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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

3123 SMB LLC, Plaintiff and Appellant, v. STEVEN J. HORN, Defendant and Respondent.	B294372 (Los Angeles County Super. Ct. No. BC705753)

APPEAL from an order of the Superior Court of Los Angeles County, David Sotelo, Judge. Affirmed.

Kling Law Firm and Anthony N. Kling for Plaintiff and Appellant.

Skane Wilcox, Wendy L. Wilcox and Jonathan Belaga for Defendant and Respondent.

Plaintiff and appellant 3123 SMB LLC (SMB) appeals an order dismissing its legal malpractice action against defendant and respondent Steven J. Horn (Horn) following the sustaining of a demurrer on statute of limitations grounds (Code Civ. Proc., § 340.6) without leave to amend.[1]

The trial court properly held that SMB's action is time-barred because the statute of limitations was not tolled while SMB's action against Horn was pending in federal court. Therefore, the order of dismissal is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Horn's representation of SMB in the underlying action; the action terminated in an involuntary dismissal because it was not brought to trial within five years.*

Horn represented SMB in the underlying civil action of *Kling, et al. v. Hassid, et al*. (L.A. Super. Ct. No. SC098810). SMB discharged Horn on October 27, 2013, and on November 1, 2013, the trial court entered an order allowing Horn to withdraw as counsel.

Ten months later, on August 27, 2014, the trial court granted a defense motion to dismiss the action for failure to bring it to trial within five years. (§§ 583.310, 583.360.) In ruling on the matter, the trial court stated: "This is an unfortunate case, one in which plaintiffs personally, who filed their action on July 1, 2008, by their own actions and repeated refusals to comply with rules [with] which all parties have to comply in preparing

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[1] The order of dismissal is appealable. (Code Civ. Proc., § 581d.) All further statutory references are to the Code of Civil Procedure, unless otherwise specified.

cases for trial, have so mishandled their own case that they have brought about this result."

2. *SMB's federal action against Horn, which was dismissed on jurisdictional grounds.*

On October 20, 2014, SMB filed a legal malpractice action against Horn in the United States District Court for the Central District of California. On February 6, 2016, the district court dismissed the federal action for lack of diversity jurisdiction because both parties were California citizens.

SMB appealed the dismissal. The Ninth Circuit conditionally reversed and remanded, stating that based on the " 'slim record,' " it appeared that Lincoln One Corporation, the sole member of SMB, a limited liability company, had its principal place of business in Missouri, not California. However, the Ninth Circuit left open the possibility that subject matter jurisdiction was nonetheless absent due to "jurisdictional manipulation."

Upon remand, on May 7, 2018, the district court dismissed the action for a second time, stating "[t]his is the strongest jurisdictional manipulation showing that is likely to come before this Court." The district court found that "lacking legitimate federal jurisdiction, Lincoln One was formed to manufacture it," and that Lincoln One "has no apparent purpose other than to exist on paper and to be a Missouri citizen."[2]

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[2] SMB asserts the May 7, 2018 dismissal decision by the district court is an unpublished opinion that cannot be cited. The argument is meritless. "Although we may not rely on unpublished California cases, the California Rules of Court do not prohibit citation to unpublished federal cases, which may properly be cited as persuasive, although not binding, authority." (*Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP*

3. *The instant malpractice action against Horn.*

a. *SMB's complaint.*

On May 9, 2018, two days after the dismissal of the federal action, SMB filed a complaint against Horn in superior court, alleging a single cause of action for legal malpractice.[3] The gravamen of the malpractice action is that before Horn withdrew from the underlying action, he failed to comply with the trial court's order to produce, serve, and lodge a long cause trial binder. As a result, according to SMB, the underlying case was not ready for trial within five years, and Horn's conduct caused or contributed to the involuntary dismissal of SMB's action.

b. *Horn's demurrer to SMB's complaint for legal malpractice.*

On August 14, 2018, Horn filed a demurrer, asserting that SMB's sole cause of action against him for legal malpractice was time-barred pursuant to section 340.6, which requires an action to be "commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, 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, subd. (a), italics added.) Here, SMB was aware of

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(2010) 183 Cal.App.4th 238, 251, fn. 6, citing Cal. Rules of Court, rule 8.1115.) Moreover, we refer to the May 7, 2018 district court decision not as legal authority, but merely as part of the procedural background of this matter.

[3] We note there is also a related case (L.A. Super. Ct. No. BC682318), in which SMB and others sued Horn for damages and declaratory relief based on allegations that they are entitled to recover fees charged by Horn, who had represented some of the plaintiffs. The related case is not the subject of this appeal.

the pertinent facts no later than August 27, 2014, when the trial court dismissed the underlying action for failing to bring it to trial within five years. SMB had one year from that date to bring suit. (§ 340.6, subd. (a.) SMB did not file the instant action until May 9, 2018, nearly three years after the time to do so expired.

Horn further contended that SMB could not argue that the statute of limitations was tolled during the pendency of the federal action because section 340.6 is tolled only under the specific circumstances set forth in the statute, and none of those circumstances applied here.

c. *SMB's response to Horn's demurrer*.

