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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

RENATO CORZO et al., Plaintiffs and Appellants, v. PARKS PALMER TURNER & YEMENIDJIAN, LLP et al., Defendants and Respondents.	B285691 (Los Angeles County Super. Ct. No. BC627978)

APPEAL from an order of the Superior Court of Los Angeles County, Alan S. Rosenfield, Judge. Affirmed.

Catanzarite Law Corporation, Kenneth J. Catanzarite and Tim J. O'Keefe for Plaintiffs and Appellants.

Glaser Weil Fink Howard Avchen & Shapiro, Barry E. Fink, Elizabeth G. Chilton and Gali Grant for Defendant and Respondent Parks Palmer Turner & Yemenidjian.

Browning Hocker and William K. Browning for Defendant and Respondent Steven M. Fifield.

INTRODUCTION

Renato Corzo and his partnership sued the partnership's accountants for malpractice and breach of fiduciary duty. Defendant accountants filed a demurrer arguing that the lawsuit was barred by the statute of limitations. The trial court agreed. Corzo asked for and received leave to amend his complaint. Corzo's next complaint included new facts he believed tolled the statute of limitations. Defendants demurred again. The trial court sustained the demurrer without leave to amend, finding that the amended complaint was a "sham" pleading engineered to avoid the statute of limitations.

Was it? Yes. We agree with the trial court that Corzo's amended complaint was a sham pleading. Because Corzo has not demonstrated he can amend the pleading to state a viable cause of action not barred by the applicable statute of limitations, we affirm the trial court's dismissal of the amended complaint with prejudice.

FACTUAL AND PROCEDURAL BACKGROUND

A. The FAC

On July 22, 2016, Corzo filed a complaint in the Los Angeles County Superior Court against Howard P. Watkins alleging accounting malpractice. On October 6, 2016, Corzo filed a First Amended Complaint (FAC), adding as defendants Alberto Sanchez, Steven M. Fifield, Alejandro Yemenidjian, and Parks Palmer Turner and Yemenidjian, LLP (together PPTY) and alleging an additional cause of action for breach of fiduciary duty. All of the defendants are accountants whose services were retained by Corzo's partnership, plaintiff Corbell Partnership (Corbell).

The FAC alleged the following sequence of events. In May 1978, Corzo formed Corbell with State-Wide Developers, Inc. (State-Wide), a real estate company controlled by Alex Bellehumeur (Alex). Corbell was to operate an equestrian stable in South Pasadena. The partnership agreement provided that Corzo would be responsible for daily operations and State-Wide would obtain financing for the partnership.

Shortly after the partnership was formed, State-Wide's internal accounting department began preparing Corbell's internal books, records, and accounting. In 1984, Linda Dyer (Linda) began working with State-Wide in maintaining Corbell's internal books and records. In 1985, Linda became a partner in Corbell and subsequently began to act in a management capacity. Outside accounting and tax services were provided to Corbell by the following accountants: Watkins from 1978–1980 and 1989–2014; Fifield from 1992–1996 in partnership with Watkins; PPTY from 1981–1988; and Sanchez commencing in 2015.[1]

Linda and Alex (the Bellehumeurs) were married sometime in 1985 or 1986. By 1994, Linda had taken over "all internal bookkeeping matters" for Corbell and was also directing Watkins's, Fifield's, and PPTY's outside accounting services. Linda would provide the outside accountants with Corbell's internal accounting documents and records; the accountants would then review these records and prepare Corbell's tax returns. Each year, Corzo would receive a "K-1" statement, but not copies of the tax returns.

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[1] Hereinafter, we refer to defendants and respondents Fifield and PPTY as "the accountants." Watkins and Sanchez are not parties to this appeal.

