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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

GORDON GREGORY et al., Plaintiffs and Appellants, v. VENBROOK INSURANCE SERVICES, LLC, et al., Defendants and Respondents.	B230860 (Los Angeles County Super. Ct. No. BC410220)
ERIC ALDEN et al., Plaintiffs and Appellants, v. VENBROOK INSURANCE SERVICES, LLC, et al., Defendants and Respondents.	B230876 (Los Angeles County Super. Ct. No. BC410228)

APPEALS from judgments of the Superior Court of Los Angeles County. Malcolm H. Mackey and Amy D. Hogue, Judges. Affirmed.

Law Offices of John A. Belcher, John A. Belcher and Nicholas W. Song for Plaintiffs and Appellants Gordon Gregory and Harvey Bibicoff.

Law Office of Nick A. Alden and Nick A. Alden for Plaintiffs and Appellants Eric Alden and Lorne Pollock.

Berman, Berman & Berman and William M. Aitken for Defendants and Respondents Venbrook Insurance Services, LLC and Mark Bishara.

DLA Piper, Shand S. Stephens, Eliot R. Hudson and Erin Frazor for Defendant and Respondent Swett & Crawford.

These two consolidated appeals involve a lawsuit by Gordon Gregory (Gregory) and Harvey Bibicoff (Bibicoff) and a separate lawsuit by Eric Alden (Alden) and Lorne Pollock (Pollock).[1] The lawsuits are against a retail broker named Venbrook Insurance Services, LLC, its principal Marc Bishara (collectively Venbrook), and a wholesale broker named Swett & Crawford (Swett) for various wrongs in connection with their placement of directors and officers insurance on behalf of Case Financial, Inc. (Case Financial). According to the directors, the respective trial courts erred by granting summary judgment or adjudication and eliminating negligence, contract and fiduciary duty claims based on the two-year statute of limitations in Code of Civil Procedure section 339.[2] In addition, Alden and Pollock maintain that the trial court in their case should have granted their motion for summary adjudication on the issue of liability, and

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[1] Collectively, we refer to Gregory, Bibicoff, Alden and Pollock as the directors.

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

that it erred when it granted judgment on the pleadings as to their claim for fraud. We find no error and affirm.

FACTS

Background

The Renewal Proposal Form; the policies

In 2004, Venbrook used Swett as an intermediary to obtain directors and officers insurance for Case Financial. The insurance was comprised of a $1 million primary policy issued by Landmark American Insurance Company (Landmark) and a $1.5 million excess policy issued by Admiral Insurance Company (Admiral) for the period of May 22, 2004, through May 22, 2005. In connection with obtaining the insurance, Venbrook submitted a Renewal Proposal Form to Admiral. The form was signed by Marc Bishara on May 22, 2004. In the form, Venbrook represented that Alden was Case Financial's chief executive officer and cochairman of the board of directors. The Renewal Proposal Form required the signature of Case Financial's chairman of the board of directors, president or chief financial officer. The signature of Alden, dated March 25, 2004, was placed on the form. At the time, Alden was no longer an officer or director of Case Financial. By March 2004, Bibicoff was the chief executive officer on an interim basis.

The Landmark policy utilized form RSG 221003 0204. In the exclusions, the policy stated that the Landmark would not, subject to certain exceptions, cover any claim made against any insured "[b]rought by or on behalf of any Insured, or which is brought by any security holder of the Insured Organization, whether directly or derivatively, unless such Claim is instigated and continued totally independent of, and totally without the solicitation, assistance, active participation or intervention, of any insured." The policy included a prior acts endorsement that stated: "The Insurer shall not be liable to make any payment for Loss arising out of or in connection with any Claim made against any Insured that alleges, arises out of, is based upon or attributable to, directly or indirectly, in whole or in part, related to any actual or alleged Wrongful Act which occurred prior to 5/22/02."

The insuring agreement in Admiral's policy stated: "This Policy provides excess coverage over the Underlying Insurance during the Policy Period. Coverage hereunder attaches only after the Underlying Insurance has been exhausted by payments, for losses and shall then apply in conformance with the provisions of the Primary Policy at its inception," except as provided.

The derivative action

In March 2005, the Canadian Commercial Workers Industry Pension Plan (CCWIPP) filed a derivative action against the directors (derivative action). According to the complaint: On May 24, 2002, a company called Asia Web purchased all of Case Financial's assets and assumed its business and name. Prior to the sale, the directors misrepresented the financial condition of Case Financial. Moreover, they failed to disclose a fraud audit letter regarding a lawyer that Case Financial owed $1.3 million, and they failed to disclose that promissory notes transferred in the sale were in default. After the sale, the directors took positions as directors and officers in Case Financial. Subsequently, they engaged in self-dealing and corporate waste in contravention of their duties of loyalty. CCWIPP alleged two causes of action for breach of fiduciary duty and one cause of action for fraud.

The directors tendered the derivative action to Landmark and Admiral.

Landmark's denial of coverage; Admiral's coverage position

On May 20, 2005, counsel for Landmark sent a letter denying coverage for the derivative action based on the insured v. insured and prior acts exclusions. Counsel wrote: "The involvement of Cliff Evans in this matter triggers [the insured v. insured] exclusion. From February through October 2004, Mr. Evans served as the chairman of the board of [Case Financial]. Therefore, he is an Insured under the Policy. Mr. Evans, however, also has overwhelming ties to CCWIPP, a major shareholder of [Case Financial] and the plaintiff in the derivative suit. In fact, Mr. Evans apparently created CCWIPP, currently sits on its board of trustees, and serves as chairman of its investment committee. Given these facts, it is evident that an Insured (Mr. Evans) has substantial connections to the derivative plaintiff CCWIPP." Moreover, "the evidence

overwhelmingly suggests that Mr. Evans is involved in CCWIPP's pursuit of the former [Case Financial] executives—when problems surfaced at [Case Financial], he appears to have seized control, cleaned house, and installed his old Asia Web partners to fix matters, which was immediately followed by his organization's commencement of action to pursue the old management for fraud and breaches of fiduciary duty." With respect to the prior acts exclusion, counsel explained: "May 22, 2002[,] was the effective date of the merger. Therefore, the exclusion excludes all Claims that arise out of or are related to Wrongful Acts committed prior to the . . . merger."

On October 25, 2005, counsel for Admiral sent a letter and stated: "At this time, Admiral must respectfully advise that it does not believe coverage exists for the [derivative action]." In the letter, counsel noted that Landmark had denied coverage based on the insured v. insured and prior acts exclusions. Then counsel stated: "This serves to advise [Case Financial] that Admiral adopts for itself Landmark's coverage position."

The 2005 lawsuits against Landmark

On July 18, 2005, Gregory and Bibicoff jointly sued Landmark for declaratory relief, breach of contract, breach of the duty to indemnify and bad faith arising from the denial of coverage. Alden and Pollock, in a separate lawsuit, also sued Landmark.

Settlement of the derivative action

Bibicoff, Gregory and Pollock settled with CCWIPP.

Landmark's payment

On February 27, 2009, Landmark paid policy limits.

Admiral's federal action

On March 17, 2009, Admiral sued the directors for declaratory relief to determine whether it was required to: (1) pay the amount Bibicoff, Gregory and Pollock expended in excess of the primary policy limits to defend and settle the derivative action, and (2) defend and indemnify Alden. Admiral alleged that there was no coverage based on the insured v. insured and prior acts exclusions. It also alleged that the amounts paid in settlement were not insured losses.

Gregory and Bibicoff's March 2009 Action

The first amended complaint

Gregory and Bibicoff filed a first amended complaint that alleged: "Venbrook agreed to work on behalf of Case Financial and its directors and officers to procure and maintain [Directors & Officers] insurance coverage. Venbrook agreed to procure and maintain a primary [Directors & Officers] insurance policy with [a previous carrier], then later [Landmark]. Venbrook also agreed to procure and maintain an excess liability policy with Admiral."

Royal Specialty issued a 2003-2004 policy that included Claims Made Form - Policy Form RSUIFP RI-00001 ED 4/93 For Profit.

For the 2004-2005 policy, the wholesale broker, Swett, sent a letter dated May 25, 2004, to Bibicoff and Alden through Case Financial's retail broker, Venbrook. The letter was captioned "Confirmation of Coverage Bound." (Capitalization omitted.) It stated that the "coverage outlined . . . may not conform to the terms and conditions you requested," and that the "document is intended for use of evidence that the insurance, as described herein, has been effected and shall be subject to all terms and conditions of policy(ies) which will be issued and that, in the event of any inconsistency herewith, the terms and provisions of such policy(ies) shall prevail." Landmark was identified as the provider of directors and officers liability coverage. The policy form was identified as "RSUIFP RI-00001 ED 4/93 For Profit" and a list of exclusions was provided, including an exclusion for prior acts.

In reliance on the description of coverage, Gregory and Bibicoff paid the premium to Landmark through Venbrook. Then, four months later, Landmark delivered a policy to Swett that contained a new base policy form which included an insured v. insured exclusion "and differed materially from the form" in Swett's May 25, 2004, letter describing the coverage.

