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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

STEVEN ROTH et al.,

Plaintiffs and Appellants,

v.

EPPS & COULSON, LLP,

Defendant and Respondent.

STEVEN ROTH,

Plaintiff and Respondent,

v.

EPPS & COULSON, LLP

Defendant and Appellant.

B285265 consolidated with B287982 & B290763

(Los Angeles County Super. Ct. Nos. BC623317; BC675159)

WEALTH MANGEMENT INTERNATIONAL, INC.,

Plaintiff and Appellant,

v.

EPPS & COULSON LLP,

Defendant and Respondent.

APPEAL from judgments and an order of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Reversed in part; affirmed in part.

Holmes, Taylor, Scott & Jones, Andrew Holmes and Patrick V. Chesney for Plaintiffs and Appellants and Plaintiff and Respondent in B285265 and B287982 and Plaintiff and Appellant in B290763.

Winget Spadafora Schwartzberg, Gabriel Z. Reynoso and Rachel D. Dardashti for Defendant and Respondent in B285265 and B290763 and Defendant and Appellant in B287982.

INTRODUCTION

Wealth Management International, Inc. (WMI) hired law firm Epps & Coulson, LLP (E&C) on a contingency basis to represent it in a lawsuit WMI brought as a plaintiff. E&C later withdrew from representation of WMI and filed a notice of attorney lien. WMI transferred its rights in the lawsuit to its principal, Steven Roth, who eventually reached a settlement with the defendants. The settlement agreement stated that release of the settlement payment was subject to E&C's attorney lien.

Eight months later, Roth asserted a declaratory relief claim against E&C seeking a judicial determination of E&C's entitlement to attorney fees. Roth also alleged that E&C committed malpractice in its handling of the lawsuit. The trial court held that all of Roth's claims sounded in malpractice, and because WMI—not Roth—was the client, Roth did not have standing to sue. The court granted E&C's motion for judgment on the pleadings. Roth appealed. E&C then moved for an award of attorney fees, arguing that even though Roth was not a party to the retainer agreement, he was nonetheless bound by the attorney fee provision. The trial court denied the motion, and E&C appealed.

WMI then sued E&C, alleging causes of action for declaratory relief and malpractice that were nearly identical to Roth's. The trial court again found that each of WMI's causes of action sounded in malpractice. The court also held that WMI must have been on notice of the alleged malpractice by the time the Roth complaint was filed, which was more than a year earlier. The court therefore held that WMI's complaint was time-barred under the one-year statute of limitations on attorney malpractice claims. WMI appealed.

All three appeals were consolidated, and E&C's appeal was deemed a cross-appeal. Roth and WMI challenge only the trial court's rulings on the declaratory relief causes of action. We reverse the trial court's rulings regarding these causes of action. Roth's and WMI's causes of action seeking declaratory relief as to the rights and responsibilities of the parties with respect to the settlement and attorney lien were not causes of action for attorney malpractice. The trial court therefore erred in finding that Roth did not have standing to assert a declaratory relief cause of action, and that WMI's declaratory relief cause of action was time-barred under the malpractice statute of limitations.

We affirm the trial court's ruling denying E&C's motion for attorney fees. Because we hold that the trial court erred in granting the judgment on the pleadings on Roth's complaint and in sustaining the demurrer to the WMI complaint, E&C is not the prevailing party and is not entitled to attorney fees. We express no opinion as to whether the attorney fee provision in the retainer agreement could be interpreted to render Roth liable for E&C's attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND

On appeal, Roth and WMI challenge only the trial court's orders as they relate to their causes of action for declaratory relief. We therefore focus on the allegations and proceedings as they relate to those causes of action.

A. Background: The Becker action

WMI is an S-corporation, and Roth is the sole owner and principal. In April 2013, WMI initiated the case *WMI v. Becker, et al.*, Los Angeles Superior Court case number BC506012—the Becker action. According to WMI, "The case concerned work

performed by Roth for which he expected, and did not receive, compensation."

In January 2014, E&C substituted in as counsel for WMI in the Becker action. The retainer agreement between WMI and E&C stated that E&C was working on a contingency fee basis, and was entitled to 25 percent of WMI's gross recovery, plus any award of attorney fees. However, if the matter was resolved within 60 days before trial was set to begin, E&C would receive 35 percent of the gross recovery plus attorney fees. The retainer agreement also stated that "[i]n the event of the Firm's discharge or withdrawal, Client agrees that, upon payment of the settlement . . . in Client's favor in this matter, the Firm shall be paid" hourly for the "services rendered."

The relationship between WMI and E&C became strained, and in November 2014 E&C informed WMI that it would be withdrawing as counsel. E&C informed WMI that once it withdrew, the fee agreement "converts to hourly," and about 250 hours of work had been done on the case to date. E&C stated that it intended to file an attorney lien in the case. According to Roth and WMI, "WMI executed an assignment of its interest in the Becker case to Roth, and Roth was then able to file a motion to substitute himself in as the plaintiff in place of WMI, and then to continue litigating the case in pro per." A substitution of attorney form, removing E&C from the case and stating that Roth would proceed in pro per, was filed on January 22, 2015. E&C eventually sent WMI a bill for 270.4 hours of work. On January 30, 2015, E&C filed a notice of attorney lien in the Becker action.