According to the FAC, between 1985 and 1990, State-Wide took disproportionate partnership distributions neither authorized nor contemplated by the partners. From 1986 to 1994, Corbell advanced moneys to State-Wide and its affiliate entity in violation of the partnership agreement. The accountants covered up the unauthorized payments and advancements by improperly classifying them in Corbell's tax returns, and did not advise Corzo of any errors or deficiencies in Corbell's accounting records. Finally, the accountants did not disclose to Corbell that they were simultaneously providing accounting and tax services to State-Wide and the Bellehumeurs personally, nor did the accountants obtain conflict waivers from Corzo or Corbell.

B. Demurrer to the FAC

Fifield, joined by PPTY, demurred to the FAC asserting: (1) the claims were barred by the statute of limitations; (2) the accountants owed no duty to Corzo personally; (3) the accountants had no duty to ensure the partners were following the terms of the partnership agreement; and (4) Corzo failed to name Corbell and the Bellehumeurs as defendants in the action, constituting a defect or misjoinder of parties.

With respect to the statute of limitations issue, Fifield asked the trial court to take judicial notice of a verified complaint from LASC Case No. BC489833 between Corzo and the Bellehumeurs, and of the arbitrator's judgment and award in that case. The verified complaint revealed that in late 2011 and early 2012, disputes arose between Corzo and the Bellehumeurs over various accounting issues dating back to the inception of the partnership in 1978. In April 2012, in connection with an audit of the partnership, Corzo discovered several years of tax returns,

which revealed a number of unauthorized transactions from Corbell to the Bellehumeurs and State-Wide, and various other misappropriations of partnership funds by the Bellehumeurs. On August 7, 2012, Corzo filed suit against the Bellehumeurs in the Los Angeles Superior Court in Case No. BC489833, alleging causes of action for fraud, breach of fiduciary duty, breach of contract, and accounting and appointment of a receiver. Fifield and PPTY argued that the verified complaint in the other lawsuit revealed that Corzo learned about the unauthorized transactions and misappropriations in April 2012, which triggered the two-year statute of limitations, yet Corzo did not file the complaint in the present matter until July 2016.

The trial court sustained the demurrer on all grounds and granted Corzo leave to amend.

C. The SAC

On May 3, 2017, Corzo filed the Second Amended Complaint (SAC). The SAC alleges the same causes of action against the same defendants, but newly alleges that Corzo discovered in October 2015 that the Bellehumeurs and State-Wide had not in fact prepared the internal books, records, and financial statements for the partnership; instead, it was the outside accountants who had been providing the internal accounting services all along. The SAC provides no explanation for this change in facts or any justification for failing to include these new and different facts in the FAC.

D. Demurrer to the SAC

The accountants demurred to the SAC, repeating the same grounds from the first demurrer: (1) the claims were barred by the two-year statute of limitations set out in Code of Civil Procedure section 339, subdivision (1); (2) the accountants owed

no duty to Corzo; and (3) the accountants had no duty to ensure the partners were following the terms of the partnership agreement. With respect to the statute of limitations issue, the accountants argued that Corzo's alleged discovery in October 2015 that they provided internal accounting services beyond outside tax return preparation did not extend the statute of limitations because Corzo had already discovered facts sufficient to create a suspicion of wrongdoing in April 2012.

In opposition to the demurrer Corzo argued that tolling based on delayed discovery applied because he was not on notice until October of 2015 that the accountants had been handling any of Corbell's internal books and records. Despite knowing there were "issues with the tax returns" in April 2012, Corzo further argued that the accountants had not shown how Corzo could have discovered that they were "inside accountants" responsible for preparing the partnerships internal books and records.

The trial court found that the "SAC appear[ed] to be a sham pleading engineered to avoid the statute of limitations" in that the new allegations created a "complete and utter factual inconsistency between the FAC and SAC." The new allegations were "made in an attempt to escape demurrer." The trial court disregarded the new allegations because Corzo failed to provide any explanation for the inconsistencies; it sustained the demurrer without leave to amend.

Corzo timely appealed, and asks us to take judicial notice of Corbell's 1981, 1988, and 1989 tax returns, and of a blank Internal Revenue Service Return of Partnership Income Form from 2014. For the reasons discussed below, we deny Corzo's request for judicial notice, and affirm the trial court's ruling sustaining the demurrers and denying Corzo leave to amend.