Regarding the excess coverage provided by Admiral, the following occurred. In March 2004, after Alden had been removed as chief executive officer and replaced by Bibicoff, the Admiral Renewal Proposal Form became due. "Venbrook or someone

working on its behalf submitted a completed proposal form to Admiral. The proposal form contained a forged signature of [Alden] and was dated March 25, 2004." Venbrook understood that the Admiral Renewal Proposal Form required Case Financial's chairman of the board of directors, president, or chief executive officer to agree to the following statement: "The undersigned . . . declares that the statements set forth herein are true and correct and that thorough efforts have been made to obtain sufficient information from each and every Director and Officer proposed for this insurance to facilitate the proper and accurate completion of this [Renewal Proposal Form]." "At no time did Venbrook perform the due diligence to determine who was the Chairman of the Board of Directors, President, or Chief Executive Officer of Case Financial. . . . [¶] The decision to forge [Alden's] signature on the [Renewal Proposal Form] and misrepresent Alden's position in Case Financial was made exclusively by Venbrook. The misrepresentation in the [Renewal Proposal Form] provided Admiral with a basis to challenge its coverage obligations for the [derivative action]."

"Venbrook failed to accurately communicate the scope of coverage of the primary policy with Landmark. Venbrook transmitted a binder to the insureds which represented that the coverage would be based on a specific form. Venbrook also represented that the new policy would not contain a specific endorsement containing the 'insured vs. insured' exclusion. [¶] . . . Landmark, however, delivered an insurance policy which was based on a different insurance form. The new form did purport to contain the 'insured v. insured' exclusion. Venbrook failed to notify or alert the insureds of the change in the insurance form, or the inclusion of the 'insured vs. insured' exclusion. [¶] . . . Subsequently, Landmark denied coverage for [the derivative action] based on the 'insured vs. insured' exclusion contained in the new policy form. Although Landmark eventually reversed position and paid policy limits, Landmark's agreement to pay came only after a lengthy lawsuit at great expense to [Gregory and Bibicoff]. [¶] . . . The failure to accurately communicate the scope of coverage of the policy[,] . . . [t]he failure to ensure that the policy was delivered was consistent with the binder[, and] [t]he failure

to notify or alert the insureds of the change in the insurance form fell below the standard of care."

Even after Landmark paid, Admiral continued to deny coverage.

Gregory and Bibicoff sued Admiral for declaratory relief, breach of contract and bad faith. In particular, they sought a declaration that Admiral's excess policy contained a Claims Made Form and did not contain an insured v. insured exclusion. Next, they sued Venbrook for breach of contract and professional negligence for failing to communicate the scope of the Landmark policy and failing to ensure that Admiral's excess policy provided coverage, and for forging Alden's signature on Admiral's Renewal Proposal Form.

The first amended complaint named 20 Doe defendants and averred: "References hereinafter made to specifically named defendants shall be deemed to refer to and include the fictitiously named defendants sued herein as DOES 1 through 20, inclusive, unless otherwise indicated."

Removal to federal court; remand back to state court

Admiral removed the action to federal court based on diversity jurisdiction. It acknowledged that its codefendant, Venbrook, was a California resident, a fact that would ordinarily bar removal. But Admiral argued that Venbrook was a sham defendant on two grounds: (1) the statute of limitations had run on Gregory and Bibicoff's claims; and (2) Venbrook did not breach the standard of care. As a result, Admiral argued that diversity jurisdiction should be determined without consideration of Venbrook.

Venbrook filed a motion to dismiss the complaint based on the statute of limitations and lack of an otherwise cognizable claim. Admiral also filed a motion to dismiss. It argued that Gregory and Bibicoff's claims should have been brought as counter-claims in connection with Admiral's already pending federal action for declaratory relief.

Not only did Gregory and Bibicoff oppose the motions to dismiss, they also filed a motion for remand to state court.

The federal court granted the motion to remand and declined to rule on the motions to dismiss. In its ruling, the federal court explained that a nondiverse defendant is fraudulently joined when the plaintiff fails to state a cause of action against the nondiverse defendant and the failure is obvious according to the settled rules of the state. The removing party must prove that there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the nondiverse defendant in state court. As a result, a federal court must resolve all issues, facts and ambiguities in the law in favor of the nonremoving party when deciding whether fraudulent joinder exists. In part, the federal court stated: "The Court cannot conclude that plaintiff's claims against [Venbrook] related to the Admiral policy are time-barred. Although plaintiffs' suit against Landmark in 2005 and [an October 25, 2005, letter from Admiral] may have put plaintiffs on notice of the misrepresentations in their policy, plaintiffs did not suffer any damage as to the excess policy until the primary policy was exhausted in February 2009. [Citation.] Furthermore, Admiral could not deny coverage in its October 25, 2005[,] letter because its obligations had not been triggered, a fact that Admiral acknowledged in the letter. . . . Therefore, the limitations period on plaintiff's professional negligence claim against [Venbrook], as it pertains to the Admiral policy, did not begin to run until February 2009, at the earliest, and is not time-barred. [Citation.]"

In a footnote to the statement that Gregory and Bibicoff were not damaged until 2009, the federal court stated: "At oral argument, counsel for [Venbrook] argued that plaintiffs' damages began accruing in 2005 when they began incurring attorneys' fees. The [federal court] makes no findings as to when plaintiffs suffer[ed] damage[s], but for the purposes of this motion notes that plaintiffs[] claim that they did not suffer damage as to the excess policy until February 2009. Therefore, the [federal court] cannot conclude that [Venbrook is a] 'sham' defendant."

The Admiral settlement

In May 2010, Gregory and Bibicoff settled with Admiral.

Motion to strike; the doe amendment

Venbrook filed a motion to strike most of the allegations related to the forgery of Alden's signature on the Renewal Proposal Form. However, the motion overlooked these three sentences: (1) "In breach of contract, [Venbrook] failed to submit an accurate insurance application to Admiral;" (2) "Admiral asserts that the insurance application, filled out by Venbrook or its agents, contained material misrepresentations;" and "[Venbrook] failed to exercise reasonable care and skill by failing to accurately fill out the insurance application, and by submitting the application with a forged signature of [Alden], when he was no longer [chief financial officer] of Case Financial."

The motion was granted.

Swett was substituted in for a Doe defendant.

Venbrook's motion for summary judgment/adjudication

Venbrook moved for summary judgment/adjudication and argued that Gregory and Bibicoff suffered appreciable harm in April 2005 when they incurred defense costs in connection with the derivative action, and they were placed on notice of Venbrook's wrongdoing when Landmark denied coverage in May 2005. Thus, Venbrook argued, the action was untimely because the claims accrued in May 2005 and the two-year statute of limitations ran in May 2007.

In their opposition, Gregory and Bibicoff argued that the federal court's ruling on the motion to remand gave rise to issue preclusion barring Venbrook's motion; Venbrook was equitably estopped from asserting the statute of limitations because it caused Gregory and Bibicoff to delay filing their action by fraudulently concealing its role as the issuing agent for Case Financial's insurance policies; and, finally, the claims against Venbrook arose only after exhaustion of the Landmark policy and coverage denial by Admiral. At the hearing, counsel for Gregory and Bibicoff raised a variety of issues, including the forgery. According to counsel, when Gregory and Bibicoff went to mediation, Admiral said that the forgery gave it an airtight rescission claim. In addition, counsel argued that the breach of contract claim was governed by the four-year statute of limitations because Gregory and Bibicoff had sued upon a written contract.

The trial court granted summary adjudication as to negligence and requested additional briefing on the issue of whether Gregory and Bibicoff had sued Venbrook on an oral or written contract.

Following supplemental briefing by the parties, the trial court granted summary adjudication as to breach of contract. It found no evidence that the contract was in writing.

Swett's motion for summary judgment/adjudication

The motion for summary judgment/adjudication filed by Swett was based on the two-year statute of limitations. Gregory and Bibicoff opposed based on issue preclusion due to the federal court's remand order, equitable estoppel due to fraudulent concealment, and the contention that they did not suffer damage until the Landmark policy was exhausted.

The trial court granted the motion.

Judgment; appeal

The trial court entered judgment in favor of Venbrook and Swett.

Gregory and Bibicoff appealed.

Alden and Pollock's March 2009 Action

The complaint; Admiral's motion for determination of good faith settlement; the first amended complaint; dismissal of Admiral

Alden and Pollock sued Venbrook and Swett for, inter alia, breach of contract, negligence and breach of fiduciary duty. They also sued Admiral for declaratory relief and breach of contract. Following mediation, Admiral agreed to pay the directors $850,000 and filed a motion for determination that the settlement was reached in good faith. The motion was denied without prejudice. Soon after, Alden and Pollock filed a first amended complaint. On April 27, 2010, Admiral was dismissed.

Venbrook's and Swett's initial motions for summary judgment/adjudication

On May 17, 2010, Venbrook moved for summary judgment/adjudication. Then, on June 17, 2010, Swett did the same. On July 23, 2010, the trial court granted Alden

and Pollock's motion for leave to file a second amended complaint and the new pleading was filed that date.