Roth later retained new counsel to work on the Becker action. In October 2015, the case settled for $60,000. The

settlement agreement stated, in part, "No funds to be released prior to obtaining a release of prior counsel's lien."

B. The Roth action

1. *Complaint*

On June 9, 2016, "Roth, individually and as Assignee of [WMI]," filed a complaint against E&C; we refer to this as the Roth action. In a section titled "facts common to all causes of action," Roth alleged facts regarding the Becker action, as summarized above. He asserted that "WMI, by and through Roth, executed" the retainer agreement with E&C, so that E&C "would become counsel of record" in the Becker action. He alleged that that E&C agreed to the representation knowing the case was not worth more than $118,395.24, "with no provision for recovery of attorney's fees."

Roth alleged that E&C began working up the case, but "failed to do so competently." He alleged that E&C failed to propound adequate discovery to a defendant, then failed to move to compel the defendant's discovery responses. E&C did move to compel responses from two other defendants, but then took the motions off calendar without receiving the discovery the defendants promised, and did not seek reimbursement for the attorney fees associated with the motion. E&C "failed to interview any witnesses or take a single deposition," and sent letters to opposing counsel "containing numerous errors." E&C also failed to dismiss a defendant in a timely manner.

Nine months after beginning work on the case, E&C "realized the case was not a 'money maker,'" and withdrew from the Becker action. E&C filed the notice of attorney lien in the Becker action, seeking far more in hourly attorney fees than it would have been entitled to under the contingency percentages in

the retainer agreement. Roth eventually retained new counsel and incurred $53,000 in legal fees, which "would not have been necessary had [E&C] actually performed the work competently and/or evaluated the evidence in support of [WMI's] claim."

Roth alleged six causes of action: declaratory relief, breach of contract, negligent interference with prospective economic advantage, professional negligence, breach of fiduciary duty, and unfair business practices. The first cause of action for declaratory relief, which is the only cause of action relevant to the appeal, stated in full:

"Plaintiff realleges and incorporates by this reference all previous paragraphs as if set forth in full herein.

"As set forth herein above, Plaintiff has performed all obligations required of Plaintiff under the Retainer Agreement with [E&C], or was excused from performing them.

"As set forth hereinabove, [E&C] withdrew as counsel for WMI and/or Roth without justifiable cause.

"As such, Plaintiff seeks a declaration that [E&C] is not entitled to any fee whatsoever in the Becker Case, and that [E&C's] lien filed in the Becker Case should be released."

Roth prayed for a declaration that E&C "is not entitled to any fee whatsoever" in the Becker action, and that the lien be "cancelled and/or released."

Roth's second cause of action for breach of contract contained very similar allegations, and stated that E&C breached the contract by "failing to represent plaintiff competently." The third cause of action for negligent interference with prospective economic advantage alleged that E&C's actions caused plaintiff to suffer business injury; it does not specify what that injury entailed. The fourth cause of action for professional negligence

alleged that E&C failed to provide competent legal services. The fifth cause of action for breach of fiduciary duty alleged that E&C "was in an attorney-client relationship with WMI. As such, [E&C] owed WMI a fiduciary duty under California law." E&C breached this duty by "seeking to maximize [its] fee" and failing to perform competently. Finally, the sixth cause of action for unfair business practices alleged that E&C "fraudulently induced Plaintiff to enter into a Retainer Agreement, while [E&C] never intended to actually bring the case to conclusion." Roth alleged that he was damaged "by at least $44,970.16, plus the cost of this suit." Roth also prayed for an award of attorney fees.

2. *Motion for judgment on the pleadings*

In August 2016, E&C filed an answer. In June 2017, it filed a motion for judgment on the pleadings. E&C argued that Roth "asserted claims against a law firm . . . with whom he never had an attorney-client relationship." E&C asserted that in the Becker action E&C was counsel for WMI, not Roth, and "the gravamen of each of Plaintiff's claims against [E&C] is alleged malpractice arising out of WMI's attorney-client relationship with [E&C]." E&C argued that as a result, Roth lacked standing to assert any claims against E&C. E&C also noted that legal malpractice claims are not assignable. (See, e.g., *Kracht v. Perrin, Gartland & Doyle* (1990) 219 Cal.App.3d 1019, 1023 ["It is now well settled that under California law a former client may not voluntarily assign his claims for legal malpractice against his former attorneys."].)

In addition, E&C asserted that the claims against it were time-barred. It argued that because the gravamen of Roth's claims was legal malpractice, the claims were governed by Code of Civil Procedure section 340.6, subdivision (a) (section

340.6(a)).[1] That statute allows an "action against an attorney for a wrongful act or omission . . . arising in the performance of professional services" to be brought "within one year after the plaintiff discovers . . . the facts constituting the wrongful act or omission," or "four years from the date of the wrongful act or omission, whichever occurs first." (§ 340.6(a).) E&C argued that because Roth's claims were based on E&C's alleged negligence before it withdrew from the Becker action and filed its notice of lien in January 2015, there was no delayed discovery and the causes of action in the August 2016 complaint were time-barred.[2]

3. *Opposition*

Roth opposed the motion for judgment on the pleadings. He asserted that E&C's motion was "either meritless" or the issues with the complaint were "easily cured through amendment." He argued that he had standing "both individually and as assignee of WMI." Roth stated that there is "essentially no distinction between Roth and WMI, an S-Corporation that is 100% owned by Roth." While acknowledging that "there is a bar against transferring legal malpractice claims," Roth contended that he "has standing to assert these claims on an individual basis as the intended third-party beneficiary of [E&C's] representation." He also asserted that E&C "took orders from Roth and [Roth] directed the lawsuit."

