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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

FORWARD THINKING
TRANSPORTATION LLC et al.,

Plaintiffs and Appellants,

v.

DONGELL LAWRENCE
FINNEY LLP et al.,

Defendants and
Respondents.

B269073

Los Angeles County
Super. Ct. No. BC500098

APPEAL from a judgment of the Superior Court of
Los Angeles County, Holly E. Kendig and Gregory Keosian,
Judges. Affirmed.

Yee & Belilove, Steven R. Yee, Steve R. Belilove, and
Timothy M. Schowe, for Plaintiffs and Appellants.

Nemecek & Cole, Jonathan B. Cole, Mark Schaeffer, and
Lucy H. Mekhael for Defendants and Respondents.

INTRODUCTION

Teresa Kelley and Forward Thinking LLC (Forward Thinking) sued a law firm, Dongell Lawrence Finney LLP (Dongell or the law firm), and four of its attorneys for legal malpractice and breach of fiduciary duty.¹ After the trial court sustained Dongell's and its attorneys' demurrer to the second amended complaint without leave to amend, it entered two judgments: the July 8, 2015 judgment in favor of the four attorneys employed by Dongell, and the October 8, 2015 judgment entered in favor of Dongell. Plaintiffs appeal only from the second judgment entered in favor of the law firm. We affirm.

FACTS AND PROCEDURAL BACKGROUND

1. Defendants' legal representation

In September 2008, Kelley began dating Matt Bures, an attorney at the law firm. On December 2, 2008, Kelley retained the law firm while she was involved in a dissolution action against her now ex-husband. After she retained the law firm, Kelley and Bures began sleeping together.

Around early 2009, Kelley and her ex-husband settled their dissolution action, executing a marital settlement agreement. They agreed to split three shipping franchises they had owned as community property, with Kelley receiving one of the franchises, "San Fernando East Unishippers." In March 2009, the court in

¹ We refer to Kelley and Forward Thinking collectively as "plaintiffs." The four attorneys are John A. Lawrence, Molly Shields, Hillary Arrow Booth, and Matt Bures. We refer to the four attorneys and the law firm collectively as "defendants."

Kelley's dissolution action entered a stipulated judgment that incorporated the terms of the marital settlement agreement.

Also in March 2009, Dongell attorneys, Shields and Lawrence, drafted an asset transfer agreement to "facilitate" Kelley's ownership of San Fernando East Unishippers. The asset transfer agreement also set forth the terms for the creation and operation of Forward Thinking.² The asset transfer agreement, however, did not attach or incorporate the terms of the marital settlement agreement or the stipulated judgment. According to Kelley, this omission resulted in her not receiving all of the assets she was entitled to after her dissolution action was resolved.

After the asset transfer agreement was executed, Kelley's ex-husband and his shipping company did not comply with the terms of the marital settlement agreement or the stipulated judgment. Defendants advised Kelley and Forward Thinking to file a civil lawsuit against Kelley's ex-husband and his company for, among other claims, breach of contract, fraud, unjust enrichment, and conversion (the underlying lawsuit). After Kelley filed the underlying lawsuit, Kelley's ex-husband and his company filed a cross-complaint against Kelley and Forward Thinking, alleging, among other claims, breach of contract, violation of the Business and Professions Code, conversion, and unjust enrichment.

On October 11, 2011, after a seven-day court trial in January 2011, the court in the underlying lawsuit entered judgment on Kelley's and Forward Thinking's complaint in favor

² It is unclear from the record whether Forward Thinking is related to San Fernando East Unishippers or whether it is a separate company created after Kelley settled her dissolution action.

of Kelley's ex-husband and his company. The court also entered judgment in favor of Kelley's ex-husband and his company on their cross-complaint, and it awarded them \$10,000 in damages and over \$200,000 in attorneys' fees. On November 2, 2011, the law firm, through Lawrence and Booth, sought to be relieved as plaintiffs' counsel because plaintiffs had not paid substantial legal fees, the trial had concluded, and a judgment had been entered. On February 2, 2012, the court granted the motion to be relieved as counsel.

2. Plaintiffs' lawsuit against the law firm and the four attorneys

In February 2013, Kelley and Forward Thinking sued the law firm and four of its attorneys—Lawrence, Shields, Booth, and Bures.³ Plaintiffs' operative second amended complaint alleged three causes of action—two for legal malpractice and one for breach of fiduciary duty.

The first cause of action for legal malpractice named the law firm, Shields, and Lawrence as defendants.⁴ Plaintiffs claimed Shields was primarily responsible for drafting the asset transfer agreement, while Lawrence reviewed and approved the agreement. According to plaintiffs, Shields and Lawrence were negligent in drafting the agreement because they failed to

³ In March 2013, Dongell (without the individual attorneys) filed a cross-complaint against plaintiffs seeking to recover over \$230,000 in unpaid legal fees.