The second amended complaint

According to the second amended complaint: When Alden and Pollock notified Landmark and Admiral of the derivative action, they both denied coverage based in the insured v. insured and prior acts exclusions. Venbrook breached its contract with Case Financial by failing to procure and maintain primary and excess insurance that would cover Alden and Pollock against, inter alia, derivative actions. Moreover, Venbrook and Swett were negligent when they failed to accurately communicate the scope of coverage, and when they submitted a Renewal Proposal Form to Admiral containing the forged signature of Alden and false information. Venbrook breached its professional and fiduciary duty of care, and it committed fraud, when it falsely represented that it was not the issuing agent for the insurance policies.

In particular, the fraud cause of action alleged that sometime in 2005, Alden and Pollock's counsel contacted Venbrook and requested a copy of the policies in effect during the years 2002 through 2005 for Case Financial. Venbrook informed Alden and Pollock's counsel that it was not the insurance agent for Case Financial during those years. In August 2007, Alden and Bibicoff wrote letters to Wendy West (West) of Venbrook to obtain copies of insurance policies issued to Case Financial. On September 13, 2007, West sent an e-mail to Alden stating: "After further research with regards to your request . . . please note that [Venbrook] was not the issuing agent for any policies for the time periods in question. Further, it appears that the policies we did write for Case Financial were flat canceled and therefore never issued. If you did in fact have Directors and Officers coverage during the period of 02-05 it must have been written with another agency . . . "

Alden and Pollock alleged that West's representations were false, and they were induced to delay suing Venbrook.

The stipulation regarding Venbrook's motion for summary judgment/adjudication; the denial of Swett's motion for summary judgment/adjudication as moot

Due to the filing of the second amended complaint, Alden, Pollock and Venbrook stipulated that Venbrook would take its motion for summary judgment/adjudication off calendar and file a new motion.

Subsequently, the parties appeared for argument on Swett's motion. The trial court stated: "The way I read [case law], the filing of the [second] amended complaint moots your summary judgment. I don't have any basis on which to decide it, because the operative pleading has changed. [¶] There's case law out there saying if I try to decide it and reach backward and decide it's pretty much the same or whatever, that that's improper, and it's beyond my jurisdiction."

Swett's motion was denied as moot. The trial court and the parties agreed that Swett could filed a new motion.

Alden and Pollock's motion for summary judgment/adjudication

Alden and Pollock filed a motion requesting summary judgment. In the alternative, they requested summary adjudication of liability. The trial court denied the motion on the grounds that Alden and Pollock failed to offer proof of the specific damages being sought.

Venbrook's subsequent motion for summary judgment/adjudication

In its new motion for summary judgment/adjudication, Venbrook argued that the negligence, breach of contract and fiduciary duty causes of action were not supported by the evidence and, in any event, they were all barred by the two-year statute of limitations in section 339, subdivision (1). Venbrook argued that the fraud allegations were really equitable estoppel allegations rather than a substantive cause of action, and they failed to avoid the statute of limitations.

Alden and Pollock opposed the motion and argued that the two-year statute of limitations did not bar the action because they did not suffer damages and the statute did not begin to run until February 11, 2009. They additionally argued that they could defeat the two-year statute of limitations based on the delayed discovery rule, equitable

estoppel, judicial estoppel and collateral estoppel. Finally, they argued that they were suing upon a written contract and therefore their contract claim was subject to a four-year statute of limitations.

The trial court took the matter under submission and then entered an order granting summary adjudication as to negligence, breach of contract and breach of fiduciary duty. According to the trial court, these causes of action were barred by the two-year statute of limitations. With respect to the fraud cause of action, the order stated: "At oral argument, Venbrook persuasively argued that West's representations could not be actionable because they were made after the two year statute of limitations on [Alden and Pollock's] claims against [Venbrook] lapsed on March 22, 2007. Since West's alleged statements were in August 2007, after the statute had already run, Venbrook essentially contends that, as a matter of law, the statements were no longer material facts, were not representations upon which [Alden and Pollock] could reasonably rely, and could not have caused the damages that [Alden and Pollock] allege (delaying prosecution of litigation already barred by the statute of limitations . . .). [¶] The [trial court] cannot grant summary adjudication on this basis because the Notice of Motion and Motion do not identify this issue."

Swett's subsequent motion for summary judgment/adjudication

Swett requested summary judgment/adjudication as to the negligence cause of action based on, inter alia, the two-year statute of limitations.[3] Alden and Pollock opposed on the grounds that the motion was an improper motion for reconsideration. They also opposed based on the delayed discovery rule, equitable estoppel, judicial estoppel, and the theory that the statute did not begin to run until the Landmark policy was exhausted.

The trial court granted summary judgment.

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[3] At the hearing, the trial court indicated that the breach of contract, breach of fiduciary duty and fraud claims no longer applied to Swett.

Venbrook's motion for judgment on the pleadings

Venbrook attacked the fraud allegations by arguing that the alleged misrepresentations were not material, reliance was not reasonable and there was no causal link to any damages.

The motion was granted.

Judgment; appeal

The trial court entered judgment in favor of Venbrook and Swett.

Alden and Pollock appealed.

STANDARD OF REVIEW

We review orders granting summary judgment/adjudication de novo. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.) First, we identify issues framed by the pleadings; second, we determine whether the moving party has established facts sufficient to negate the claim and justify judgment as a matter of law; and third, when a motion prima facie justifies judgment, we determine whether the opposition demonstrates the existence of a triable issue of material fact. (*Roger E. Smith, Inc. v. SHN Consulting Engineers & Geologists, Inc.* (2001) 89 Cal.App.4th 638, 642.)

A motion for judgment on the pleadings is equivalent to a general demurrer. A trial court, as well as a reviewing court, must treat all properly pleaded material facts in the complaint as true. On appeal, we are not bound by the trial court's determination. "Instead, we review the matter de novo, and render an independent judgment on whether a cause of action has been stated. [Citations.]" (*Hopp v. City of Los Angeles* (2010) 183 Cal.App.4th 713, 717.) When reviewing an order sustaining a demurrer, a reviewing court may affirm on any grounds stated in the demurrer. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 201.)

DISCUSSION

I.

Gregory and Bibicoff's Appeal

Gregory and Bibicoff seek reversal of the adverse judgment based on the following arguments: they did not suffer actual harm until the Landmark policy was exhausted in 2009; if they suffered harm in 2005, the action is saved by the delayed discovery rule; Venbrook and Swett are equitably estopped from asserting the statute of limitations because Venbrook fraudulently concealed its role and therefore its identity as a wrongdoer, and because Swett failed to produce discovery; the causes of action did not accrue until Gregory and Bibicoff knew or should have known they were harmed by Venbrook's falsification of the Renewal Proposal Form; and Venbrook and Swett failed to comply with section 1008.

These arguments lack merit.

A. Appreciable and Actual Harm Occurred in 2005.

In their first amended complaint, Gregory and Bibicoff claimed that Venbrook and Swett breached their duties by failing to accurately communicate the scope of the Landmark policy, failing to procure adequate excess insurance, and submitting the Renewal Proposal Form with a forgery and misrepresentation. A cause of action generally accrues on the date of harm. (*Vaca v. Wachovia Mortgage Corp.* (2011) 198 Cal.App.4th 737, 743.) The question here is this: When did Gregory and Bibicoff first suffer harm for accrual purposes?

In *Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145 (*Hydro-Mill*), the court held that a claim against an insurance broker for procuring inadequate insurance accrued when the insurer made it clear that certain losses were not covered. (*Id*. at p. 1162.)[4] In other words, once the insurer

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[4] The Ninth Circuit has interpreted California law consistent with *Hydro-Mill*. In *Schutte v. Koerting, Inc. v. Swett & Crawford* (9th Cir. 2008) 298 Fed.Appx. 613, 614–615, the court held that the statute of limitations began to run against a negligent broker when the insurer denied coverage. To argue a contrary rule, Gregory and Bibicoff

indicated that it would deny coverage, the insured was harmed. As applied to this case, *Hydro-Mill* establishes that the directors suffered harm no later than May 2005 after Landmark had denied coverage. It was at that time Gregory and Bibicoff suffered adverse consequences due to Venbrook's and Swett's failure to accurately communicate the scope of the Landmark policy.

To get out from under the yoke of *Hydro-Mill*, Gregory and Bibicoff point out that before Landmark exhausted its policy limits, there was a chance that excess liability would never attach. (*Signal Companies, Inc. v. Harbor Ins. Co.* (1980) 27 Cal.3d 359, 367.) In our view, their point misses the mark. Case Financial requested primary *and* excess insurance without an insured v. insured exception but did not receive it. Venbrook and Swett's alleged breaches of duty had immediate ramifications in May 2005. Gregory and Bibicoff were exposed to defense costs and liability in the derivative action, and they incurred costs to sue Landmark.[5]

Though Gregory and Bibicoff ask us to split their causes of action between damages related to the primary policy and damages related to the excess policy, they have not cited authority allowing such a bifurcation. More importantly, there is good reason not to split the causes of action. If Venbrook and Swett failed to communicate the

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improperly cite *ITT Small Business Finance Corp. v. Niles* (1994) 9 Cal.4th 245, 258 (*ITT*). In *ITT*, the court held that "in transactional legal malpractice cases, when the adequacy of the documentation is the subject of dispute, an action for attorney malpractice accrues on entry of adverse judgment, settlement, or dismissal of the underlying action." (*Ibid*.) This insurance broker malpractice case involves the adequacy of insurance rather than the adequacy of documents, which means *ITT* is inapposite. Also, *ITT* was overruled in *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 763.)