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[2] E&C asserted additional arguments not relevant to this appeal. It also requested that the court take judicial notice of the retainer agreement, emails between E&C attorneys and Roth, the settlement agreement in the Becker action, and the notice of lien filed in the Becker action. It does not appear that the court ever ruled on the request for judicial notice.

Roth also argued that certain causes of action, including the cause of action for declaratory relief, were based, "at least in part, on conduct that may not constitute malpractice." Because the allegations included actions by E&C occurring after it withdrew as counsel for WMI, such as filing a notice of lien and therefore interfering with Roth's ability to find another attorney, these actions were "separate from, and in addition to, the malpractice Defendant committed in the course of representing WMI."

Roth further contended that WMI could assign its legal malpractice claims to Roth. He argued that "forbidding . . . WMI's assignment here would promote a grave injustice and be contrary to public policy." Roth asserted that there was a "complete unity of interest between Roth and WMI," and it would be economically unfeasible to make WMI assert its own malpractice claims because, as a corporation, it would have to hire an attorney.[3]

Roth also asserted that the statute of limitations did not bar his claims. He contended that the declaratory relief claim addressed "an existing and ongoing dispute between the parties that merits resolution." He also argued that the "remaining claims did not accrue until the contingency contemplated by the parties' retainer agreement occurred," which was the October 2015 settlement of the Becker action. Before then, Roth and

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[3] "[U]nder a long-standing common law rule of procedure, a corporation, unlike a natural person, cannot represent itself before courts of record in propria persona, nor can it represent itself through a corporate officer, director or other employee who is not an attorney. It must be represented by licensed counsel in proceedings before courts of record." (*CLD Construction, Inc. v. City of San Ramon* (2004) 120 Cal.App.4th 1141, 1145.)

WMI had not sustained actual injury. The complaint was filed less than a year later, in June 2016. Roth asked that the motion be denied, and "[a]lternatively, Roth requests that the Court grant him leave to amend the Complaint and cure any material defects identified by the court." E&C filed a reply in support of its motion.

4. *Court ruling*

At the hearing on the motion, held on June 30, 2017, the court stated that its tentative ruling was to grant the motion for judgment on the pleadings on standing grounds. The court noted that "[l]egal malpractice causes of action are not assignable no matter how they are pled." Because E&C "represented WMI only," the "claims of malpractice would be held by WMI only," and they could not be assigned. The court stated, "There can be no leave to amend as to Steven Roth."

Counsel for E&C argued that leave to amend should also be barred for WMI, because "they're also time barred." The court, noting that it was not giving advice, said, "Plaintiff, you might entertain in your toolbox a thought that WMI – that you could file a new lawsuit as to WMI. But I don't think . . . that would work because at the very latest, WMI would know of the wrongdoing on the day that this action was filed. That would be June 9, 2016. [¶] As there is a one year statute of limitations, WMI would have had to file by June 9, 2017; right? That was three weeks ago." The court continued, "I'm not telling you not to do it," because "I don't know exactly how that would work out."

Roth's counsel argued that there was an ongoing dispute as to E&C's entitlement to the settlement funds under its lien. And because the settlement funds "are in Mr. Roth's name, it's possible that [E&C] would be going after Mr. Roth" to recover on

the lien. If standing remained an issue, however, Roth asked for leave to amend "to consider possibly substituting WMI for Mr. Roth rather than filing a new lawsuit."

After a hearing, the court issued a minute order denying E&C's motion on statute of limitations grounds, and granting the motion on standing grounds. The court stated, "Since all of the causes of action raised in this action arise from the attorney-client relationship that comes from the retainer agreement," the statute of limitations in section 340.6(a) applied. The court stated that there was insufficient information in the complaint to show that Roth knew or should have known of the alleged negligence more than a year before he filed the complaint. Thus, the court denied the motion for judgment on the pleadings on the basis of the statute of limitations.

As to standing, the court stated, "Legal malpractice causes of action are not assignable, no matter how they are pled." The court stated that E&C had represented WMI only, not Roth, so Roth "cannot claim that the malpractice was as to him. Any claims of malpractice would be held by WMI only." The court concluded, "No leave to amend as to Steven Roth. The action is dismissed, and the four discovery motions (two today and two next week) are placed off calendar. [¶] Moving party is to give notice."

The court entered judgment in favor of E&C on July 24, 2017. Roth timely appealed.

5. *E&C motion for attorney fees*

On September 25, 2017, E&C filed a motion seeking to recover its attorney fees for defending the Roth action. Although it had successfully moved for judgment in the Roth action on the basis that Roth was not a party to the retainer agreement, E&C

nonetheless asserted that Roth was bound by the portion of the retainer agreement allowing for a recovery of attorney fees by the prevailing party in any dispute involving the retainer agreement.

