Filed 2/5/15 Gunter v. Malanga CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JEFFREY R. GUNTER et al., Plaintiffs and Appellants, v. GERALD MALANGA, Defendant and Respondent.	B253621 (Los Angeles County Super. Ct. No. BC501454)

APPEAL from a judgment of the Superior Court of Los Angeles County, Holly E. Kendig, Judge. Reversed with directions.

Timothy D. McGonigle for Plaintiffs and Appellants.

Nemecek & Cole, Jonathan B. Cole, Mark Schaeffer and David B. Owen for Defendant and Respondent.

****

This is a legal malpractice lawsuit against Attorney Gerald Malanga for failing to identify the alleged legal malpractice of another attorney. The trial court sustained Malanga's demurrer to the first amended complaint without leave to amend, finding the lawsuit barred by the statute of limitations. On appeal, we conclude the trial court should have allowed leave to amend to assert equitable estoppel as a potentially valid defense to the statute of limitations.

FACTS AND PROCEDURE

1. The Court Sustains Malanga's Demurrer

According to the allegations in the first amended complaint, on February 17, 2000, appellants Jeffrey and Johanna Gunter entered into a construction agreement with Hans Kostrzewski to demolish their residence and construct a new single family residence. The Gunters hired Attorney Robert Mann to represent them in a dispute with Kostrzewski. Mann allegedly sent a letter terminating Kostrzewski without considering a 15-day termination provision in the construction agreement.

Subsequently, in July 2003, Kostrzewski sought $518,874 as payment due under his construction agreement with the Gunters. In November 2003, the Gunters retained Malanga to represent them in a lawsuit with Kostrzewski and a subcontractor. In March 2004, George Calkins, a private mediator, conducted a mediation. Based on Kostrzewski's legal arguments at the mediation, Malanga should have known that Mann failed to terminate Kostrzewski in accordance with the procedure required by the construction agreement and should have warned the Gunters of the statute of limitations to file a legal malpractice action against Mann. Eventually following a binding arbitration the Gunters were ordered to pay Kostrzewski $560,115. The arbitrator concluded that Mann did not provide Kostrzewski with the notice required in the construction agreement. The Gunters challenged the arbitration award but eventually settled with Kostrzewski and a subcontractor.

Further according to the operative complaint, in January 2010, the Gunters sought to arbitrate their claims against Malanga. On January 26, 2010, the Gunters' counsel

demanded Malanga submit to arbitration. The following e-mails dated February 8, 2010, reflect a tolling agreement entered into by the parties.

Counsel for the Gunters wrote: "Please confirm today that your client acknowledges that the dispute is subject to binding arbitration per the retainer agreement he himself prepared, and that my demand constituted commencement of the action for purposes of the statute of limitations. Then let's talk about whether it is possible to resolve short of arbitration."

Counsel for Malanga responded: "I will agree that your demand constituted commencement of the action for S/Ls purposes which is all I think you need at this point. The rest of the issues are under discussion."

Counsel for the Gunters answered: "Does that mean you are not now acknowledging that your own client's retainer agreement requires binding arbitration?"

Counsel for Malanga responded: "I am not going to tell what I am thinking at the moment. I am researching certain issues which could potentially affect your right to compel binding arbitration. That is all. I should have an answer shortly. You have your agreement that the S/Ls is now deemed tolled so you are not prejudiced."

Subsequent to the e-mail discussion about arbitration, the parties negotiated the arbitration process and discussed who should conduct the arbitration. They appeared to agree to a three member panel. For example, counsel for Malanga wrote the following e-mail on October 3, 2011: "I did speak with my client. He, too, prefers the three member panel based upon the size of your clients' claim. He also preferred the AAA forum, per the underlying contract." Another e-mail from Malanga's counsel to the Gunters' counsel stated: "You and I need to discuss how we can select the panel, because we both may want a bit more control over the process than simply receiving a strike list from JAMS."

But then a year and a half later, on October 19, 2012, counsel for Malanga wrote counsel for the Gunters the following e-mail: "After discussing the matter with our clients and in light of the fact that there is no signed agreement to arbitrate, our clients

have decided to reject your proposal for arbitration. Thus, to the extent that your client deems it appropriate, you should proceed to file a complaint in the superior court."

On February 20, 2013, the Gunters sued Malanga for legal malpractice and breach of fiduciary duty. According to the Gunters, in addition to failing to advise the Gunters of Mann's negligence, Malanga also breached his duty of care by selecting an arbitrator who handled a prior mediation, failed to warn his client that the arbitrator had not made necessary disclosures, improperly told the Gunters that the arbitrator's decision was not binding; failed to disclose significant developments to the Gunters, and improperly threatened to withdraw if the Gunters wanted to proceed to trial.

Malanga demurred to the first amended complaint, arguing that the lawsuit was barred by the one-year statute of limitations governing legal malpractice lawsuits. The court sustained the demurrer and dismissed the lawsuit. The court concluded that the Gunters failed to file the lawsuit until more than three years after demanding arbitration and at least three years after Malanga ceased representing the Gunters. The court found equitable estoppel did not apply because the Gunters knew that they did not sign the arbitration agreement.