[5] With its motion for summary judgment, Venbrook submitted an evidence binder that included interrogatory responses from Gregory and Bibicoff. In those responses, they stated that after Landmark denied coverage, they "were forced to incur significant sums of money in attorneys fees to defend themselves, and subsequently settled [the derivative action] at great expense. Further, [Gregory and Bibicoff] incurred significant sums of money to initiate and prosecute coverage actions against Landmark and subsequently Admiral."

scope of the primary policy, that wrongful act spilled over to the excess policy because it followed form. Thus, the wrongful act was tied to both policies and damages related to either is enough for accrual.

We are not suggesting that the directors suffered all of their damages in 2005. Because the Landmark policy had not been exhausted, they did not suffer a loss of excess insurance until 2009. But the point is moot. The two-year statute of limitations triggered when Bibicoff and Gregory suffered appreciable and actual harm that consisted of more than nominal damages. "It is the fact of damage, rather than the amount, that is the relevant consideration. [Citation.] Consequently, the client may suffer 'appreciable and actual harm' before he or she sustains all, or even the greater part, of the damages occasioned by the professional negligence. [Citations.]" (*Van Dyke v. Dunker & Aced* (1996) 46 Cal.App.4th 446, 452.)

B. The Delayed Discovery Rule did not Extend the Time for Filing the Action.

"The general rule in California is that a 'statute of limitations begins to run when a cause of action accrues, even though the plaintiff is ignorant of the cause of action or of the identity of the wrongdoer.' [Citation.]" (*M&F Fishing, Inc. v. Sea-Pac Ins. Managers, Inc.* (2012) 202 Cal.App.4th 1509, 1531.) The harshness of this rule is alleviated by the judicially created doctrine of delayed accrual. (*Hogar Dulce Hogar v. Community Development Commission* (2003) 110 Cal.App.4th 1288, 1297.) "'A cause of action for professional negligence does not accrue until the plaintiff . . . discovers, or should discover, the negligence.' [Citation.]" (*Hydro-Mill, supra*, 115 Cal.App.4th at p. 1161.) The discovery rule also applies to breaches of contract that are "committed in secret and, moreover, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time." (*April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 832 (*April Enterprises*).) However, the rule "contains procedural safeguards protecting against lengthy litigation on the issue of accrual. It presumes that a plaintiff has knowledge of injury on the date of injury. In order to rebut the presumption, a plaintiff must plead facts sufficient to convince the trial judge that delayed discovery

was justified." (*Ibid.*) And, at trial, the plaintiff has the burden of proving the existence of delayed accrual. (*Ibid*.)

We start with the presumption that Gregory and Bibicoff were aware of broker wrongdoing on the date they were harmed in May 2005. To rebut that presumption, they were required to plead around the statute of limitations. Because the issues on summary judgment are framed by the pleading, we must examine whether the pleading contains a rebuttal. A thorough reading of the first amended complaint reveals that Gregory and Bibicoff failed to allege delayed discovery. Thus, based on the presumption, they knew that a broker or brokers breached their contractual and professional duties when Landmark denied coverage in May 2005. As a consequence, the two-year statute of limitations expired in May 2007.

It is suggested that the statute of limitations did not begin to run until Gregory and Bibicoff learned about the Renewal Proposal Form in 2008. We cannot accede. As alleged, there were multiple causes of harm and the Renewal Proposal Form was only one. Even if they could not have discovered the Renewal Proposal Form sooner, they knew about the denial of primary coverage in 2005. In other words, knowledge of a contributing cause of harm at an earlier date was sufficient to require Gregory and Bibicoff to pursue their legal remedies.

According to Gregory and Bibicoff, they did not know until 2009 that it was Venbrook and Swett who procured and delivered the insurance and suggest that their ignorance tolled the statute of limitation. This argument is misplaced. Whether they knew the identity of wrongdoers is irrelevant unless there was fraudulent concealment. (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 936 (*Bernson*). As our Supreme Court explained, "The discovery rule . . . allows accrual of the cause of action even if the plaintiff does not have reason to suspect the defendant's identity. [Citation.]" (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807 (*Fox*).) Once a plaintiff is aware of a cause of action, it is expected that the defendant's identity will ordinarily be revealed by investigation. (*Ibid*.)

C. Equitable Estoppel does not Apply Based on Venbrook's Concealment of its Role or Swett's Failure to Produce Discovery.

"[A] defendant may be equitably stopped from asserting the statute of limitations when, as the result of intentional concealment, the plaintiff is unable to discover the defendant's actual identity." (*Bernson, supra,* 7 Cal.4th at p. 936.) The operative word here is *may*. A plaintiff must exercise reasonable diligence. "Thus, . . . the statute [of limitations] will toll *only* until such time that the plaintiff knows, or through the exercise of reasonable diligence should have discovered, the defendant's identity. Lack of knowledge alone is not sufficient to stay the statute; a plaintiff may not disregard reasonably available avenues of inquiry which, if vigorously pursued, might yield the desired information." (*Ibid*.) A consideration is "whether the filing of a timely Doe complaint would, as a practical matter, have facilitated the discovery of the defendant's identity within the requisite three-year period for service of process. [Citations.] Where the identity of at least one defendant is known, for example, the plaintiff must avail himself of the opportunity to file a timely complaint naming Doe defendants and take discovery." (*Id*. at pp. 936–937.)

Though Gregory and Bibicoff rely on equitable estoppel to defeat the statute of limitations, we need not reach the issue because they did not allege it in the first amended complaint. To be complete, we note that the argument fails on the merits. They claim that during the Landmark litigation, they attempted to learn whether Venbrook and Swett had a role in issuing the insurance policies. But on September 13, 2007, West lied and stated that the policies had not been placed by Venbrook. Then, when Gregory and Bibicoff subpoenaed Swett's records on June 9, 2008, no documents were produced. Based on these facts, it is suggested that Venbrook and Swett are equitably estopped from arguing that the claims are stale. The problem with this argument is that the statute of limitations expired in May 2007. As a result, Venbrook and Swett did nothing to prevent Gregory and Bibicoff from suing on time. (*Vaca v. Wachovia Corp., supra,* 198 Cal.App.4th at p. 746.) In addition, we fail to perceive a reason why Gregory and Bibicoff could not have asserted its broker claims against Doe defendants in the

Landmark action and then, after conducting appropriate discovery, substituted Venbrook and Swett in as named defendants.

D. The Facts Related to the Renewal Proposal Form did not Give Rise to a Stand Alone Tort with a Separate Accrual Date.

"[I]f a plaintiff's reasonable and diligent investigation discloses only one kind of wrongdoing when the injury was actually caused by tortious conduct of a wholly different sort, the discovery rule postpones accrual of the statute of limitations on the newly discovered claim." (*Fox, supra*, 35 Cal.4th at p. 813.) Gregory and Bibicoff rely on this rule for the argument that all of their damage was caused by the 2004 falsification of the Renewal Proposal Form and that they could not have discovered the cause until within two years of the time that they filed their lawsuits against Venbrook and Swett.

Fox is distinguishable.

There, the plaintiff sued for medical malpractice after gastric bypass surgery resulted in complications. During discovery, she learned that a medical device used during the surgery may have malfunctioned, causing her injury. She amended her complaint to add a products liability cause of action against the manufacturer of the device. Our Supreme Court held that the pleading survived the manufacturer's statute of limitations attack. The court noted that if a reasonable inquiry would not have revealed a factual basis for the cause of action, the statute of limitations would be tolled. (*Fox, supra*, 35 Cal.4th at p. 803.)

Here, the evidence shows that Venbrook and Swett failed to secure or deliver policies with the terms agreed to by Case Financial. As a result, Gregory and Bibicoff incurred defense costs in the derivative action. Thus, their injury was not caused solely by the falsified Renewal Proposal Form. Also, it cannot be said that the falsification of the Renewal Proposal Form was a wholly different sort of wrongdoing such as medical malpractice v. products liability. Like the other alleged wrongful acts, the falsification was a breach of the brokers' duties of care in connection with the procurement of insurance and communication about the insurance. Indeed, the falsification was not alleged as a separate cause of action.

We are told that this case is akin to *Brandon G. v. Gray* (2003) 111 Cal.App.4th 29 (*Brandon G.*). The attempted analogy fails. The *Brandon G.* court held that "where there is one injury but separate claims, based on separate theories, against separate tortfeasors," the discovery rule is applied independently to those separate claims. (*Id*. at p. 36.) In other words, based on when the plaintiff could have discovered his or her claims, the claims against one of the tortfeasors could accrue at a later date than the claims against the other tortfeasor. Simply put, *Brandon G.* does not apply to separate claims made against the same tortfeasors.

