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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JOHN B. PELKOLA,

Plaintiff and Appellant,

v.

STEVEN S. FEDER et al.,

Defendants and Respondents.

2d Civil No. B282954
(Super. Ct. No. 56-2014-00454064-
CU-PO-VTA)
(Ventura County)

John B. Pelkola appeals a judgment of dismissal entered after the trial court sustained a demurrer to his third amended complaint without leave to amend. (Code Civ. Proc., § 581d.)¹ We affirm.

FACTUAL AND PROCEDURAL HISTORY

On June 11, 2014, Pelkola brought an action against Steven S. Feder and the law firm of Hathaway, Perrett, Webster, Powers, Chrisman & Gutierrez (collectively Feder), and Samuel

¹ All statutory references are to the Code of Civil Procedure unless stated otherwise.

M. Huestis and the Law Offices of Samuel M. Huestis (collectively Huestis). Pelkola alleged 10 causes of action arising from the legal representation of his parents, Bruce and Edna Pelkola.² Pelkola alleged that Bruce and Edna suffered from dementia and other illnesses and sought legal representation to qualify for long-term care benefits. Feder and Huestis advised Bruce and Edna regarding estate planning and Medi-Cal benefits. Feder also drafted a quitclaim deed to Pelkola regarding the Ventura real property owned by Bruce and Edna (their Gorrion Avenue home) as well as an occupancy agreement granting them a lifetime right to occupy the property and a declaration of the right to return home.

Following his parents' move into an assisted living facility, Pelkola mortgaged their real property and transferred their savings into his bank account. When Bruce and Edna requested funds to pay for their care, Pelkola claimed that the funds he transferred into his account had been a gift. Bruce and Edna then asked to return home, but Pelkola demanded that they pay the mortgage as a condition of their return.

In 2009, Bruce and Edna retained Huestis to investigate and file a financial elder abuse claim with the Ventura County District Attorney. Feder provided Huestis with copies of the documents that he drafted for Bruce and Edna. He also declared that Bruce and Edna intended that Pelkola hold their funds for their benefit. In 2010, the District Attorney charged Pelkola with elder abuse and, in 2013, Feder testified at Pelkola's preliminary examination. At the conclusion of the preliminary examination,

² We shall refer to Bruce and Edna Pelkola by their first names, not from disrespect but to ease the reader's task.

however, the trial court dismissed the criminal charges for insufficient evidence.

Among other allegations, Pelkola's initial complaint alleged causes of action for malicious prosecution, abuse of process, fraud, intentional infliction of emotional distress, and defamation. Feder and Huestis brought a special motion to strike these five causes of action pursuant to the anti-SLAPP statute. (§ 425.16.) The trial court granted the motion and we affirmed in an unpublished opinion. (*Pelkola v. Feder* (Jan. 20, 2016, B261697).)

Pelkola then filed a first amended complaint, and later, a second amended complaint regarding the remaining causes of action. The trial court sustained demurrers to the respective pleadings and granted Pelkola leave to amend each time. His third amended complaint, the pleading with which this appeal is concerned, alleged these causes of action: breach of agreement, legal malpractice, notary malpractice, breach of fiduciary duty, and negligence.

The allegations of the third amended complaint state that, in 2006, Feder drafted and notarized a quitclaim deed to Bruce and Edna's real property in favor of Pelkola, as well as additional documents ensuring their right to resume occupancy. Pelkola alleged that the additional documents "resurrect[ed] possible ownership" in the real property to his detriment. In 2007, Pelkola employed an attorney to draft his estate planning documents because Feder refused to record the quitclaim deed or to provide it to Pelkola. Nevertheless, Pelkola alleged that Feder represented him regarding various legal matters, including his dissolution of marriage, until December 2009, when Feder violated the attorney-client relationship. Following that date,

Pelkola alleged that Feder had a continuing duty to not commit acts adverse to him and to avoid any conflict of interest. Pelkola also alleged that Feder breached his professional duty by providing a declaration which then served as a basis for Pelkola's 2010 criminal prosecution for financial elder abuse.

The trial court sustained Feder's demurrer to the third amended complaint without leave to amend. In his response to the demurrer, Pelkola did not request leave to amend nor did he assert how he might amend his pleading to correct any defects. In its written ruling, the court stated that the causes of action were time-barred because Pelkola did not sufficiently allege facts showing that Feder continued to represent him after 2009. Alternatively, the court decided that the litigation privilege of Civil Code section 47 precluded Pelkola's claims regarding Feder's declaration in the elder abuse matter. The court then entered a judgment dismissing the action.