DISCUSSION

A. Standard of review

We independently review the ruling on a demurrer and determine de novo whether the pleading alleges facts sufficient to state a cause of action. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) " 'We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded, and matters of which judicial notice has been taken.' " (*Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 833.)

If a trial court sustains a demurrer without leave to amend, as here, we determine whether there is a reasonable possibility appellant could cure the defect by amendment. If so, we conclude that the trial court abused its discretion and we reverse. The appellant has the burden of proving that an amendment would cure the defect. (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 320.)

B. The statute of limitations and the delayed discovery doctrine

The two-year statute of limitations prescribed by Code of Civil Procedure section 339, subdivision (1) applies to actions for accounting malpractice. (*Sahadi v. Scheaffer* (2007) 155 Cal.App.4th 704, 714.) The statute begins to run when "(1) the aggrieved party discovers the negligent conduct causing the loss or damage and (2) the aggrieved party has suffered actual injury as a result of the negligent conduct." (*Apple Valley Unified School Dist. v. Vavrinek, Trine, Day & Co.* (2002) 98 Cal.App.4th 934, 942.)

The statute of limitations for breach of fiduciary duty is typically three years or four years, depending on whether the breach is fraudulent. (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1479.) The statute is three years " 'for a cause of action for breach of fiduciary duty where the gravamen of the claim is deceit.' " (*Ibid.*) If the claim does not amount to fraud, the Code of Civil Procedure section 343 "catchall" four-years limitations period applies. (*Ibid.*)

If a plaintiff could not have discovered facts supporting a cause of action within the applicable statute of limitations, he or she may nevertheless bring the action upon a showing that "despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period." (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 809.) In other words, to invoke the delayed discovery doctrine, a plaintiff whose complaint " 'shows on its face' " that the action would be time-barred must " 'specifically plead facts' " to show " 'the time and manner of discovery *and* . . . the inability to have made earlier discovery despite reasonable diligence.' " (*Id.* at p. 808.)

C. The sham pleading doctrine

After an amended pleading has been filed, a trial court generally disregards the original pleading. (*Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 343 (*Larson*).) An exception to this rule exists " ' "where an amended complaint attempts to avoid defects set forth in a prior complaint by ignoring them." ' " (*Ibid.*) The court may then look to the prior complaints to determine whether the amended complaint is " ' "merely a sham." ' " (*Ibid.*) Under the " ' "sham pleading

doctrine, plaintiffs are precluded from amending complaints to omit harmful allegations, without explanation, from previous complaints to avoid attacks raised in demurrers." ' " (*Id.* at p. 344.)

This exception also applies to pleadings filed in a separate action, as the trial court may take judicial notice " 'of a party's earlier pleadings and positions as well as established facts from both the same case *and other cases*.' " (*Larson*, *supra*, 230 Cal.App.4th at p. 344.) The prior complaint should be read " 'as containing the judicially noticeable facts,' " even when the current operative complaint contains express allegations to the contrary. A plaintiff " 'may not avoid a demurrer by pleading facts or positions in an amended complaint . . . that contradict the facts or positions that the plaintiff pleaded in earlier actions.' " (*Ibid*.)

Any inconsistencies between prior and amended complaints must be explained; " 'if the pleader fails to do so, the court may disregard' " the allegations in the amended complaint that are contrary to factual allegations in prior pleadings. (*Larson*, *supra*, 230 Cal.App.4th at p. 343.) Indeed, a court is never bound to " ' "accept as true allegations contrary to factual allegations in a former pleading in the same case." ' " (*Ibid*.)