On September 10, 2018, in response to the demurrer, SMB filed a first amended complaint (FAC), again alleging a single cause of action against Horn for attorney malpractice. SMB reiterated its theory that Horn's failure to comply with the trial court's long cause binder order "caused or contributed" to the underlying action being dismissed under the five-year rule.

SMB concurrently filed an opposition to Horn's demurrer. SMB made a number of procedural arguments. It asserted that Horn's demurrer was moot due to SMB's filing of the FAC, Horn failed to properly notice the hearing date for the demurrer, and Horn's electronic service of the demurrer was improper because SMB had not agreed to accept electronic service. With respect to the merits, SMB argued its complaint was timely because California law provides for equitable tolling when an action is timely commenced in federal court, and therefore, SMB's refiling its legal malpractice action in state court just two days after the dismissal by the district court was proper.

d. *Trial court's ruling.*

On October 15, 2018, the matter came on for hearing. The trial court ruled as follows:

"[Horn] filed a demurrer on August 14, 2018. The reservation receipt attached as the last page to the demurrer indicates that the original hearing date was September 5, 2018, although the caption page lists the hearing date as September 11, 2018. In either event, on September 10, 2018, [SMB] filed a first amended complaint, and in its opposition to the demurrer filed that same day stated that [the] amended complaint is timely because the hearing date is September 24, 2018.

"Finding no evidence in the record that the hearing date was ever actually scheduled for September 24, 2018, and given that [SMB] has misled the Court in other matters . . . , the Court hereby STRIKES the first amended complaint as improperly filed. (See CCP § 472(a) ['A party may amend its pleading once without leave of court at any time before the answer, demurrer, or motion to strike is filed, or after a demurrer or motion to strike is filed but before the demurrer or motion to strike is heard if the amended pleading is filed and served no later than the date for filing an opposition to the demurrer or motion to strike.']

"Even assuming the first amended complaint were the operative complaint, it would fail for the same reason the original complaint does. Both complaints allege a single cause of action for attorney malpractice . . . . [T]he cause of action is time-barred under . . . section 340.6."

On December 11, 2018, SMB filed a premature but timely notice of appeal from the order of dismissal entered on February 21, 2019. (Cal. Rules of Court, rule 8.104(d).)

CONTENTIONS

SMB contends: the instant action was timely filed because the federal action was filed within the limitations period, and after the federal action was dismissed without prejudice, it was promptly refiled in state court; the demurrer should have been taken off calendar because SMB did not consent to electronic service; and the timely filing of the FAC rendered moot both the original complaint and the demurrer thereto.

DISCUSSION

1. *Standard of appellate review.*

" ' "On appeal from an order of dismissal after an order sustaining a demurrer, our standard of review is de novo, i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law." ' (*Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 650.) In reviewing the complaint, 'we must assume the truth of all facts properly pleaded by the plaintiffs, as well as those that are judicially noticeable.' (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814.) We may affirm on any basis stated in the demurrer, regardless of the ground on which the trial court based its ruling. (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324.)" (*Krolikowski v. San Diego City Employees' Retirement System* (2018) 24 Cal.App.5th 537, 549.)

2. *Trial court properly sustained Horn's demurrer without leave to amend because section 340.6 does not provide for tolling while an action is pending in federal court.*

a. *SMB's theory as to why the instant action was filed timely.*

SMB's calculation is as follows. Pursuant to section 340.6, it had one year to file suit against Horn, commencing either on

October 27, 2013, when SMB discharged Horn, or on November 1, 2013, when the trial court in the underlying action granted Horn's request to withdraw as counsel. Assuming the latter date of November 1, 2013 date is controlling, SMB timely filed the federal action on October 20, 2014, on the 354th day after the November 1, 2013 order. By filing in federal court, SMB "stopped the clock," so as to suspend the running of the statute of limitations. When the district court dismissed the federal action on May 7, 2018, the statute of limitations began to run again. At that juncture, 11 days remained of the one-year period. SMB promptly refiled its action in state court a mere two days later, making this action timely.[4]

Thus, the essential issue presented is whether the statute of limitations was tolled during the pendency of SMB's federal action against Horn.

b. *Section 340.6 and its exclusive tolling provisions*.

The controlling statute, section 340.6, states in relevant part: "(a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, *whichever occurs first*. . . . Except for a claim for which

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[4] We note SMB's "start/stop" theory is similar to the rule for calculating the statute of limitations for commencing a malicious prosecution action when an appeal is taken in the underlying litigation. (*Roger Cleveland Golf Co., Inc. v. Krane & Smith, APC* (2014) 225 Cal.App.4th 660, 668, disapproved on other grounds by *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1239.)

the plaintiff is required to establish his or her factual innocence, in no event shall the time for commencement of legal action exceed four years *except that the period shall be tolled during the time that any of the following exist*:

"(1) The plaintiff has not sustained actual injury.

"(2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred.

"(3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation.

"(4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action." (§ 340.6, italics added.)