E&C asserted that the retainer agreement between it and WMI stated in part, "If an arbitration or lawsuit arises concerning a dispute relating to the validity or enforcement of this Agreement, the prevailing party shall be entitled to collect reasonable attorney's fees incurred in the course of prosecuting or defending the claim, including for time spent by attorneys and/or paralegals of the FIRM. Similarly, if a party expends funds to enforce the terms of this Agreement the prevailing party shall be entitled to collect reasonable attorneys' fees." E&C argued that "the Fees Provision does not limit an award of fees and costs to parties of the Retainer Agreement - i.e., WMI and [E&C]. Rather, the Fees Provision provides that the prevailing party in any arbitration or lawsuit" concerning the retainer agreement "is entitled to recover fees in 'enforcing or defending the claim.'"

E&C acknowledged that attorney fees are typically available for only for contract actions under Civil Code section 1717. It asserted that although Roth also asserted tort claims in his complaint, all of E&C's claimed attorney fees should be awarded because the contract and tort claims were inextricably intertwined.

Roth opposed the motion. He asserted that the court's ruling that Roth lacked standing under the retainer agreement undermined E&C's argument that Roth was bound by the attorney fees provision of the same agreement. Roth also asserted that E&C acted in bad faith by delaying the resolution of the Roth action, with the intent to inflate its fees and run out the

statute of limitations so WMI could not file a timely malpractice action. E&C filed a reply in support of the motion.

At the hearing on December 8, 2017, the parties briefly argued their respective positions. In a minute order issued the same day, the court stated, "Motion DENIED. [¶] No basis for fees; there is no agreement between Roth and Epps & Coulson. Roth is not a third party beneficiary to that agreement and Roth did not stand in the shoes of the signatory. Attorney fees not available to Epps & Coulson. *Cargill v. Souza* (2011) 201 Cal App 4th 962, 967-8."

E&C timely appealed the order denying its attorney fees motion.

C. The WMI action

1. *Complaint*

Meanwhile, on September 8, 2017, WMI filed a complaint against E&C—the WMI action. The facts alleged pertained to E&C's conduct in the Becker action, and were nearly identical to the allegations in the Roth complaint. However, WMI deleted allegations from the Roth complaint that E&C had negligently handled discovery and other litigation matters in the Becker action. WMI also alleged that the statute of limitations was tolled while the Roth action was pending, from June 9, 2016 (the date the Roth complaint was filed) to July 24, 2017 (the date of the Roth judgment). WMI stated that the court had denied Roth's request for leave to amend in the Roth action, and "[h]ad leave been granted, Roth would have substituted WMI as plaintiff." WMI also alleged, "This case arises from the same facts and therefore relates back to the filing of the complaint in the Roth Case."

WMI asserted causes of action for declaratory relief, breach of contract, negligent interference with prospective economic advantage, breach of fiduciary duty, and unfair business practices—the same causes of action in the Roth action, minus professional negligence. The declaratory relief cause of action was nearly identical to the one in the Roth complaint. It stated that E&C "withdrew as counsel for WMI and/or Roth without justifiable cause" and "fail[ed] to represent plaintiff competently." It requested a declaration that E&C "is not entitled to any fee whatsoever" from the Becker action, and the "lien should be released." The allegations of the other causes of action were also nearly identical, but they are not at issue on appeal. WMI's damages claim was the same: $44,970.16, plus costs and attorney fees.

2. *Demurrer*

E&C demurred to WMI's complaint. It asserted that WMI was attempting a "second bite at the proverbial 'apple'" by filing another lawsuit. E&C argued that WMI's claims were barred by collateral estoppel because "there can be no question that Roth is in privity with WMI," and therefore "WMI should have reasonably expected to be bound by the Court's ruling in the Roth Action."

E&C also argued that WMI's claims were barred by the one-year statute of limitations under section 340.6(a). It pointed to an email dated December 9, 2014, which was attached to the complaint as an exhibit, in which Roth threatened to file a malpractice action against E&C if it withdrew from the Becker action. E&C stated that it withdrew from the Becker action on January 22, 2015, triggering accrual of WMI's claims. E&C

argued that because the WMI action had not been filed until September 8, 2017, it was time-barred.

E&C also contended that the relation back doctrine did not apply, because a new action cannot "relate back" to the filing of a complaint in an entirely different lawsuit. In addition, relation back would not save the claims because "WMI's claims were already time-barred at the time the Roth Action was filed." It argued that any amendment would be futile, so leave to amend should be denied.

3. *Opposition*

WMI opposed the demurrer. It reiterated that the terms of the settlement in the Becker case prevented Roth or WMI from accessing settlement funds until E&C's attorney lien is resolved. WMI stated, "The primary thrust of WMI's case is this: Can [E&C] (1) assert an attorney's lien; (2) refuse—contrary to California law—to take any action to resolve the lien; and then (3) subsequently frustrate its former client's attempts to resolve the lien?" It continued, "WMI's instant cause of action should best be described as an anticipatory defense, rather than a normal cause of action subject to a statute of limitations."