⁴ Although the first cause of action in the second amended complaint is also brought against Bures and Booth, plaintiffs conceded in their opposition to defendants' demurrer that they inadvertently named those two attorneys in that cause of action.

incorporate the terms of the marital settlement agreement and the stipulated judgment.

The second cause of action for legal malpractice named the law firm and the four attorneys as defendants. The claim arises out of defendants' representation of plaintiffs in the underlying lawsuit against Kelley's ex-husband and his company.

Specifically, plaintiffs alleged the following deficiencies in defendants' representation: (1) they did not conduct adequate discovery by failing to "depone key witnesses" and "propound sufficient written discovery" on Kelley's ex-husband's company; (2) they failed to "procure and present various exhibits," prepare Kelley to testify, or call sufficient witnesses to support plaintiffs' claims; and (3) they "continued to prosecute the underlying action, charging attorneys' fees, and incurring costs" even though they were aware plaintiffs had a small likelihood of prevailing in the underlying trial due to their negligent drafting of the asset transfer agreement. Plaintiffs claimed they would have obtained a more favorable result in the underlying trial but for these deficiencies.

The third cause of action for breach of fiduciary duty names the law firm and the four attorneys as defendants. The claim arises, in part, out of Bures's sexual relationship with Kelley. Plaintiffs claimed Bures violated Rule 3-120 of the Rules of Professional Conduct by having sex with Kelley while she was represented by the law firm, and that Bures's negligence in representing plaintiffs was caused by his sexual relationship with Kelley.⁵ According to plaintiffs, the law firm, Lawrence, Shields,

⁵ Rule 3-120 provides in relevant part: "A member shall not: [¶] (1) Require or demand sexual relations with a client incident to or as a condition of any professional representation; or [¶] (2) Employ

and Booth were aware of Bures's sexual relationship with Kelley and ratified Bures's conduct.

Plaintiffs also claimed defendants breached their fiduciary duty by attempting to withdraw from representing plaintiffs in the underlying matter in September 2011, and by failing to advise plaintiffs of their "legal recourse options" before the court entered judgment. However, plaintiffs also alleged that defendants did not actually withdraw until February 2, 2012, several months after the court entered judgment in the underlying lawsuit.⁶ Finally, plaintiffs alleged defendants breached their fiduciary duty by continuing to prosecute plaintiffs' claims against Kelley's ex-husband and his company despite being aware of the low likelihood that plaintiffs would prevail.

In February 2014, defendants demurred to the second amended complaint. On July 2, 2014, the court sustained the demurrer without leave to amend as to the entire second amended complaint. On July 8, 2015, the court entered judgment in favor of Lawrence, Booth, Shields, and Bures. Plaintiffs were served with the notice of entry of judgment on July 15, 2015. Plaintiffs did not appeal from that judgment.

Meanwhile, Dongell's claims against plaintiffs for unpaid

coercion, intimidation, or undue influence in entering into sexual relations with a client; or [¶] (3) Continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of rule 3-110." (Rules Prof. Conduct, rule 3-120(B).)

⁶ The trial court granted defendants' request for judicial notice of a February 2, 2012 order issued in the underlying lawsuit granting the law firm's request to be relieved as counsel.

attorneys' fees remained active until Dongell dismissed its cross-complaint on October 8, 2015. That same day, the court entered judgment in favor of Dongell. Notice of entry of judgment was provided on October 21, 2015. On December 17, 2015, plaintiffs filed a timely notice of appeal from the October 8, 2015 judgment.

On September 20, 2016, defendants filed a motion to dismiss as untimely the portions of plaintiffs' appeal that challenge the July 8, 2015 judgment in favor of the individual attorneys. Defendants argued that, to the extent it challenged the July 8, 2015 judgment, plaintiffs' appeal was untimely because plaintiffs waited more than 60 days from July 15, 2015—when notice of entry of the judgment was served—to file their notice of appeal. On November 8, 2016, we issued an order striking from plaintiffs' opening brief references to the July 8, 2015 judgment in favor of the four attorneys. Because plaintiffs did not timely appeal from the July 8, 2015 judgment in favor of the four attorneys, we limit our review to the court's October 8, 2015 judgment in favor of the law firm.

DISCUSSION

The July 8, 2015 judgment in favor of the four attorneys bars plaintiffs' claims against the law firm.

Defendants urge us to affirm the trial court's October 8, 2015 judgment in favor of the law firm without addressing the merits of the court's ruling on the demurrer to the second amended complaint. Specifically, defendants assert that because plaintiffs did not appeal from the July 8, 2015 judgment in favor of the four attorneys, they are barred from pursuing their claims against the law firm. Defendants contend that because plaintiffs'

claims against the law firm are based entirely on theories of vicarious liability stemming from the conduct of the firm's attorneys, plaintiffs are precluded from pursuing those claims because there is a judgment on the merits in favor of the attorneys. We agree.