2. Events Subsequent to the Trial Court's Ruling

Subsequent to the court's ruling, the Gunters found a signed copy of their retainer agreement provided by Malanga. That agreement provided: "Any dispute concerning the terms and conditions of this RETAINER AGREEMENT and/or the legal services provided hereunder will be resolved through binding arbitration conducted under the rules of the American Arbitration Association." When the Gunters found a signed agreement to arbitrate, they again demanded Malanga arbitrate. Malanga refused and threatened the Gunters' attorney with sanctions for frivolously seeking arbitration.

In their appellate brief the Gunters assert that Malanga's representation of them ceased on August 4, 2009, and they had until August 4, 2010, to bring an action against Malanga. They assert that during that time period they made a written demand for arbitration by letter dated January 26, 2010. According to the Gunters, Malanga and his

counsel entered tolling agreements memorialized in the above quoted e-mail exchange. Four months after Malanga refused to arbitrate, the Gunters filed this litigation.

DISCUSSION

"We review de novo the trial court's order sustaining a demurrer. [Citation.] We assume the truth of all facts properly pleaded, and we accept as true all facts that may be implied or reasonably inferred from facts expressly alleged, unless they are contradicted by judicially noticed facts. [Citations.] . . . [Citation.] We give the complaint a reasonable interpretation and we read it in context. [Citation.] But we do not assume the truth of contentions, deductions or conclusions of fact or law." (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1468.) "It is an abuse of discretion to sustain a demurrer if there is a reasonable probability that the defect can be cured by amendment." (*Williams v. Housing Authority of Los Angeles* (2004) 121 Cal.App.4th 708, 719.)

The parties agree that the one-year statute of limitations in Code of Civil Procedure section 340.6 applies to this case.[1] They also agree that the lawsuit is untimely

---

[1] Code of Civil Procedure section 340.6 provides:

"(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. If the plaintiff is required to establish his or her factual innocence for an underlying criminal charge as an element of his or her claim, the action shall be commenced within two years after the plaintiff achieves postconviction exoneration in the form of a final judicial disposition of the criminal case. Except for a claim for which 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.

unless there is a valid tolling agreement or equitable estoppel bars Malanga from asserting the statute of limitations. We conclude that the Gunters have shown they should be able to amend the complaint to allege equitable estoppel. In contrast, the Gunters fail to show that they can allege a tolling agreement, rendering this lawsuit timely.

1. Tolling Agreement

The bulk of the Gunters' arguments seek to show that the February 8 e-mail exchange—standing alone—demonstrate this action was timely filed. They argue that the e-mail exchange shows that the parties intended to deem an arbitration demand equivalent to filing a lawsuit for purposes of the one-year statute of limitations in Code of Civil Procedure section 340.6. They argue the demand for arbitration "constituted actual commencement of the Gunters' action." They argue the e-mails provide an express written tolling agreement. None of their arguments have merit.

"Under California law, tolling generally refers to a suspension of a statute of limitations." (*Don Johnson Productions, Inc. v. Rysher* (2012) 209 Cal.App.4th 919, 929.) A defendant "waives the right to assert the tolling period counts as part of the time during which the statute of limitations is running." (*Ibid.*) Tolling agreements generally are favored because they help facilitate settlement. (*Id*. at p. 928.)

The February 8 e-mail exchange—which is the only evidence the Gunters cite of a tolling agreement—reflects no intention to suspend the statute of limitations through February 20, 2013, when the Gunters filed their lawsuit. The Gunters do not argue that they can amend the lawsuit to allege that a separate tolling agreement existed. Nor do they show that the parties agreed the arbitration demand would toll a civil lawsuit. Although filing a civil action tolls a statute of limitation in an arbitration agreement

---

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

"(b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of that act or event."

(Code Civ. Proc., § 1281.12), the Gunters cite no authority that sending a demand for arbitration tolls a statute of limitations for a later filed civil action.[2]

Cases relied on by the Gunters are inapposite. For example, *Donovan v. RRL Corp*. (2001) 26 Cal.4th 261, 270-271, describes general requirements for forming a contract. Here, there are allegations that the parties formed a tolling agreement, but no allegation that the tolling agreement extended to the date of the lawsuit. Similarly, the Gunters' heavy reliance on principles of contract interpretation is misplaced because the Gunters identify no principle that would extend the statute of limitations through February 2013 when they filed this lawsuit. Contrary to the Gunters' argument, the plain language of the February 8, 2010 e-mails does not extend the statute of limitations indefinitely.

