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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

JOSEPH M. FAHS, Cross-complainant and Appellant, v. ALAIN V. BONAVIDA, Cross-defendant and Respondent.	B268415 (Los Angeles County Super. Ct. No. BC550323)

APPEAL from a judgment and an order of the Superior Court for the County of Los Angeles. Elizabeth Allen White, Judge. Affirmed.

Grignon Law Firm, Margaret M. Grignon, Anne M. Grignon; Wheeler & Associates and David C. Wheeler for Cross-complainant and Appellant.

Yvonne Renfrew and Alain V. Bonavida, in pro. per., for Cross-defendant and Respondent.

SUMMARY

This is a case with procedural misadventures that make it appear more complicated than it is. In the end, there are only two principal issues.

One issue is whether the trial court erred in summarily adjudicating two breach of fiduciary duty claims asserted by a client (Joseph Fahs) against one of his attorneys (Alain V. Bonavida), on the ground they were barred by the statute of limitations.

The other issue concerns Mr. Fahs's cause of action for declaratory relief. During a demurrer hearing that preceded the motion for summary judgment, the attorney for Mr. Fahs orally dismissed his declaratory relief claim. The trial court then sustained Mr. Bonavida's demurrer to the declaratory relief claim without leave to amend (and overruled his demurrer to the breach of fiduciary duty claims).

After the trial court granted summary adjudication of the breach of fiduciary duty claims, judgment was entered for Mr. Bonavida. Mr. Fahs then asked the trial court to determine whether his counsel had dismissed the declaratory relief claim with or without prejudice, and, if he had done so with prejudice, to vacate the judgment as void, because he (Mr. Fahs) did not authorize a dismissal with prejudice. The trial court denied the motion to vacate the judgment.

We find no error in the trial court's refusal to vacate the judgment. Nor was there error in the trial court's conclusion the statute of limitations barred Mr. Fahs's breach of fiduciary duty claims. Accordingly, we affirm the judgment.

FACTS

1. The Background

The genesis of the claims before us lies in a $10 million judgment in favor of Mr. Fahs in litigation with his employer (the Marciano litigation).

In September 2007, Mr. Fahs engaged Mr. Bonavida to defend him when he (and several other employees) were sued by Mr. Marciano. The retainer agreement called for an hourly rate of $150.

In March 2008, Mr. Bonavida recommended that Mr. Fahs, like other employee-defendants in the Marciano litigation, file a cross-complaint. Messrs. Fahs and Bonavida entered into a contingency fee agreement with respect to the Marciano cross-complaint, under which Mr. Bonavida would receive 40 percent of any recovery within 30 days of the initial trial date (and a reasonable fee if he were discharged).

In April 2009, the court in the Marciano litigation ordered Mr. Marciano to pay Mr. Fahs $36,400 in sanctions. (Mr. Bonavida had told the court in support of the sanctions that all his fees were incurred "at my rate of $350.00/hour.")

In July 2009, after Mr. Marciano defaulted and after a jury trial on damages, Mr. Fahs obtained a judgment of $74 million (reduced in March 2013 to $10 million). (The other employees obtained similar judgments.)

In August 2009, at Mr. Bonavida's recommendation, Mr. Fahs engaged another lawyer, Joshua Friedman, to collect the judgment. Mr. Friedman's retainer agreement called for fees of $900 an hour if recovery were obtained, capped at 20 percent of the amount recovered. The Friedman retainer agreement also provided that Mr. Friedman "will communicate solely and

directly with [Mr. Bonavida] regarding status updates, any and all settlement authority and related decisions, and disbursements will be made directly to [Mr. Bonavida]."

In October 2009, Mr. Fahs hired bankruptcy counsel and (along with others) forced Mr. Marciano into bankruptcy.

Two years later, in October 2011, at a settlement conference in the bankruptcy proceeding, Mr. Friedman handed Mr. Fahs "a copy of my updated hours and costs to date." (Mr. Friedman had previously provided similar reports to Mr. Bonavida (in August, October and November 2009 and in October 2011).)

On January 12, 2012, Mr. Fahs terminated Mr. Friedman, stating: "Given that Marciano is in bankruptcy and his payments on my state court judgment will come through the bankruptcy, I no longer need your services. Please forward the file to me at your convenience."

On January 18, 2012, the bankruptcy trustee distributed a portion ($18,378.13) of the sanctions Mr. Marciano had been ordered to pay Mr. Fahs. The trustee's disbursement was "for [Mr. Fahs's] benefit directly to Bonavida." (Mr. Marciano had posted certificates of deposit to stay enforcement of the sanctions order pending an appeal, which he lost.) Mr. Bonavida applied these monies to an invoice he had sent Mr. Fahs on January 10, 2012, that purported to show how the sanctions award should be allocated as between Mr. Fahs and Mr. Bonavida. (Mr. Fahs had first authorized the trustee to pay the monies to Mr. Fahs, but ultimately agreed to have the first portion paid to Mr. Bonavida, after Mr. Bonavida told Mr. Fahs he would be in breach of their agreement and he (Mr. Bonavida) might have to take court action.)