The tolling provisions set forth in the statute are exclusive. As the Supreme Court stated in *Laird v. Blacker* (1992) 2 Cal.4th 606, 618 (*Laird*), "[s]ection 340.6, subdivision (a), states that 'in no event' shall the prescriptive period be tolled except under those circumstances specified in the statute. Thus, the Legislature expressly intended to disallow tolling under any circumstances not enumerated in the statute." (Accord, *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 371; *Gordon v. Law Offices of Aguirre & Meyer* (1999) 70 Cal.App.4th 972, 979.)

The issue in *Laird* was whether the one-year statute of limitations for attorney malpractice actions is tolled during the pendency of an appeal by the client from the underlying judgment on which the claim of malpractice is based. (*Laird*, *supra*, 2 Cal.4th at p. 608.) *Laird* held that under section 340.6, the statute of limitations for legal malpractice actions commences

upon the entry of an adverse judgment or final order of dismissal, and is not tolled during the time the client appeals from the underlying judgment. (*Id.* at p. 615.) *Laird* reasoned: "We cannot rewrite section 340.6 to adopt the rule advocated by plaintiff. The statute is clear on its face and the Legislature has provided for tolling in specific enumerated circumstances, none of which apply here. *As noted above, the Legislature intended that 'in no event' should the limitations period be tolled except as stated in the statute*." (*Id.* at pp. 620-621, italics added.)

c. *Because section 340.6 does not allow for tolling while an action is pending in federal court, SMB's action is time-barred.*

Guided by *Laird*, we conclude that section 340.6 does not allow for tolling while an action is pending in federal court. SMB contends *Laird* is inapposite because unlike the instant case, it did not involve a state court refiling of a timely filed federal action that had been dismissed. The argument is unavailing. Irrespective of the factual distinction identified by SMB, we are bound by the Supreme Court's broad holding in *Laird* that "the Legislature intended that 'in no event' should the limitations period be tolled except as stated in the statute." *(Laird*, *supra*, 2 Cal.4th at p. 621; see *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we cannot enlarge the circumstances in which section 340.6 is tolled to provide for tolling in the instant fact situation.[5]

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[5] In support of its theory that the statute of limitations was tolled during the pendency of the federal action, SMB principally relies on *Collier v. City of Pasadena* (1983) 142 Cal.App.3d 917 (*Collier*) and *Addison v. California* (1978) 21 Cal.3d 313 (*Addison*). However, those decisions do not involve section 340.6

In sum, the statute of limitations for the legal malpractice action accrued no later than August 27, 2014, the date the trial court dismissed the underlying action under the five-year rule. SMB had one year from that date to commence this action. (§ 340.6, subd. (a).) Because the statute of limitations was *not* tolled during the pendency of the federal action, the trial court properly held that the original complaint, which was not filed until May 9, 2018, is time-barred. Further, as the trial court found, the FAC suffered from the same infirmity as the original complaint.

Additionally, SMB has not shown that it is capable of amending its pleading to allege it timely filed the legal malpractice action in superior court. Therefore, the trial court properly sustained Horn's demurrer without leave to amend.

3. *SMB's remaining arguments are meritless.*

a. *Electronic service of the demurrer.*

SMB contends the electronically served demurer was improper because SMB never consented to electronic service in this action, and therefore the demurrer should have been taken off calendar.

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and therefore are not helpful. *Collier* addressed whether filing a workers' compensation claim equitably tolls a statute of limitation for filing a disability pension claim arising out of the same disabling injury. (*Collier*, *supra*, 142 Cal.App.3d at p. 919.) *Addison* involved the Tort Claims Act (Gov. Code, § 810 et seq.), and it held the filing of an action in the United States District Court suspends the running of the six-month limitations period (Gov. Code, § 945.6) within which suit must be brought against a public entity in state court. (*Addison*, *supra*, 21 Cal.3d at p. 315.)

The argument is unavailing because SMB opposed the demurrer on the merits, filed the FAC in response to the demurrer, and appeared at the hearing on the demurrer. Therefore, any issue with respect to the mode of service is an irrelevancy. "[A] party who appears and contests a motion in the court below cannot object on appeal . . . that he had no notice of the motion or that the notice was insufficient or defective.' [Citations.]" (*Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 8.)

b. *The effect of the filing of the FAC.*

SMB contends its filing of the FAC mooted the original complaint and the demurrer thereto, and therefore the trial court could not enter a ruling on the demurrer.

As indicated, the trial court struck the FAC pursuant to section 472, subdivision (a), but further ruled that "[e]ven assuming the first amended complaint were the operative complaint, it would fail for the same reason the original complaint does. Both complaints allege a single cause of action for attorney malpractice . . . . [T]he cause of action is time-barred under . . . section 340.6."

The sufficiency of a pleading presents a pure question of law which we review de novo. (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089, fn. 10.) As discussed, both the original complaint and the FAC failed to state a cause of action due to the bar of the statute of limitations, and SMB failed to show that it is capable of amending its pleading to state a cause of action. Therefore, SMB cannot show that any procedural error, if it occurred, was prejudicial.

DISPOSITION

The order of dismissal is affirmed. Horn shall recover his costs on appeal.

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EDMON, P. J.

We concur:

EGERTON, J.

DHANIDINA, J.