D. The trial court properly sustained the demurrer

In the FAC, Corzo alleged multiple times that the Bellehumeurs and State-Wide were entirely responsible for all of Corbell's internal accounting. Corzo stated that: (1) State-Wide and Alex "took over both the internal accounting and financial record keeping functions" of the partnership and "interface[d] with the outside accountants [PPTY, Watkins, and Fifield] for outside accounting services and tax return preparation from that

point forward;" (2) by 1994, Linda had "taken over all internal bookkeeping matters as well as all direction and control" of the accountants with respect to their services "as the outside accountant[s] in the review of accounting records and the preparation of the partnership tax returns;" (3) the accountants "continuously provided" Corbell with "outside accounting services including the review of the clearly deficient and self[-]serving internally prepared income statements;" and, (4) "from the inception of the [Corbell] partnership, the partnership books and records had been under the direction and control of Alex Bellehumeur and State-Wide and from and after 1985, Linda Bellehumeur and State-Wide . . . interfaced with [the accountants] for the review thereof and the preparation of all tax returns."

In the SAC, Corzo changed the facts to allege that it was actually the accountants, not State-Wide or the Bellehumeurs, who had always been responsible for Corbell's internal accounting. Multiple times in the SAC, Corzo stated he learned in October 2015 that the accountants were "in fact the inside accountants preparing the internal books and records" for Corbell. Not only do these allegations directly contradict Corzo's explicit statements in the FAC, Corzo provided no explanation in the trial court for the factual inconsistencies between the two complaints.

On appeal, Corzo attempts to distinguish the two complaints by arguing that the FAC does not state the Bellehumeurs or State-Wide "prepared all financial statements . . . or otherwise excluded [the accountants] from acting in the role as preparers of the financial statements that were used to prepare the Corbell" tax returns filed on Form 1065. We find this

statement disingenuous. As discussed above, the FAC repeatedly alleges that from the inception of the partnership, State-Wide, Alex, and Linda "took over" the internal accounting and financial record keeping," assumed "direction and control" over the "outside" accountants," and assumed direction and control over the partnership books and records.

The trial court was not bound to accept the contradictory allegations in the SAC and neither are we. Corzo has not provided us or the trial court with a reasonable explanation for the glaring inconsistencies between the FAC, the SAC, and the verified complaint from the 2012 action against the Bellehumeurs. Accordingly, the stark discrepancy in facts among the three complaints is fatal to Corzo's action. Without these "newly discovered" facts, the causes of action in the SAC against the accountants are time-barred.

In addition, Corzo did not adequately explain why he should have been given the benefit of the delayed discovery doctrine. In his opposition to the demurrer to the SAC, Corzo argued that tolling based on delayed discovery applied because he was not on notice until October of 2015 that the accountants had been handling any of Corbell's internal books and records. Instead of pleading facts to show why a diligent investigation would not have revealed the accountants' wrongdoing within the two-year statute of limitations, Corzo merely stated he never received any information contradicting his reasonable expectation as to who prepared Corbell's accounting and had "no reason to suspect" that that the accountants had breached their duty of care. On this second point, we disagree.

To employ the delayed discovery rule Corzo should have shown that he conducted a reasonable investigation into "*all potential causes*" of his injury. (*Fox v. Ethicon Endo-Surgery, Inc.*, *supra*, 35 Cal.4th at p. 808, italics added.) It was through an examination in April of 2012 of the tax returns *prepared by the accountants* that Corzo first discovered any potential wrongdoing. This alone was sufficient to " ' "arouse the suspicions" ' " of a reasonable person, placing upon Corzo a duty to investigate whether the accountants were a potential cause of his injury. (See *Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 179.) This, Corzo did not do; nor did he attempt to show why even a mere inquiry of the accountants into the services they provided to Corbell would have failed to uncover any alleged wrongdoing. Instead, Corzo offered the conclusory rationale that he had no reason to suspect the accountants played any role. A plaintiff, however, must show " ' "diligence, and conclusory allegations will not withstand demurrer." ' " (*Id.* at p. 175.)