WMI asserted that because it had not alleged a cause of action for professional negligence, and instead sought to settle the terms of the attorney lien as it affected the Becker settlement, the case was not one for professional negligence. It argued that any right to the lien was necessarily a claim by E&C, and any assertion of malpractice would be an issue only if WMI chose to assert it as a defense against E&C's claim to settlement funds. WMI argued that the professional negligence statute of limitations therefore did not apply. WMI further asserted that even if this limitations period did apply, the statute had been

tolled while the Roth action was pending, and that the filing of the WMI action related back to the filing of the Roth action.

WMI also argued that collateral or equitable estoppel did not bar the action because the prior order was being appealed, and therefore there was no final determination on the merits. E&C filed a reply in support of its demurrer.

4. *Court ruling*

There is no transcript for the April 18, 2018 hearing included in the record on appeal. In a minute order issued the same day, the trial court sustained E&C's demurrer on statute of limitations grounds. The court stated, "All of the causes of action raised arise from the attorney-client relationship that comes from the retainer agreement," and therefore the one-year statute of limitations in section 340.6(a) applied. The court continued, "WMI would know of the wrongdoing on the day that the [Roth] action was filed – 9 June 2016." The court also stated that the WMI complaint could not relate back to the filing of the Roth complaint, because WMI and Roth were different parties, and "[t]he term 'assignee' does not change that fact. As the parties are different, there can be no relation back." The court therefore sustained the demurrer "with prejudice."

WMI timely appealed the demurrer order. Roth moved to consolidate all three appeals, and we granted his motion.

DISCUSSION

Roth and WMI make clear in their briefing on appeal that they are only challenging the trial court's orders with respect to the causes of action for declaratory relief. Thus, they assert that the trial court erred in granting E&C's motion for judgment on the pleadings in the Roth action, and sustaining the demurrer in the WMI action, as to the declaratory relief causes of action. In

its cross-appeal, E&C challenges the trial court's denial of its attorney fees motion in the Roth action. We consider Roth and WMI's arguments first.

A. Roth's and WMI's declaratory relief causes of action were not tantamount to malpractice claims

Roth and WMI contend that in granting E&C's motion for judgment on the pleadings in the Roth action, the trial court erred in finding that Roth's declaratory relief cause of action sounded in attorney malpractice. They also contend that in sustaining E&C's demurrer to the WMI complaint, the trial court erred in finding that WMI's declaratory relief cause of action sounded in attorney malpractice, and therefore was barred by the one-year statute of limitations in section 340.6(a). Because these causes of action are nearly identical, we consider these arguments together. We agree that the trial court's conclusion in each case was erroneous, because a declaratory relief action to determine rights relating to an attorney lien is not a claim based on attorney malpractice.

"When reviewing an order sustaining a demurrer, we review the trial court's ruling de novo, exercising our independent judgment to determine whether the complaint states a cause of action under any legal theory. [Citation.] We accept as true the properly pleaded allegations of facts in the complaint, but not the contentions, deductions or conclusions of fact or law." (*Ochs v. PacifiCare of California* (2004) 115 Cal.App.4th 782, 788 (*Ochs*).) "'A motion for judgment on the pleadings is equivalent to a demurrer and is governed by the same de novo standard of review.'" (*People ex rel. Harris v. Pac Anchor Transportation, Inc.* (2014) 59 Cal.4th 772, 777.)

In the declaratory relief causes of action in both the Roth complaint and the WMI complaint, Roth and WMI alleged in identical language that E&C "withdrew as counsel for WMI and/or Roth without justifiable cause. [¶] As such, plaintiff seeks a declaration that [E&C] is not entitled to any fee whatsoever in the Becker Case, and that [E&C's] lien filed in the Becker Case should be released."

Roth and WMI assert that the declaratory relief causes of action are distinct from an attorney malpractice claim, because "an action to enforce a lien doesn't require a showing that the attorney was negligent or violated professional rules or standards." E&C argues that the claim is one for attorney malpractice, because in their respective complaints Roth and WMI alleged that E&C was not entitled to collect on the lien due to professional misconduct. E&C also contends that the declaratory relief cause of action "arises out of the attorney-client relationship between WMI and E&C and, as such, sounds in legal malpractice."

Both parties cite *Lee v. Hanley* (2015) 61 Cal.4th 1225 (*Lee*), in which the Supreme Court considered which claims are governed by the statute of limitations in section 340.6(a). That statute applies to "[a]n action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services." (§ 340.6(a).) In *Lee*, the plaintiff, Lee, hired an attorney, Hanley, to represent her in litigation. Lee advanced $110,000 to be used as attorney fees, and $10,000 for expert witness fees. (*Id*. at p. 1230.) The litigation settled, and shortly thereafter Hanley sent Lee a letter stating that she had a credit balance of more than $46,000. (*Ibid.*) When Lee requested a final billing statement and refund,

however, Hanley told her that there was no credit balance and she would not be receiving a refund. (*Ibid*.)