An order sustaining a general demurrer for failure to allege facts to state a cause of action is a judgment on the merits. (*Kanarek v. Bugliosi* (1980) 108 Cal.App.3d 327, 334 (*Kanarek*).) Such an order precludes other claims based on the same set of facts raised in the complaint that was the subject of the sustained demurrer. (*Ibid.*; see also *Keidatz v. Albany* (1952) 39 Cal.2d 826, 828.)

In their demurrer to plaintiffs' second amended complaint, defendants argued, in part, that plaintiffs failed to state sufficient facts to establish their two causes of action for legal malpractice and one cause of action for breach of fiduciary duty. The trial court sustained the demurrer on these grounds as to all three causes of action. As to the first two causes of action for legal malpractice, the court found plaintiffs failed to allege sufficient facts establishing the element of causation. Specifically, the court found plaintiffs failed to allege facts demonstrating a connection between the attorneys' conduct in drafting the asset transfer agreement and representing plaintiffs in the underlying matter and any harm plaintiffs suffered. As to the breach of fiduciary duty claim, the court found plaintiffs failed to allege facts demonstrating a causal relationship between Bures's sexual relationship with Kelley and any legal services Bures provided that caused plaintiffs harm. The court also found plaintiffs failed to allege how the four attorneys' conduct during the underlying trial, including Booth's and Lawrence's attempt to

withdraw from representing plaintiffs, caused plaintiffs any harm.

In light of the court’s ruling, the July 8 and October 8, 2015 judgments are judgments on the merits. (See *Kanarek, supra*, 108 Cal.App.3d at p. 334.) As for the July 8, 2015 judgment, it is final and conclusive for purposes of res judicata for claims based on the same underlying facts—i.e., the conduct of the four attorneys—because plaintiffs failed to appeal from it. (See *Proctor v. Vishay Intertechnology, Inc.* (2013) 213 Cal.App.4th 1258, 1270.)

We now turn to the issue of whether the July 8, 2015 judgment in favor of the four attorneys bars plaintiffs’ claims against the law firm. We conclude that it does because the law firm’s liability on all three claims is based entirely on the conduct of the four attorneys.

A law firm is vicariously liable for the loss or injury caused by the wrongful acts or omissions of its partners, associates, or other employees acting in the ordinary course of business of the law firm or with the firm’s authority. (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 391–392.) “It is the firmly-established rule that a judgment on the merits favorable to an employee in an action by a third person for a tort of the employee is a bar to an action by the third person against the employer where the latter’s asserted liability for the tort rests upon *respondeat superior* and not his independent tort. [Citations.]” (*Freeman v. Churchill* (1947) 30 Cal.2d 453, 461 (*Freeman*), accord *Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1347 [“A judgment on the merits in favor of an employee bars recovery against the employer when the only claim against it is based on vicarious

liability and there is no allegation the employer committed an independent tort”].) This rule applies regardless of whether the claims against the employer are brought in the same or a separate action as those against the employees. (*Freeman, supra*, 30 Cal.2d at p. 461.)

In this case, all of plaintiffs’ claims arise out of the conduct of the four attorneys in whose favor the July 8, 2015 judgment was entered. The first two causes of action for legal malpractice in the second amended complaint are based on the attorneys’ drafting of the asset transfer agreement and their representation of plaintiffs in the underlying lawsuit against Kelley and her ex-husband’s company. Plaintiffs do not allege any facts that would render the law firm directly liable for any of plaintiffs’ losses, such as a claim of negligent hiring or negligent supervision. (See *Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139–1140 [an employer may be directly liable for its own conduct in negligently hiring an employee that is incompetent or unfit or in negligently controlling an employee’s conduct].) Likewise, the third cause of action for breach of fiduciary duty is based on the attorneys’ conduct, such as Bures’s relationship with Kelley, the attorneys’ representation of plaintiffs in the underlying matter against Kelley’s ex-husband and his company, and Lawrence’s and Booth’s attempt to withdraw from representing plaintiffs in the underlying matter. Even if we were to assume that the allegations that the law firm ratified Bures’s relationship with Kelley could expose Dongell to liability, such a claim is nevertheless barred because the July 8, 2015 judgment constitutes a final judgment on the merits that Bures did not engage in any wrongful or prohibited conduct that the law firm could be liable for ratifying.

In sum, plaintiffs are barred from pursuing their claims against the law firm because those claims are based entirely on the conduct of the four attorneys in whose favor there exists a judgment on the merits. Plaintiffs also do not explain how the law firm could be held individually liable for malpractice or breach of fiduciary duty when its attorneys have been exonerated for the same alleged acts or omissions. Finally, plaintiffs have not shown in what manner they can amend their operative pleading and how that amendment will change the legal effect of their pleading. (See *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.)

DISPOSITION

The October 8, 2015 judgment is affirmed. Respondents shall recover their costs on appeal.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

GOSWAMI, J.*

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