Corzo also argued that the accountants failed to show how he could have discovered that the accountants provided "inside" services to Corbell by preparing the partnership's internal books and records. The burden, however, was not on the accountants to prove that Corzo could have discovered their alleged wrongdoing. To invoke the delayed discovery rule, the burden rested entirely with Corzo to show that he could not have discovered facts giving rise to his cause of action within the applicable limitations period despite a diligent investigation. This, Corzo has failed to do.

E. The trial court did not abuse its discretion in denying leave to amend

Corzo contends he should have been given a "reasonable opportunity" in the trial court to explain the distinctions between the FAC and the SAC, and to plead a separate claim against the accountants for aiding and abetting the Bellehumeurs' breach of fiduciary duty, which would have invoked a four-year statute of limitations.

Corzo was given an opportunity to explain the discrepancies between the FAC and the SAC at the hearing on the demurrer to the SAC. The trial court stated that the second, inconsistent pleading was "of some concern to the court," and then asked, "[w]ould you like to address that, counsel?" Plaintiff's counsel replied that the FAC concerned "what was discovered in August of 2012" and the SAC concerned "what was discovered in October 2015." Plaintiff's counsel continued: "As far as the court's inquiry as to why" the alleged October 2015 discovery "wasn't in the first pleading in the first place, I can't comment on that. I don't know the exact reason." Plaintiff's counsel gave no explanation for the factual discrepancies and inconsistencies in the pleadings, namely why the FAC alleged State-Wide and the Bellehumeurs maintained exclusive control over Corbell's internal accounting whereas the SAC alleged it was the accountants who were responsible for all internal accounting services from Corbell's inception.

Even if Corzo were again given leave to amend the complaint to allege a cause of action against the accountants for aiding and abetting the Bellehumeurs' breach of fiduciary duty, the claim would be time-barred. As alleged in the 2012 verified complaint, Corzo learned of the Bellehumeurs' alleged breach in

April of 2012. Yet, he filed his complaint in the instant action in July of 2016, four years and three months after the cause of action would have accrued. And, as discussed above, Corzo has not pleaded facts sufficient to invoke the delayed discovery doctrine.

For the reasons stated above, we conclude the trial court did not abuse its discretion in denying Corzo leave to amend.

F. Corzo's request for judicial notice

Corzo asks us to take judicial notice of Corbell's 1981, 1988, and 1989 tax returns, and of a blank Internal Revenue Service Return of Partnership Income Form from 2014. The 1981, 1988, and 1989 returns were prepared by Yemenidjian, PPTY, and Watkins, respectively, and include the income statements and balance sheets for each year. Corzo contends these returns demonstrate that the accountants were "inside accountants" responsible for preparing Corbell's income statements and balance sheets. We disagree.

The documents merely show that the accountants prepared Corbell's tax returns in 1981, 1988, and 1989. The income statements and balance sheets, on their face, are included as part and parcel of the tax returns, and there is no dispute that the accountants have always prepared Corbell's tax returns. These documents do not show that the accountants provided Corbell with any internal bookkeeping or other financial record-keeping services as alleged in the SAC. As these documents are therefore irrelevant to the issues on appeal, we deny Corzo's request for judicial notice. (*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063, overruled on other grounds in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1262.)

Furthermore, Corzo does not indicate in his request for judicial notice when he came into possession of the tax returns he asks us to consider. In his prior complaint against the Bellehumeurs, Corzo admitted that he came into possession of Corbell's tax returns in April 2012. Therefore, even if these documents did somehow demonstrate that the accountants provided internal accounting services to Corbell as far back as 1981, they only tend to show that Corzo was on notice of any alleged wrongdoing by the accountants more than four years before he filed his complaint in the instant action. Accordingly, Corzo's request for judicial notice not only fails to support his arguments on appeal, it potentially undermines his contention that he only became aware of the accountants' alleged wrongdoing in October of 2015.

DISPOSITION

The judgment is affirmed. Respondents are to recover costs on appeal.

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STRATTON, J.

We concur:

RUBIN, Acting P. J.

GRIMES, J.