On December 6, 2010, Lee sent Hanley a demand letter. (*Lee, supra*, 61 Cal.4th at p. 1230.) Hanley returned a portion of Lee's unused expert witness fees, but refused to return any unused attorney fees. On December 21, 2011, more than a year after her demand letter, Lee sued and alleged that Hanley was unjustly enriched by retaining the unused attorney fees. (*Id*. at p. 1231.) Hanley demurred, asserting that Lee's claims were barred by the one-year statute of limitations in section 340.6(a). (*Ibid.*) The trial court sustained the demurrer, the Court of Appeal reversed, and the Supreme Court granted review.

The Supreme Court held that "section 340.6(a)'s time bar applies to claims whose merits necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services. . . . By contrast . . ., section 340.6(a) does not bar a claim for wrongdoing—for example, garden-variety theft—that does not require proof that the attorney has violated a professional obligation." (*Lee, supra,* 61 Cal.4th at pp. 1236-1237.) The court continued, "[W]e conclude that the trial court erred in sustaining the demurrer on section 340.6(a) grounds because, based solely on the allegations in the relevant complaint, Lee's lawsuit is not necessarily barred." (*Id.* at p. 1240.) It explained, "Lee's complaint may be construed to allege that Hanley is liable for conversion for simply refusing to return an identifiable sum of Lee's money. Thus, at least one of Lee's claims does not necessarily depend on proof that Hanley violated a professional obligation in the course of providing professional services. Of course, Lee's allegations, if true, may also establish that Hanley has violated certain professional

obligations . . . . But because Lee's claim of conversion does not necessarily depend on proof that Hanley violated a professional obligation, her suit is not barred by section 340.6(a)." (*Ibid.*)

Thus, according to *Lee*, if an action depends on proof that an attorney violated a professional obligation, that action may be properly classified as professional negligence. Roth and WMI assert that this definition does not apply to an action regarding enforcement of an attorney lien, which can be resolved in a declaratory relief action without any proof that the attorney violated professional obligations. We therefore consider the requirements for recovery on attorney liens.

"An attorney's lien is created . . . by an attorney fee contract with an express provision regarding the lien or by implication in a retainer agreement that provides the attorney will be paid for services rendered from the judgment itself." (*Mojtahedi v. Vargas* (2014) 228 Cal.App.4th 974, 977. "After the client obtains a judgment, the attorney must bring a separate, independent action against the client to establish the existence of the lien, to determine the amount of the lien, and to enforce it." (*Carroll v. Interstate Brands Corp*. (2002) 99 Cal.App.4th 1168, 1173; see also *Mojtahedi, supra,* 228 Cal.App.4th at p. 977.)

However, the mere existence of an attorney lien does not mean that the attorney is entitled to be paid for the legal work done in the case. "The rules on recovery after a separation between client and attorney in a contingency fee case depend on exactly who wanted out of the relationship and why. . . . If the client fires the attorney, the law is clear that the attorney may assert a quantum meruit claim against any recovery." (*Rus, Miliband & Smith v. Conkle & Olesten* (2003) 113 Cal.App.4th 656, 671 (*Rus*).) But "when the attorney leaves without having

been discharged by the client," the attorney's "claim to a subsequent recovery depends on whether the attorney had 'justifiable cause so as to permit a recovery of compensation.'" (*Id*. at p. 672.) "[A]n attorney who withdraws without justifiable cause may not recover any attorney fees under a contingency fee agreement." (*Duchrow v. Forrest* (2013) 215 Cal.App.4th 1359, 1382.) "[T]he justifiability of the reason for withdrawal is dependent on the particular facts of the case." (*Rus, supra,* 113 Cal.App.4th at p. 672.) "The law governing an attorney's right or duty to merely withdraw from a case—and be done with it for good—is a 'different question' than an attorney's right to withdraw and then *later* recover." (*Id.* at p. 673.) "Good cause to withdraw is not necessarily good cause to recover money obtained in a settlement after withdrawal." (*Ibid.*)

It seems clear that an independent action to recover on an attorney lien, when brought by an attorney against a client, could not reasonably be considered an attorney malpractice claim. E&C does not assert otherwise. Indeed, on January 22, 2019, while these appeals were pending, E&C filed a complaint against WMI for "breach of written contract, quantum meruit, declaratory relief, and enforcement of attorney's lien." Appellants requested that we take judicial notice of E&C's complaint, and we granted the motion.[4] In its declaratory relief

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[4] We asked the parties to file letter briefs addressing whether E&C's complaint had any effect on the issues before us. The parties all agreed that it did not. E&C also used its letter brief as a sur-reply to address substantive arguments about *Rus, supra*, 113 Cal.App.4th 656 and *Estate of Falco* (1987) 188 Cal.App.3d 1004, which Roth and WMI discussed in their opening brief but E&C did not mention in its respondent's brief. This discussion did not respond to our inquiry, was inappropriate, and

cause of action, E&C stated that there is "a controversy concerning the existence, amount, and enforceability of a lien granted to [E&C] granted by [WMI] under the [retainer agreement]." It requested "a judicial determination and declaration of the parties' respective rights, duties, and obligations under the Agreement in question."

The case before us is unique in that instead of the attorney or law firm initiating the action to recover on the lien, a third party (Roth) and the client (WMI) initiated the action seeking a declaration of the parties' rights. In so doing, Roth and WMI asserted what would have been an affirmative defense had E&C initiated the action: that E&C withdrew from the Becker action without justifiable cause, and therefore was not entitled to recover attorney fees. Indeed, this is the exact language both Roth and WMI used in their complaints: "As set forth hereinabove, [E&C] withdrew as counsel for WMI and/or Roth without justifiable cause."