E. The Motions for Summary Judgment were not Motions to Reconsider Subject to Section 1008.

"When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order." (§ 1008, subd. (a).) Section 1008 "specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions. . . . No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section." (§ 1008, subd. (e).)

Gregory and Bibicoff argue that Venbrook's and Swett's motions for summary judgment amounted to motions to reconsider the federal court's order granting the motion to remand to state court. This argument is patently frivolous. They do not cite any cases holding that section 1008 applies to state courts reconsidering federal rulings. Assuming for the sake of argument that section 1008 could apply, it would not. The federal court did not hear and deny summary judgment motions by Venbrook and Swett that they then renewed in state court. Nor did Venbrook and Swett ask the trial court to reconsider the federal court's remand order.

II.

Alden and Pollock's Appeal

According to Alden and Pollock, the issues on appeal are: whether they may move for summary adjudication of liability; whether the cause of action for negligence is saved by delayed discovery, equitable estoppel, equitable tolling or characterizing the claim as one for implied contractual indemnity or equitable indemnity; whether the breach of contract cause of action is based on a written contract and therefore subject to a four-year statute of limitations; whether the fiduciary duty cause of action is subject to a four-year statute of limitations; whether the pleading adequately states a fraud cause of action; whether issue preclusion bars Venbrook and Swett from raising the statute of limitations as a defense; and whether Swett's motion for summary judgment on the statute of limitations should have been denied pursuant to section 437c, subdivision (f)(2) as an improper motion for reconsideration.

After considering Alden and Pollock's rambling and often incomprehensible arguments, we perceive no grounds for reversal.

A. Alden and Pollock's Motion for Summary Judgment/Adjudication was Properly Denied.

In the alternative to summary judgment, Alden and Pollock moved for summary adjudication of liability. Section 437c, subdivision (f)(1) permits a party to move for summary adjudication of a cause of action, an affirmative defense, a claim for damages or an issue of duty. Thus, a "motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (§ 437c, subd. (f)(1).) The alternative motion did not fall within section 437c, subdivision (f)(1) and was not authorized. As a result, the trial court properly treated the motion as one for summary judgment only. That motion ignored the specific damages being sought and focused primarily on liability, too. It was properly denied on the grounds that it left triable issues as to the element of damages. (*Pajaro Valley Water Management Agency v. McGrath* (2005) 128 Cal.App.4th 1093, 1106 [the

plaintiff "could not establish a prima facie entitlement to summary judgment without showing both the fact *and the amount* of damages"].)

In their reply brief, Alden and Pollock argue that they were denied due process because the trial court did not give them an opportunity to brief the issue of whether the motion was proper. They claim that this amounts to error that is reversible per se. This argument is preposterous. Simply put, the trial court was not required to entertain what amounted to a frivolous motion. Nor was it required to cause the other side to incur additional expense opposing it.

B. The Cause of Action for Negligence is Time-Barred.

Alden and Pollock offer a series of arguments in counterpoint to the trial court's conclusion that the negligence action is time-barred. None of these arguments, however, establishes grounds for reversal.

1. *There are no triable issues regarding when the statute of limitations commenced.*

Viewing this case through a prism of disjointed argument and off point law, Alden and Pollock argue that reversal is required by *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1112 (*Jolly*). The *Jolly* court explained that "[w]hile resolution of the statute of limitations issue is normally a question of fact, where the uncontradicted facts established through discovery are susceptible of only one legitimate inference, summary judgment is proper. [Citation.]" (*Ibid*.)

Based on *Jolly*, Alden and Pollock posit: "Until August 21, 2007, when Landmark produced the forged insurance application, [Alden and Pollock] did not even know who was their agent. Until November 2008, when Venbrook produced its files, [Alden and Pollock] had no knowledge that anyone else, but [Venbrook], was involved in the procurement of the policies. [¶] Landmark's letter denying coverage did not give [Alden and Pollock] a clue as to what the broker did or did not do that caused Landmark to deny coverage. In fact, Landmark's letter was based on inaccurate facts. . . . [¶] Landmark's letter stated: 'The involvement of Cliff Evans in this matter triggers this exclusion[]"[] because Evans was the chairman of [Case Financial] and has close ties to

CCWIPP. . . . At the time of the filing of [the derivative action], Evans had resigned as chairman of the board of [Case Financial] more than six months earlier and had retired from CCWIPP. Therefore, he could not have triggered the exclusion. [¶] At the time the Landmark case was filed, the only issue was Landmark's failure to defend. There was no request for indemnification, as no judgment was obtained yet against any of the Insureds. 'The duty to defend "may exist even where coverage is in doubt and ultimately does not develop." [Citation.]' [Citation.]"

In their reply brief, Alden and Pollock state: "[Venbrook and Swett] argue that the statute of limitations commenced on May 20, 2005, when Landmark denied coverage. . . . [¶] The problem with [this] argument[] is this, nowhere, not at the trial level nor in their responding briefs, did [Venbrook and Swett] point to any language in the [*sic*] Landmark's letter suggesting that the brokers procured the wrong policy. It is axiomatic that not every denial of coverage by an insurance carrier is the result of a broker's negligence. [¶] Landmark denied coverage based on (1) [p]rior [a]ct and (2) insured v. insured. These are standard provisions in many insurance policies. There is nothing in the [*sic*] Landmark's letter to suggest that these two exclusions were included in the policy because the brokers ordered the wrong policy. [Alden and Pollock] did not negotiate the 2004-2005 policy and had no knowledge what policy was ordered by [Case Financial]."

These arguments fail to establish error. Based on *April Enterprises,* we presume that Alden and Pollock were aware of their cause of action when they were injured in May 2005. A "'plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence.' [Citation.] In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to 'show diligence.'" (*Fox, supra,* 35 Cal.4th at p. 808.)

The second amended complaint showed, on its face, that Alden and Pollock's causes of action were timed barred. As a result, they were required to plead around the

statute of limitations and allege facts showing when they discovered that a broker or brokers "failed to procure [Directors & Officers] coverage that protected [Alden and Pollock] against third party lawsuits, including, but not limited to, shareholders' derivative lawsuits" and "failed to accurately communicate the scope of the primary policy with [Landmark]." Also, they were required to allege why they could not have made the discovery sooner.

We turn to the pleading.

In August 2007, Alden and Pollock allegedly learned that Venbrook or Swett submitted a Renewal Proposal Form to Admiral that contained the forged signature of Alden and falsely stated that he was Case Financial's chief financial officer. In 2010, they learned that Venbrook lied when it stated it was not the issuing agent for the policies. Also in 2010, they learned that Swett received a binder from Landmark based on policy form RSG 221003 0204 and then issued a "Confirmation of Coverage Bound" which offered policy form RSUIFP RI-00001 ED 4/93 for profit, a form that provided coverage for shareholders' derivative suits. None of these allegations come close to rebutting the *April Enterprises* presumption because they do not reference discovery of the alleged breaches of duty.

There is yet another hurdle that proves too high for Alden and Pollock to clear. "[A] pleaded fact is *conclusively deemed true* as against the pleader." (*Dang v. Smith* (2010) 190 Cal.App.4th 646, 657.) Consequently, Alden and Pollock are bound by the allegations in the second amended complaint. They alleged that in early 2002, Michael Schaffer (Schaffer), the former chief executive officer of Case Financial, was sued in a shareholder's derivative lawsuit. "Members of the Board of Directors of Case Financial were concerned they might be targets of such lawsuits and requested Case Financial to obtain a [Directors & Officers] insurance coverage [*sic*] to protect them against third party lawsuits, including shareholders' derivative lawsuits, as a condition to their continued service as directors. [¶] . . . [Alden] met with [Venbrook] to discuss Case Financial's needs for insurance. [Alden] specifically told [Venbrook] about the lawsuit involving [Schaffer] and explained to [Venbrook] that the board members want a

[Directors & Officers] insurance policy that will protect them against third party liability, including shareholders' derivative actions. [Alden] specifically told [Venbrook] that the [Directors & Officers] coverage was an implicit consideration to [Alden and Pollock] and others for serving as Directors and Officers of [Case Financial]. [¶] . . . [Venbrook] told [Alden] that [it] has been in the insurance business for more than 20 years and will use [its] expertise and experience to obtain full coverage for Case Financial and its Directors and Officers against third party lawsuits, including shareholders' derivative actions. [Venbrook] agreed to act as an insurance agent for [Case Financial]. As a result, [Alden] hired [Venbrook] to act as the Insurance Agent[] and Broker[] for Case Financial, its Officers and Directors [*sic*]. [Venbrook] procured for [Case Financial] policies for the years 2002-2005 through [Swett]."

A plaintiff must act once he has a suspicion of wrongdoing and therefore an incentive to sue. Under the delayed discovery rule, "'a cause of action accrues and the statute of limitations begins to run when the plaintiff *has reason to suspect an injury and some wrongful cause*, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for *that particular cause of action*.' [Citation.]" (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1319.) If Alden knew that full coverage against derivative actions was an implicit consideration for Case Financial's directors and officers to continue serving, and if he knew that he hired Venbrook to specifically procure that coverage, Alden and Pollock had reason to suspect injury and some wrongful cause when Landmark denied coverage in May 2005. The facts suggested that they had not been provided with full coverage against derivative actions.