Pelkola appeals and contends that the trial court erred by sustaining the demurrer without leave to amend and then dismissing the action.

DISCUSSION

Pelkola argues that he has alleged sufficient facts to fall within the statute of limitations for each cause of action in his third amended complaint.

On appeal from a judgment dismissing an action following the sustaining of a demurrer without leave to amend, our standard of review is de novo, i.e., we exercise our independent judgment whether the complaint alleges facts sufficient to state a cause of action under any possible legal theory. (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1010; *Lafferty v. Wells*

Fargo Bank (2013) 213 Cal.App.4th 545, 564.) We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. (*Centinela*, at p. 1010; *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1189, fn. 1.) We also give the complaint a reasonable interpretation, reading it in context and as a whole, to determine whether plaintiff has stated a cause of action. (*Centinela*, at p. 1010; *Lafferty*, at p. 564.) Pursuant to the rules of truthful pleading, we disregard allegations that are inconsistent with either other allegations or matters that may be judicially noticed. (*Trinity Park, L.P. v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014, 1027, disapproved on other grounds by *Sterling Park, LP v. City of Palo Alto* (2013) 57 Cal.4th 1193, 1202.)

Plaintiff bears the burden of showing that the factual allegations establish every element of each cause of action pleaded. (*Martin v. Bridgeport Community Assn., Inc.* (2009) 173 Cal.App.4th 1024, 1031.) We will affirm the trial court's ruling if there is any ground upon which the demurrer could have been properly sustained. (*Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1052; *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 752.) Plaintiff also bears the burden of showing that a reasonable possibility exists that he can amend his pleading to state a cause of action. (*Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 962; *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 44 ["Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the

demurrer without leave to amend"].) A demurrer properly challenges a cause of action barred by the statute of limitations where the timeliness defect clearly and affirmatively appears on the face of the pleading. (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1232.)

Statute Of Limitations

Statutes of limitations preclude the causes of action alleged in Pelkola's third amended complaint. (§§ 337, subd. 1 [four years for breach of written contract]; 339, subd. 1 [two years for breach of oral contract]; 340.6, subd. (a) [one year from discovery of legal malpractice or four years from date of wrongful act or omission]; 338, subd. (f)(1) & (2) [one year from discovery of malfeasance or three years from date of wrongful act]; 338, subd. (d) [three years for breach of fiduciary duty based upon fraud].) Pelkola alleges that Feder did not perform any legal services after 2009 and that the Feder declaration to the prosecutor was provided on December 18, 2009. Pelkola also alleges that he employed another attorney several years before, in 2007. Pelkola filed his initial complaint on June 11, 2014. In view of these specific allegations, we disregard the conclusionary general allegation that Feder represented Pelkola until 2013. (*Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1235-1236 [specific allegations in a complaint control over an inconsistent general allegation].) The asserted wrongful acts occurred far outside the statutes of limitation for breach of contract, attorney and notary malpractice, and negligence.

Litigation Privilege – Civil Code section 47

The litigation privilege of Civil Code section 47, subdivision (b) pertains to any communication 1) made in judicial or quasi-judicial proceedings; 2) by litigants or other participants

authorized by law; 3) to achieve the objects of the litigation; and 4) that have some connection or logical relation to the action. (*GetFugu, Inc. v. Patton Boggs LLP* (2013) 220 Cal.App.4th 141, 152.) The privilege extends to communications made before or after trial. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057.) The privilege also encompasses actions by administrative bodies and includes statements made to initiate official action. (*Johnson v. Ralphs Grocery Co.* (2012) 204 Cal.App.4th 1097, 1104 [report to police of suspected crime falls within litigation privilege]; *Wang v. Heck* (2012) 203 Cal.App.4th 677, 684 [judicial and quasi-judicial proceedings are defined broadly to include administrative, legislative, and other truth-seeking proceedings].)

The declaration that Feder submitted to Huestis for the purposes of initiating a criminal prosecution is privileged pursuant to Civil Code section 47. (*Johnson v. Ralphs Grocery Co.*, *supra*, 204 Cal.App.4th 1097, 1104.) To the extent that Pelkola's causes of action rely upon Feder's declaration as an asserted wrongful act, the causes of action fail.

The judgment of dismissal is affirmed. Respondents shall recover costs on appeal.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Henry J. Walsh, Judge

Superior Court County of Ventura

Armstrong & Armstrong, James J. Armstrong for Plaintiff
and Appellant.

Enenstein Pham & Glass, Alan R. Jampol for Defendants
and Respondents.