E&C asserts that this language by its nature invokes principles of professional negligence: "[D]etermining whether E&C's withdrawal as WMI's counsel in the Becker Action was 'justifiable' necessarily requires an assessment of whether E&C violated its professional duties to WMI in connection with terminating its attorney-client relationship with WMI." E&C cites no authority stating that determining whether a withdrawal was without justifiable cause for purposes of later entitlement to fees *necessarily* equates to a breach of professional duties. But

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has not been considered. With its letter brief, Roth and WMI also filed a request for judicial notice of an attorney fee order filed in the WMI action in August 2019. The order is not relevant to the issues before us, and as such the request is denied.

even assuming that this statement is correct, a cause of action for declaratory relief on an attorney lien—which itself is not a claim for legal malpractice, given that the same relief could be sought by the attorney—does not become a claim for legal malpractice simply because some of the same principles might be relevant in determining the parties' respective rights.

Lee is instructive. As previously noted, the court stated, "[B]ecause Lee's claim of conversion does not necessarily depend on proof that Hanley violated a professional obligation, her suit is not barred by section 340.6(a)." (*Lee, supra,* 61 Cal.4th at p. 1240.) Here, the determination of entitlement to payment pursuant to the lien does not depend on proof that E&C violated professional obligations. Declaratory relief on the lien may be resolved by a finding that E&C withdrew from the Becker action *with* justifiable cause—impliedly finding that E&C did not breach any professional responsibilities—and therefore E&C is entitled to recover its attorney fees. Indeed, the parties' rights on an attorney lien may be determined without any consideration as to whether the law firm violated its professional duties.

E&C points out that Roth and WMI incorporated the factual allegations of malpractice into their declaratory relief causes of action, and assert that the declaratory relief causes of action must be read as malpractice, unless "this Court simply ignore[s] [the] allegations that form the gravamen of" Roth and WMI's complaints. We disagree. A plaintiff is the master of his or her complaint (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1202), and may allege the causes of action he or she chooses. Moreover, "[i]t is well established that 'a party may plead in the alternative and may make inconsistent allegations.'" (*Third Eye Blind, Inc. v. Near North Entertainment Ins. Services,*

LLC (2005) 127 Cal.App.4th 1311, 1323.) E&C cites no authority, and we have found none, holding that a plaintiff's allegation of non-essential facts or facts supporting an alternative theory may undermine an otherwise viable cause of action. To the contrary, "unnecessary allegations" in a pleading "'will be treated as surplusage unless the opposing party would be prejudiced.'" (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945; see also *Zakk v. Diesel* (2019) 33 Cal.App.5th 431, 446 [on demurrer, "'the complaint will be held good although the facts may not be clearly stated, or may be intermingled with a statement of other facts irrelevant to the cause of action shown.'"].)

Roth and WMI asserted viable claims for declaratory relief relating to the Becker action lien, and Roth's and WMI's incorporation of malpractice-based facts into their causes of action for declaratory relief does not undermine those otherwise viable causes of action. A demurrer or judgment on the pleadings is not warranted when "the complaint states a cause of action under *any* legal theory." (*Ochs, supra*, 115 Cal.App.4th at p. 788 [emphasis added].) Thus, the trial court erred by holding that both the Roth and WMI causes of action for declaratory relief were claims for attorney malpractice.

B. Roth had standing to assert a declaratory relief cause of action relating to the lien

E&C asserts that Roth did not have standing to assert his declaratory relief claim, because "it is well-established, black letter law in California that legal malpractice claims . . . are not assignable." (See, e.g., *Kracht v. Perrin, Gartland & Doyle, supra,* 219 Cal.App.3d at p. 1023 ["a former client may not voluntarily assign his claims for legal malpractice against his former attorneys."]; *Fireman's Fund Ins. Co. v. McDonald, Hecht*

& Solberg (1994) 30 Cal.App.4th 1373, 1378 [it is "'well settled' that a legal malpractice action is personal to the plaintiff and cannot be assigned."].)

E&C's argument embraces the reasoning of the trial court, which granted E&C's judgment on the pleadings in the Roth action on the basis that WMI, not Roth, was E&C's client. The court acknowledged that attorney malpractice claims cannot be assigned, and held that therefore Roth lacked standing to assert a declaratory relief claim against E&C. However, as discussed above, we find that the declaratory relief cause of action was not an attorney malpractice claim. Thus, the rule against assigning attorney malpractice claims does not bar Roth from bringing a declaratory relief claim regarding the lien.

Roth, as a party to the Becker settlement, which was encumbered by the attorney lien, had standing to assert a declaratory relief action to determine the parties' respective rights. "Any person interested under a written instrument . . . or under a contract . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties." (§1060.) The requested declaration of rights "may be either affirmative or negative in form and effect." (*Ibid.*) "The fundamental basis of declaratory relief is the existence of an actual, present controversy over a proper subject." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79, citing 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 817, p. 273.)