None of the Gunters' proposed amendments demonstrate that the tolling agreement suspended the statute of limitations through February 20, 2013. They seek leave to assert the following facts: (1) they did not learn until October 2012 that Malanga believed the retainer agreement was not signed; (2) they have located a fully executed copy of the retainer agreement; (3) they did not appear at the mediation regarding Kostrzewski claims; (4) they would have objected to the mediator conducting the binding arbitration had they known it as the same person; (5) their attorney demanded arbitration on January 26, 2010, (6) Malanga suspected the Gunters might not be able to arbitrate because they could not find the executed copy of the agreement; (7) they filed their lawsuit four months after Malanga refused to arbitrate; (8) the delay in filing the action was because they were negotiating the process for the arbitration. None of these facts—

---

2 "The 'equitable tolling' doctrine 'reliev[es] plaintiff from the bar of a limitations statute when, possessing several legal remedies he, reasonably and in good faith, pursues one designed to lessen the extent of his injuries or damage.'" (*Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 409.) The Gunters do not rely on equitable tolling. They explain: ". . . Respondent continues to harp on the fact that the doctrine of equitable tolling does not apply to this case. Appellants have never argued that it did." "So that it is perfectly clear, Appellants are **NOT** relying on the doctrine of equitable tolling." (Boldface, capitalization and underscoring in original.)

assuming they are true—show that the parties had a tolling agreement extending the statute of limitations to February 20, 2013.

The Gunters also seek leave to amend to assert a cause of action for breach of contract. But they fail to identify the alleged contract or the alleged breach. Thus they have not demonstrated that leave to amend should have been granted to assert a cause of action for breach of contract. (*J.B. Aguerre, Inc. v. American Guarantee* (1997) 59 Cal.App.4th 6, 18 [it is the appellant's burden to show how a complaint may be amended].)

2. Equitable Estoppel

We now turn to the Gunters' contention that they should be able to pursue the claim that Malanga is equitably estopped from asserting the statute of limitations. "[E]quitable estoppel is available even where the limitations statute at issue expressly precludes equitable tolling." (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 383-384.) "One aspect of equitable estoppel is codified in Evidence Code section 623, which provides that '[w]henever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.' [Citation.] But '"[a]n estoppel may arise although there was no designed fraud on the part of the person sought to be estopped. [Citation.] To create an equitable estoppel, 'it is enough if the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss.' . . . '. . . Where the delay in commencing action is induced by the conduct of the defendant it cannot be availed of by him as a defense.'"'" (*Id*. at p. 384.) "'The statute of limitations was intended as a shield for [the defendant's] protection against stale claims, but he may not use it to perpetrate a fraud upon otherwise diligent suitors.'" (*McMackin v. Ehrheart* (2011) 194 Cal.App.4th 128, 142.)

Here the allegations in the operative pleading and other evidence in the record provided by Malanga suggests the Gunters may be able to amend their complaint to assert a claim for equitable estoppel. The Gunters may be able to allege that the delay in filing

the action was caused by Malanga. First, the Gunters demanded arbitration in January 2010. Malanga's counsel acknowledged the demand for arbitration and that it was timely when made. The parties negotiated the terms of the arbitration such as whether it would be before a single arbitrator or a panel of three arbitrators. Almost two years after the Gunters' demand for arbitration, while the Gunters were pursuing their rights, Malanga refused to arbitrate on the grounds that there was no fully executed arbitration agreement. An argument can be made that by negotiating the arbitration process, Malanga lured the Gunters into believing that he would arbitrate the dispute. The Gunters may be able to allege that they relied on the negotiation by refraining from filing a civil action during that time period. This argument is further supported by the fact that Malanga refused to arbitrate because he claimed the arbitration agreement was not signed, when he arguably should have known it was executed because it was his retainer agreement—the basis upon which he charged the Gunters for his services. On appeal, Malanga argues "the [retainer] agreement and its arbitration clause, signed or not, was enforceable." Malanga's argument further supports application of equitable estoppel because it suggests Malanga should have arbitrated the dispute when the Gunters demanded arbitration.

In short, leave to amend should have been granted for the Gunters to allege facts supporting the claim that Malanga's conduct induced them to forbear from filing suit. (See *Atwater Elementary School Dist. v. California Dept. of General Services* (2007) 41 Cal.4th 227, 233 [when delay in commencing lawsuit is induced by conduct of defendant he cannot assert statute of limitations as a defense]; see also *Battuello v. Battuello* (1998) 64 Cal.App.4th 842, 848 [equitable estoppel applied when defendant made promise which she revoked after statute of limitations passed].)

Malanga's argument that the Gunters' three-year delay in filing the lawsuit forecloses equity is disingenuous. The record indicates that Malanga's counsel agreed the Gunters timely demanded arbitration. Once they learned that Malanga refused to arbitrate the Gunters filed the lawsuit four months later—not three years later. Moreover, an arbitration would still be timely as the Gunters would have four years from the time Malanga refused to arbitrate to compel arbitration. (*Wagner Construction Co. v. Pacific*

Mechanical Corp. (2007) 41 Cal.4th 19, 29.) At a minimum, an argument could be made that the delay in filing the lawsuit was due to Malanga, not the Gunters, and the Gunters should have the opportunity to allege relevant facts.[3]

DISPOSITION

The judgment of dismissal is reversed. The superior court is directed to enter an order sustaining Malanga's demurrers with leave to amend to allege equitable estoppel. Appellants shall have their costs on appeal.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.

---

[3] We decline the Gunters' request to take judicial notice of several documents in the underlying litigation between the subcontractor and the Gunters. The Gunters fail to demonstrate the documents are relevant to any material issue on appeal.