Tacitly, Alden and Pollock argue that there was no basis for suspicion. They maintain that if Case Financial "had requested a policy that does not cover shareholders' derivative lawsuits, there would have been no cause of action against the brokers, even though the carrier denied coverage." But even if there was a scenario under which the brokers were not negligent, Alden and Pollock still knew sufficient facts to require them to investigate and obtain answers.

Moving on, Alden and Pollock claim that "the statute of limitations begun [*sic*] to run when [Alden and Pollock] settled with Landmark on February 6, 2009, and Admiral denied coverage. Alternatively, when Venbrook produced the documents, without which [Alden and Pollock] were unable to determine if the brokers did anything wrong [*sic*]." They cite *Williams v. Hilb, Rogal & Hobbs Ins. Services of California, Inc.* (2009) 177 Cal.App.4th 624 (*Williams*), *Twomey v. Mitchum, Jones &Templeton, Inc.* (1968) 262 Cal.App.2d 690 (*Twomey*) and *Walker v. Pacific Indemnity Co.* (1960) 183 Cal.App.2d 513 (*Walker*).

In *Williams*, an insurance agent obtained liability insurance for a business but failed to procure workers' compensation insurance. When the business was sued by an employee who was injured in a fire, the business received a defense from its liability carrier. Ultimately, the employee obtained a judgment in excess of the liability carrier's $1 million policy limit. The court held that a negligence cause of action against the insurance agent did not accrue until entry of the employee's judgment because only then was the business injured by having an insufficient amount of insurance. (*Williams, supra,* 177 Cal.App.4th at p. 642.) The *Williams* court relied on *Walker*. The broker in *Walker* negligently obtained automobile insurance in an amount less than the car owner requested. When the car owner was sued, the carrier that issued the policy provided a defense. The court held that a claim for broker negligence did not accrue until entry of judgment in excess of policy limits. (*Walker, supra,* 183 Cal.App.2d at pp. 516–519.) At issue in *Twomey* was the application of the two-year statute of limitations in an action against a stock brokerage for various acts of misfeasance. The court surveyed case law analyzing when a cause of action accrues against attorneys, accountants and insurance agents and cited *Walker* for the following proposition: "In insurance agent malpractice[,] the statute does not start to run until a judgment against the intended insured which the neglected insurance was intended to cover has been obtained. [Citation.]" (*Twomey, supra,* 262 Cal.App.2d at p. 725.) Thus, the quoted language in *Twomey* is not a holding and merely echoes *Walker*.

Neither *Williams* nor *Walker* apply to this case. Alden and Pollock paid defense costs in the derivative action and were damaged at that time. This is not a case in which they were provided with a defense and injured only later when they became liable for amounts not covered by insurance.

With respect to the Admiral policy, Alden and Pollock advert to the rule that an excess policy is not triggered until the primary policy is exhausted. They then argue that the statute of limitation began to run in February 2009 when Landmark's primary policy was exhausted and Admiral filed a declaratory relief action in federal court. We cannot concur. As previously explained in connection with Gregory and Bibicoff's appeal, the alleged negligence of Venbrook and Swett cannot be divided between the two policies to support separate accrual dates.

2. *Equitable estoppel does not apply*.

In September 2007, West wrote to Alden and Pollock and represented that Venbrook was not the issuing agent for any of the policies from 2002 to 2005. Based on this evidence, Alden and Pollock contend that Venbrook and Swett should be equitably estopped from relying on the statute of limitations based on Venbrook's fraudulent concealment of its role in procuring the insurance. But because the statute of limitations ran in May 2007, equitable estoppel is moot. It bears mention that the party asserting estoppel must be ignorant of the true state of facts. (*Doheny Park Terrace Homeowners Assn., Inc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1099.) It was alleged that Alden hired Venbrook in 2002. This suggests that at least during the time he served as chief executive officer, he knew Venbrook was Case Financial's insurance broker. It is therefore unclear how Alden and Pollock can tacitly claim they believed West's statement was accurate.

Making yet another lengthy and confused point, Alden and Pollock argue that Venbrook and Swett "cannot claim to be prejudiced" by the tardiness of the complaint because they possessed documents necessary to prove or disprove their negligence but denied Alden and Pollock access. Also, they state: "Landmark filed a motion for summary judgment on the issue of coverage. The Landmark court denied the motion.

Landmark filed a petition for a writ of mandate. . . . The Court of Appeal issued an Order to Show Cause 'why a peremptory writ of mandate should not issue ordering you to vacate the order of November 7, 2008 . . . denying . . . Landmark's motion for summary judgment, and to make a new and different order granting Landmark's motion.'. . . This appeal was dismissed because Landmark settled with [Alden and Pollock] and tendered its policy. Therefore, it can be argued that[] the statute of limitation[s] begun [*sic*] to run when the Court of Appeal determined that Landmark's policy did not provide coverage for [the derivative action]."[6]

These arguments are unsupported by legal authority. Worse, they are like bad improvisational jazz that assaults the ear because the musician repeatedly hits sour notes and the song has no rhyme or reason. We need not spend our time trying to debunk improper argument. It is axiomatic that "'every brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.' [Citation.] [¶] It is the duty of appellants' counsel, not the courts, 'by argument and the citation of authorities to show that the claimed error exists.' [Citation.]" (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1050.)

Even if there are no triable issues as to equitable estoppel, Alden and Pollock argue that reversal is required because the trial court improperly granted judgment on the pleadings instead of summary judgment. In their opening brief, under the heading "Whether Venbrook Should be Equitably Estopped from Raising the Statute of Limitations," Alden and Pollock point out that, at the hearing, the trial court stated: "To prove [equitable] estoppel, the plaintiff has to prove, number one, Venbrook knew the facts; number two, Venbrook intended that [Alden] rely on its conduct or her statements, or that [Alden] acted . . . in such a way that it was reasonable for [Alden] to do so. [¶] [Alden] has to prove that he was ignorant of the true state of facts, and that he relied on

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[6] Boiled down, Alden and Pollock are suggesting that the statute of limitations did not begin to run until an appellate court decided that there was no coverage under the Landmark policy.

the conduct to his injury, and moreover the reliance has to be reasonable. It's the plaintiff's burden to establish all of that. [¶] And my tentative ruling is to find that plaintiff has failed to establish [equitable] estoppel, because I don't have sufficient evidence of anything other than the first two elements. I don't have sufficient evidence of ignorance and reliance, the third and fourth factors. [¶] So for that reason, my tentative is to grant the summary adjudication as to the first, second and third adjudication requested."

Rebounding off this ruling, Alden and Pollock quote *Cole v. City of Los Angeles* (1986) 187 Cal.App.3d 1369, 1374 for the proposition that the existence of equitable estoppel is generally a question of fact. Without segue, they argue, "It is respectfully submitted that the trial court holding suggests that the [trial court] granted a judgment on the pleading, which [Venbrook and Swett] did not ask for." We disagree. The trial court never stated that the pleading was factually deficient. Rather, it ruled that Alden and Pollock did not meet their burden to prove that a triable issue existed regarding equitable estoppel.

In their reply brief, Alden and Pollock argue that there is a triable issue as to equitable tolling because they alleged that their counsel called Venbrook in 2005 and requested a copy of the policies in effect during the years 2002-2005. Venbrook allegedly claimed that it was not the insurance agent for Case Financial during the years 2002 through 2005 and had no files. The problem for Alden and Pollock is that they did not make this argument in their opening brief. In their opening brief, they focused solely on the misrepresentation in West's September 2007 e-mail. We need not consider this argument. "'A point not presented in a party's opening brief is deemed to have been abandoned or waived. [Citations.]' [Citation.]" (*Wurzl v. Holloway* (1996) 46 Cal.App.4th 1740, 1754, fn. 1.) And, again, we cannot fathom how Alden and Pollock could have accepted the alleged 2005 statement as true given that Alden hired Venbrook as Case Financial's broker in 2002.

A second observation is in order. Venbrook and Swett were not obligated to respond to the allegation that Alden and Pollock's counsel was told by an unnamed

person at Venbrook that it was not Case Financial's agent. This is because the allegation lacks specificity, and there is no allegation that counsel relayed the information to his clients or that the statement induced Alden and Pollock to delay filing suit. Also, the second amended complaint only contains reliance allegations with respect to the statements made by West in her September 2007 e-mail. (*Stolz v. Wong Communications Limited Partnership* (1994) 25 Cal.App.4th 1811, 1817 [a party moving for summary judgment is not required to respond to "'assertions which are unintelligible or make out no recognizable legal claim'"].)

3. *Equitable tolling does not apply.*

Invoking the doctrine of equitable tolling, Alden and Pollock contend that the statute of limitations was tolled while it pursued a remedy against Landmark. This argument is not well received.