Here, because WMI had assigned its rights to Roth, the settlement agreement in the Becker action was between the Becker parties on one hand, and Roth on the other. The

settlement agreement stated, "No funds to be released prior to obtaining a release of prior counsel's lien." Thus, Roth's entitlement to the settlement proceeds was directly affected by the lien, even though he was not E&C's client and did not have standing to assert a malpractice claim. Roth therefore was a "person interested" in the settlement agreement, and there was "an actual controversy relating to the legal rights and duties" of Roth and E&C with respect to the settlement.

E&C is correct that a determination of E&C's entitlement to collect its unpaid attorney fees under the lien relies, at least in part, on the circumstances of its withdrawal from the Becker action. Therefore, a determination of E&C's entitlement to fees turns on the relationship between E&C and WMI, not non-client Roth. However, because E&C had a lien on any recovery in the Becker action, and Roth, not WMI, is a party to the Becker settlement, Roth has standing to assert a declaratory relief action as it related to E&C's lien.

C. The statute of limitations in section 340.6(a) did not bar Roth's or WMI's declaratory relief claim.

E&C also asserts the trial court was correct in finding that WMI's complaint was time-barred. It also contends that although the trial court rejected its timeliness argument in the Roth action below, the Roth complaint was also time-barred. E&C bases these arguments on the assumption that these claims sound in attorney malpractice, and the statute of limitations in section 340.6(a) applies. That statute states that attorney malpractice must be asserted one year after the client discovers or should have discovered the wrongful act, or no later than four years after the wrongful act. (§ 340.6(a).) E&C argues that the one-year statute accrued when Roth or WMI became aware of

E&C's alleged malpractice—no later than December 2014, when WMI and E&C began to communicate about E&C withdrawing from the Becker action. E&C acknowledges that accrual is tolled while the "attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred" (§340.6(a)(2)), and therefore the statute of limitations as to WMI began to run upon E&C's withdrawal from the Becker action in January 2015. E&C argues that because the Roth complaint was filed in June 2016, and the WMI complaint was filed in September 2017, both actions were time barred.

Although the trial court denied E&C's motion for judgment on the pleadings in the Roth action on statute of limitations grounds, the court sustained E&C's demurrer in the WMI action on that basis. The court held that the limitations period in section 340.6(a) applied, and WMI knew of any wrongdoing no later than the date the Roth action was filed in June 2016. As the WMI complaint was filed more than a year later, in September 2017, the court held that it was time-barred.

As discussed above, the declaratory relief causes of action are not claims for attorney malpractice. Therefore, the trial court erred in finding that section 340.6(a) is the applicable statute of limitations, and that WMI's cause of action for declaratory relief was time-barred under this statute. We also reject E&C's argument that Roth's declaratory relief cause of action was barred under section 340.6(a).

D. E&C is not entitled to attorney fees in the Roth action because it is not the prevailing party

E&C cross-appealed the court's order denying its motion for attorney fees in the Roth action. As discussed above, after the trial court granted E&C's motion for judgment on the pleadings

in the Roth action, E&C moved for an award of attorney fees. E&C asserted that because the court found in its favor, E&C was "the prevailing party in this action and, as such, is entitled to recover the reasonable attorneys' fees it incurred in defense of this action." It cited the retainer agreement, which stated in part, "If an arbitration or lawsuit arises concerning a dispute relating to the validity or enforcement of this Agreement, the prevailing party shall be entitled to collect reasonable attorneys' fees incurred in the course of prosecuting or defending the claim, including for time spent by attorneys and/or paralegals of the Firm. Similarly, if a party expends funds to enforce the terms of this Agreement, the prevailing party shall be entitled to collect reasonable attorneys' fees."

The court denied the motion, holding that Roth was not a party to the retainer agreement and therefore was not bound by it. In its cross-appeal, E&C asserts that the trial court erred in denying the motion, because the retainer agreement anticipates that a non-party may be liable for attorney fees. "On appeal, a determination of the legal basis for an attorney fees award is reviewed de novo as a question of law." (*Cargill, Inc. v. Souza, supra,* 201 Cal.App.4th at p. 966.)

The retainer agreement stated that the prevailing party shall be entitled to reasonable attorney fees. In light of our holding that the motion for judgment on the pleadings should have been denied as to the declaratory relief cause of action, there is no prevailing party. Thus, there is no basis for an award of attorney fees under the retainer agreement.

E&C also asserts that it is entitled to attorney fees under Civil Code section 1717, which states that a "prevailing party" in a contract action is entitled to fees when the contract provides for

it. (Civ. Code, § 1717, subd. (a).) As E&C is not the prevailing party, Civil Code section 1717 also does not compel a finding that E&C is entitled to collect attorney fees.

The parties' briefs include extensive discussion about whether Roth, who was not a party to the retainer agreement, can be compelled to pay attorney fees under the retainer agreement. As we find that the denial of the attorney fee request was appropriate given our reversal of the judgment on the pleadings, we express no opinion on this issue.

DISPOSITION

The judgments against Roth and WMI are reversed as to the causes of action for declaratory relief. The court's order on E&C's motion for attorney fees is affirmed. Roth and WMI are entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, ACTING P.J.

CURREY, J.