follows:

"Berger Kahn[, the defendant law firm,] maintains that section 1714.10 has been employed to block claims in many situations outside of the context of litigation or contested claims. However, the cases it cites do not convince us that case law has abrogated the language of subdivision (a) of the statute. Rather, we construe a statute so as to give meaning to all its parts. [Citation.]" (*Stueve*, *supra*, 222 Cal.App.4th at p. 332; accord, *People v. Cole* (2006) 38 Cal.4th 964, 980–981 [a reading of a statute rendering some words surplusage is to be avoided].)

Stueve observed, "[i]n some of the cases Berger Kahn cites, the courts addressed only section 1714.10, subdivision (c), not subdivision (a), based on the way the parties framed the issues, or for apparent ease of analysis. (See, *Pavicich v. Santucci* (2000) 85 Cal.App.4th 382, 396 [attorney argued § 1714.10, subd. (c) exception was inapplicable and court responded exception applied, so prefiling requirements did not]; *Panoutsopoulos v. Chambliss* (2007) 157 Cal.App.4th 297, 301, 303–306 [trial court granted plaintiff tenants' petition to join as defendants attorneys who represented landlord in prelitigation disputes; following *Pavicich*, appellate court proceeded directly to analysis of § 1714.10, subd. (c) exception without analysis of subd. (a)].) But as we know, ' " '[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.' " [Citations.]' [Citations.] Neither *Pavicich* nor *Panoutsopoulos* shows that subdivision (a) is irrelevant or has

been excised from the statute." (*Stueve*, *supra*, 222 Cal.App.4th at pp. 332–333.)

Stueve continued, "Berger Kahn also cites two cases in which the courts addressed section 1714.10, subdivision (c) at length, following only a minimal discussion of subdivision (a). In those cases, there was no need for an in-depth analysis of subdivision (a), because it was readily apparent that the alleged conspiracies did indeed arise from an 'attempt to contest or compromise a claim.' (See, *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.*, *supra*, 131 Cal.App.4th at pp. 811–814, 824 [lawyers representing assignee for benefit of creditors contested the claim of plaintiff creditor in bankruptcy proceedings]; *Evans v. Pillsbury, Madison & Sutro* (1998) 65 Cal.App.4th 599, 604 [in investor dispute, law firm sued investors ' "to coerce them into abandoning their rights" '].)" (*Stueve*, *supra*, 222 Cal.App.4th at p. 333.) [6]

Thus, *Stueve* found nothing in the case law to demonstrate that the language of subdivision (a) has been abrogated. It thus concluded that before examining whether any of the exceptions of subdivision (c) apply, a court must address whether the claims alleged in plaintiff's complaint fall within the coverage of subdivision (a) of section 1714.10. (*Stueve*, *supra*, 222 Cal.App.4th at pp. 331–333.)

We agree with *Stueve*'s analysis of the statute. As discussed, the statute was amended in 1991 to narrow the scope of section 1714.10, subdivision (a). Given the limitation imposed

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[6] Similarly, *Klotz*, *supra*, 238 Cal.App.4th 1339, a post-S*tueve* decision, summarily concluded that any advice defendant attorneys gave the client "arose from an attempt to contest or compromise a claim or dispute." (*Klotz*, *supra*, at pp. 1342, 1352.)

by the 1991 amendment, we reject Simpson's broad construction, which would essentially read the 1991 amendment out of the statute. (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1184–1185 [presumption against surplusage applies with particular force when language in question is added by amendment.]

Guided by these principles, we scrutinize Patel's operative second amended complaint. The pleading does not allege that Patel's agreement to sell his preferred stock to Meridian arose from an attempt by the parties to contest or compromise a claim or dispute. Rather, as detailed above, Patel's claims arise out of Simpson's transactional activities in drafting and negotiating the promissory note contracts, whereby Meridian agreed to purchase Patel's preferred stock in the company. Irrespective of the fact that Patel alleged that Simpson drafted the agreements despite knowing of Meridian's fraudulent scheme, there is nothing in the complaint to show that *at the time* Patel and Meridian entered into the agreement for Meridian to purchase Patel's shares, there was any *existing* claim or dispute between the parties. To the contrary, Patel pled that he was "unaware of the lease arrangements and unfair payment of leasing rates between Meridian and the business organizations in which Preimesberger and/or Simpson was an officer, director, agent, shareholder, or fiduciary."

Thus, section 1714.10 is inapplicable to Patel's operative pleading, pursuant to the plain wording of subdivision (a), because Patel's claims against Simpson did not arise out of an attempt to contest or compromise a claim or dispute. Accordingly, it is unnecessary to address whether any of the

exceptions of subdivision (c) apply. (*Stueve*, *supra*, 222 Cal.App.4th at p. 333.)

Having determined that Patel's claims against Simpson were not subject to the prefiling requirement of section 1714.10, subdivision (a), we conclude the trial court's decision overruling Simpson's demurrer, pursuant to the exception contained in subdivision (c)(2), was correct in result and must be affirmed. (*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].)

DISPOSITION

The order overruling Simpson's demurrer to Patel's second amended complaint is affirmed. Patel shall recover costs on appeal.

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EDMON, P. J.

We concur:

LAVIN, J.

STONE, J.*

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