"Equitable tolling of statutes of limitations is a judicially created, nonstatutory doctrine designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations, i.e., timely notice to the defendant of the plaintiff's claims, has been satisfied. [Citation.] Courts have applied equitable tolling in carefully considered situations to prevent the unjust technical forfeiture of causes of action where the defendant would not be prejudiced. [Citation.] [¶] Broadly speaking, equitable tolling applies when a person has several legal remedies and, reasonably and in good faith, pursues only one. [Citation.] Thus, for example, it may apply where administrative remedies must first be exhausted, where a first action embarked on in good faith is found to be defective for some reason, or where informal remedies are first pursued. [Citation.]" (*People v. Western Ins. Co.* (2012) 204 Cal.App.4th 1025, 1032.) Under the doctrine of equitable tolling, "the statute of limitations in one forum is tolled as a claim is being pursued in another forum. [Citations.]" (*Martell v. Antelope Valley Hospital Medical Center* (1998) 67 Cal.App.4th

978, 985.)[7] When a plaintiff pursues successive claims in the same forum, equitable tolling does not apply. (*Ibid*.)

The action against Landmark for breach of contract did not give Venbrook and Swett notice of Alden and Pollock's claims against them for professional negligence. As case law has explained, "the filing of the first claim must alert the defendant in the second claim of the need to begin investigating the facts which form the basis for the second claim. Generally this means that the defendant in the first claim is the same one being sued in the second." (*Collier v. City of Pasadena* (1983) 142 Cal.App.3d 917, 924.) Also, the Landmark action was pursued in the same forum as the action against Venbrook and Swett. In light of the underlying facts of this case, the policy behind equitable tolling is not triggered.

4. *The negligence cause of action cannot be saved by characterizing it as a cause of action for implied contractual indemnity or equitable indemnity.*

On the shoulders of dubious creativity, Alden and Pollock offer their strangest argument yet. Raising the theory for the first time, they contend that their negligence "claim can be categorized as implied contractual indemnity or traditional equitable indemnity," and that their indemnity claims did not accrue until they settled with Landmark and Admiral. This argument was waived. "'A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing party.' [Citation.] The principles of 'theory of the trial' apply to motions [citation], including summary judgment motions. [Citation.]" (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 29.) To permit a party to change of theory

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[7] In the typical scenario, a plaintiff sues on state claims in federal court. When the federal action is dismissed on technical grounds, the plaintiff promptly files a state action. Under the doctrine of equitable tolling, the statute of limitations will be suspended during the time spent in federal court. The state action will not be time-barred because the time spent in federal court will not counted.

on appeal "would be manifestly unjust to the opposing parties, unfair to the trial court, and contrary to judicial economy." (*Ibid*.)

Further, we note that these claims were not pleaded. Venbrook and Swett did not have to negate them in their motions.

C. The Breach of Contract Cause of Action is Time-Barred.

Venbrook served a form interrogatory asking Alden and Pollock to identify each part of the contract being sued upon that was not in writing. They responded: "There was an agreement between [Case Financial] and Venbrook providing for Venbrook to act as an insurance agent for Case Financial and to procure insurance policies covering Officers and Directors of Case Financial." Citing this interrogatory response, Venbrook established that the contract was not written. It properly argued that the cause of action was subject to the two-year statute of limitations in section 339, subdivision (1).

At the hearing below, and now on appeal, Alden and Pollock argue that there is a triable issue as to whether they had a written contract for the period May 22, 2004, to May 22, 2005. In making this argument, they rely on an issue that was not alleged in the second amended complaint. As we discuss, issues falling outside the pleading cannot defeat summary judgment.

1. *The cause of action alleged (2002 contract).*

In the preliminary allegations, the second amended complaint alleged that in 2002, Alden hired Venbrook to obtain insurance for Case Financial and its officers and directors. As a result, Venbrook "procured for [Case Financial] policies for the years 2002-2005 through . . . [Swett]."

The breach of contract cause of action alleged: "[Alden and Pollock], through [Case Financial], entered into a contract with [Venbrook][] to obtain insurance policies. [Venbrook] agreed to procure and maintain primary and excess liability [Directors & Officers] coverage for [Alden and Pollock] to cover them against third party lawsuits, including, but not limited to, shareholders' derivative lawsuits. [¶] . . . In breach of the contract, [Venbrook] failed to procure [Directors & Officers] coverage that protected [Alden and Pollock] against third party lawsuits, including, but not limited to,

shareholders' derivative lawsuits. As a result, [Landmark] and [Admiral] denied coverage. . . . [¶] . . . In breach of their obligation under the contract, [Venbrook] failed to accurately communicate the scope of coverage of the primary policy with [Landmark]. [Venbrook] transmitted a binder to the insureds which represented that the coverage would be based on a specific form, which did not include an endorsement containing the 'insured v. insured' exclusion. [¶] . . . About six months after the policy went into effect, Landmark issued an insurance policy which was based on a different insurance form than the binder. The new form did purport to contain the 'insured v. insured' exclusion. [Venbrook] failed to notify or alert the insureds of the change in the insurance form, which was in conflict with the binder. [¶] . . . Subsequently, [Landmark] denied coverage based on two exclusions, prior acts and 'insured v. insured.' Although [Landmark] eventually paid policy limits, [Admiral] and [Landmark's] agreements to settle came only after a lengthy lawsuit at great expense to [Alden and Pollock]. [¶] . . . [Venbrook] breached the contract by failing to cooperate with [Alden and Pollock][] after [they] were sued in [the derivative action], and by denying any involvement in the procurement of the policies."

2. *The new cause of action urged by Alden and Pollock below and on appeal (2004 contract).*

Venbrook sent Case Financial a document entitled Summary of Insurance for Case Financial (summary). The summary provided that Landmark would issue primary directors and officers coverage and Admiral would issue excess coverage. The form for each policy would be a claims made form, and each policy would be subject to a prior acts exclusion. The insurance was subject to various conditions. Case Financial was required to make a deposit of $25,701.49 to bind coverage. At the end, the summary stated: "Please sign below to acknowledge you have read and understand all terms and conditions provided above. [Venbrook] will bind coverage on your behalf effective" on a date not specified. Case Financial executed the summary on May 21, 2004.

According to Alden and Pollock, the summary "provided coverage for [s]harholders [d]erivative [l]awsuits. This was a written offer of insurance. . . . [Case

Financial] returned the executed [s]ummary with the premium check. . . . As a result, a written contract was formed." They contend that Venbrook breached the summary by failing to deliver the specified insurance.

3. *There is no triable issue*.

"The pleadings are the 'outer measure of materiality in a summary judgment proceeding.' [Citation.]" (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 412.) A party may not employ the pleadings "as a ticket to the courtroom which may be discarded after admission." (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381.) If a theory or issue is not alleged by a plaintiff, a defendant is not placed on notice that it needs to address that theory or issue in a motion for summary judgment. Thus, a plaintiff ordinarily "cannot defeat summary judgment by raising a triable issue of fact as to a claim defendant never knew it had to address." (*Lockhart v. County of Los Angeles* (2007) 155 Cal.App.4th 289, 311; *Laplante v. Wellcraft Marine Corp.* (2001) 94 Cal.App.4th 282, 297 ["summary judgment cannot be granted or denied on issues not raised by the pleadings"].) There is an exception. When a moving party addresses a newly raised issue in a reply brief and does not assert an objection, a trial court can treat any potential objection as waived. (*Stalnaker v. Boeing Co.* (1986) 186 Cal.App.3d 1291, 1302 (*Stalnaker*).)

Because Alden and Pollock did not allege breach of a 2004 contract, the pleading did not establish it as a material issue. Under the general rule, Alden and Pollock cannot rely on a new issue to defeat summary judgment. They can save their argument only if the *Stalnaker* exception applies. They do not suggest, however, that Venbrook briefed the issue and waived its objection.

A perusal of the trial court's order reveals that it considered the matter a nonissue. It wrote: "[Alden and Pollock] provide no foundation for [the summary] other than a declaration of outside trial counsel who has no personal knowledge because he was retained after the [summary] [was] prepared and sent. If the foundational issue were cured, the[summary] would evidence a communication from [Venbrook] to [Case Financial's] President and [chief information officer], Gary Primas, describing proposed

coverage for the upcoming year and Primas' signature acknowledging that he has 'read all terms and conditions provided above' and authorizing Venbrook to 'bind coverage on [Case Financial's] behalf.' The Exhibit also includes a photocopy of [Case Financial's] contemporaneous deposit check, signed by Primas, and made payable to Venbrook. Since the documents in Exhibit B only refer to [Directors & Officers] coverage generally, with no reference to coverage for shareholder derivative actions per se, they do not evidence Venbrook's alleged written promise to provide such coverage. They evidence, at most, that [Alden and Pollock] authorized Venbrook to obtain [Directors & Officers] coverage in May 2004."

We agree with the trial court. The summary does not evince a promise for Venbrook to provide coverage for derivative actions. There cannot be a triable issue of fact regarding a newly minted breach of contract cause of action if there is no evidence to support the asserted contract.

Our analysis of this topic need not go further.

D. The Fiduciary Duty Cause of Action is Time-Barred.

"'"To determine the statute of limitations which applies to a cause of action it is necessary to identify the nature of the cause of action, i.e., the 'gravamen' of the cause of action. . . . '[T]he nature of the right sued upon and not the form of action nor the relief demanded determines the applicability of the statute of limitations under our code.' . . ."' [Citations.] 'What is significant for statute of limitations purposes is the primary interest invaded by defendant's wrongful conduct.' [Citation.]" (*Hydro-Mill*, *supra*, 115 Cal.App.4th at p. 1153.)

In *Hydro-Mill*, the plaintiff stated claims, inter alia, for negligence and breach of fiduciary duty based on the allegation that a broker failed to obtained the insurance requested by the plaintiff, and on the further allegation that the broker falsely represented that the proper coverage had been obtained. After a bench trial, the plaintiff was awarded damages. The appellate court reversed based on the two-year statute of limitations in section 339, subdivision (1). In doing so, it rejected the plaintiff's argument that the fiduciary duty cause of action was governed by the four-year statute of limitations in

section 343. The court explained: "The statement of decision indicates that liability on both of those causes of action is based on the same findings: [the broker] failed to obtain the requested insurance coverage and did not disclose that failure. In short, [the plaintiff's] causes of action, regardless of appellation, amount to a claim of professional negligence. Because a two-year statute of limitations governs that type of claim . . . , [the plaintiff] cannot prolong the limitations period by invoking a fiduciary theory of liability." (*Hydro-Mill, supra,* 115 Cal.App.4th at p. 1159, citing *Curtis v. Kellogg & Andelson* (1999) 73 Cal.App.4th 492, 503 [if the "gravamen of [a] . . . breach of fiduciary duty claim[] [is] the purported malpractice" of the defendant, then "the two-year statute of limitation applies"].)

Here, the trial court concluded that the gravamen of Alden and Pollock's action was professional negligence and therefore the fiduciary duty claims was subject to the two-year statute of limitations. On appeal, they argue the four-year statute of limitations applies because they alleged sufficient facts to state a cause of action. They do not, however, explain why the trial court misapplied *Hydro-Mill*. In other words, they do not explain why the gravamen of this action is breach of fiduciary duty rather than negligence such that section 339 does not apply. Having failed to show error, Alden and Pollock cannot prevail.

E. The Trial Court Properly Granted Judgment on the Pleadings as to the Fraud Cause of Action.

Venbrook unsuccessfully moved for summary adjudication of the fraud cause of action based on the statute of limitations. Then it attacked the fraud cause of action via a motion for judgment on the pleadings. Based on *Centinela Hospital Assn. v. City of Inglewood* (1990) 225 Cal.App.3d 1586 (*Centinela Hospital*) and *Le Francois v. Goel* (2005) 35 Cal.4th 1094 (*Le Francois*), Alden and Pollock argue that the motion for judgment on the pleadings was an improper motion for reconsideration. Neither case, however, supports the argument.

Centinela Hospital recognized that a summary judgment motion "necessarily includes a test of the sufficiency of the complaint. [Citation.]" (*Centinela Hospital*,

supra, 225 Cal.App.3d at p. 1595.) In *Le Francois*, the court held that a party may not file a motion for summary judgment on the same grounds asserted in a previous motion for summary judgment unless the party satisfies the requirements of section 437c, subdivision (f)(2). Subdivision (f)(2) provides that "a party may not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court, unless that party establishes to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion."

Nothing in section 437c, subdivision (f)(2) bars a motion for judgment on the pleadings. Thus, Venbrook's motion was proper.

We now turn to the merits.

"The elements of fraud**,** which give rise to the tort action for deceit, are (1) a misrepresentation, (2) with knowledge of its falsity, (3) with the intent to induce another's reliance on the misrepresentation, (4) justifiable reliance, and (5) resulting damage." (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1255.) Fraud must be pleaded with specificity. (*Wilson v. Houston Funeral Home* (1996) 42 Cal.App.4th 1124, 1139.) The specificity rule "in a fraud action against a corporation requires the plaintiff to allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written. [Citations.]" (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 157.)

Out of the box, the fraud allegations fail to state a cause of action. If Venbrook caused Alden and Pollock to incur defense costs to defend themselves in the derivative action and then settle, and to incur attorney fees suing Landmark and Admiral, it was through Venbrook's negligence, breach of contract or breach of fiduciary duty related to the procurement of the policies. The fraud allegations are merely Alden and Pollock's attempt to plead equitable estoppel to avoid the statute of limitations. Thus, a separate cause of action does not arise. Though Alden and Pollock contend that their equitable estoppel allegations support a separate fraud cause of action for the exact same damages

sought in their negligence claim, and that this fraud cause of action is subject to a three-year statute of limitations, that contention is absurd. No law supports the theory that if a professional commits malpractice and then later lies about it, the malpractice cause of action is converted into a fraud claim.

With respect to the elements of fraud, we offer the following observations. The second amended complaint alleged that "[Alden and Pollock's] counsel[] contacted Defendant [Venbrook] and requested a copy of the policies in effect during the years 2002 through 2005 for [Case Financial]. Defendant [Venbrook] informed . . . counsel that [Venbrook] was not the insurance agent for [Case Financial] during the years 2002 through 2005 and had no files." These allegations are deficient. As alleged, Venbrook is a limited liability company. The pleading fails to give Venbrook notice of who made the statement and what authority the person had. Without an allegation regarding the identity and authority of the person to speak, the allegation of reasonable reliance must fail.

In any event, as a matter of law, Alden and Pollock could not have reasonably relied on the statements by anyone, including West in September 2007, disclaiming Venbrook's role as a broker. The second amended complaint alleged that Alden was the chief executive officer and chairman of the board of Case Financial from March 15, 2002, to February 23, 2004. He met with Venbrook and Venbrook "agreed to act as an insurance agent for [Case Financial]. As a result, [Alden] hired [Venbrook] . . . to act as the [insurance agent and broker] for [Case Financial], its Officers and Directors." Because Alden hired Venbrook as Case Financial's insurance broker, Alden and Pollock were not entitled to rely on subsequent statements by Venbrook employees that it was not the broker for any policies between 2002 and 2005 when Alden knew to the contrary at least as to 2002. They were required to exercise reasonable diligence to investigate. Finally, Alden and Pollock cannot claim that they delayed filing suit to their detriment based on West's statements. At the time the statements were made, the statute of limitations had already run.

The allegations also fail to establish causation and damages. As we have explained, the directors were on notice of their claims in 2005. Whether they were

ignorant of Venbrook's role as a broker is moot because they were required to exercise reasonable diligence and discover the identity of the tortfeasors. Regardless, Alden and Pollock did not suffer damage due to fraud. Their damage, if any, was caused by broker malpractice in obtaining insurance.

F. The Doctrine of Issue Preclusion does not Apply.

Alden and Pollock argue that the federal court's ruling on the motion to remand has preclusive effect. We cannot agree.

The doctrine of issue preclusion, otherwise known as collateral estoppel, precludes the relitigation of issues "only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. [Citations.]" (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.)

In connection with the motions for summary judgment, the trial court was concerned with whether there was a triable issue as to the statute of limitations as to Alden and Pollock. When the federal court ruled on the motion to remand, it was concerned with whether Venbrook and Swett were sham defendants in an action brought by Gregory and Bibicoff. It examined whether Admiral had established that there was no possibility that Bibicoff and Gregory would be able to establish a cause of action against Venbrook and Swett in state court. In other words, Admiral had to show that a time bar was obvious under the settled rules of California.

Undeniably, the legal issues in the federal proceeding involving Gregory and Bibicoff and the state court proceeding involving Alden and Pollock were not identical. The motions and plaintiffs involved were different, which gave rise to different issues. Even if the issues were identical, it would not matter. The federal court did not necessarily decide whether the statute of limitations had expired because it expressly did

not decide when damage occurred. It accepted without analysis the assertion by Gregory and Bibicoff that they were not damaged until 2009. If the federal court did not decide when damages occurred, it could not decide when the claims accrued. Absent a resolution of when the claims accrued—which required a finding as to when Gregory and Bibicoff knew or should have known of their claims—the federal court could not decide when the statute of limitations began to run and therefore whether the action was timely. Last and most pivotal, the federal court's order remanding the matter back to state court was not a final judgment on the merits.

G. Swett's Second Motion for Summary Judgment was not Barred by Section 437c, subdivision (f)(2).

Though Alden and Pollock suggest Swett's second motion for summary judgment should have been denied pursuant to section 437c, subdivision (f)(2), they are wrong. Section 437c, subdivision (f)(2) prohibits a motion for summary judgment only if a party made a prior motion for summary adjudication on the same issues and the trial court denied it. The only exception is if the moving party establishes to the satisfaction of the trial court that there are newly discovered facts or circumstances or a change of law supported the reasserted issues.

The first summary judgment motion was not denied on the merits. Rather, the trial court denied the motion as moot because Alden and Pollock had filed a second amended complaint. In our view, section 437c, subdivision (f)(2) only applies to a merits based denial. Even if section 437c, subdivision (f)(2) was implicated, this would be a situation in which there were changed circumstances (the new pleading), and the second motion would be allowed.

DISPOSITION

The judgments are affirmed.

Venbrook and Swett are entitled to their costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