On February 6, 2012, Mr. Fahs terminated Mr. Bonavida's representation.

On February 28, 2012, the bankruptcy trustee made a disbursement of $18,378.13 "for [Mr. Fahs's] benefit directly to [Mr. Fahs's] bankruptcy counsel, Bradley Brook." (This was the second disbursement of the monetary sanctions.)

On April 2, 2012, both Mr. Bonavida and Mr. Friedman served, on Mr. Fahs and others, notices of liens on Mr. Fahs's claims in the Marciano bankruptcy proceeding. Mr. Bonavida filed his notice of lien in the bankruptcy court on May 23, 2013.

On April 4, 2012, Mr. Fahs's bankruptcy counsel advised Mr. Bonavida (after Mr. Bonavida demanded a portion of the trustee's second disbursement of the monetary sanctions) that no funds would be distributed to him or to Mr. Fahs "on account of any distributions received in this case until I receive joint instructions or a court order."

On May 24, 2012, Mr. Friedman provided Mr. Fahs's bankruptcy counsel with a copy of Mr. Friedman's updated hours and costs to date.

Two years later, on July 2, 2014, the bankruptcy trustee made the first interim distribution to Mr. Fahs ($3.3 million plus), to be credited toward his $10 million judgment. Two more distributions were made to Mr. Fahs in August 2014 and January 2015. The bankruptcy trustee withheld $4 million-plus for Mr. Bonavida's lien claim and $532,530 for Mr. Friedman's lien claim.

2. This Lawsuit

On July 3, 2014, the day after Mr. Fahs received the first distribution on his $10 million judgment, Mr. Friedman filed this lawsuit against Mr. Fahs (the *Friedman* lawsuit), alleging causes

of action for breach of contract, common counts (account stated, services rendered), and fraud. (Mr. Bonavida also filed his own lawsuit against Mr. Fahs on the same day (the *Bonavida* lawsuit). The *Bonavida* lawsuit is ongoing, and is not pertinent to our resolution of this appeal, which concerns only the cross-complaint Mr. Fahs filed in the *Friedman* lawsuit.)

Mr. Fahs filed his cross-complaint on August 15, 2014. He named as cross-defendants both Mr. Friedman *and* Mr. Bonavida (who until then had not been a party to the *Friedman* lawsuit). The first cause of action sought declaratory relief against both cross-defendants, alleging (1) the Bonavida contingency fee agreement violated sections 6147 and 6148 of the Civil Code,[1] entitling Mr. Fahs to declare it void, and was also void as unconscionable, and (2) the Friedman billing seeking $532,530 was "wildly exaggerated." The second cause of action alleged breach of fiduciary duty against Mr. Bonavida in connection with the terms of the contingency fee agreement, and in negotiating the retention of the Friedman firm and allowing Mr. Friedman to engage in sham billing. The third cause of action alleged a breach of fiduciary duty against both Messrs. Bonavida and Friedman in connection with the terms of the Friedman retainer agreement.

The following description of the ensuing litigation activity necessarily involves both cross-defendants, but it may be helpful to bear in mind that this appeal is only from the judgment for Mr. Bonavida on Mr. Fahs's cross-complaint (which disposed of

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[1] Mr. Fahs apparently meant the Business and Professions Code, not the Civil Code.

all claims against Mr. Bonavida in the *Friedman* lawsuit). The cross-complaint litigation proceeded as follows.

a. The demurrer

Mr. Friedman demurred to the Fahs cross-complaint. He argued his retainer agreement, attached to the cross-complaint, complied with all requirements of Business and Professions Code sections 6147 and 6148. He contended the second and third causes of action were barred by the statute of limitations.

Mr. Fahs's opposition stated that, because Mr. Friedman's complaint alleged breach of contract, "Fahs will not pursue the declaratory relief count against the Friedman defendants. A dismissal will be filed concurrently with this filing of this opposition." That same day, counsel filed a request for dismissal of the declaratory relief claim as to Mr. Friedman, without prejudice. The dismissal was entered by the clerk on October 14, 2014.

Two weeks later, Mr. Bonavida filed a joinder to the Friedman demurrer.

On November 10, 2014, the court held a hearing on Mr. Friedman's demurrer to the cross-complaint. (There is no transcript of the hearing in the record.) The court's minute order reflects its grant of Mr. Bonavida's joinder in the demurrer, and then states: "[Mr. Friedman's] demurrer to the first cause of action is moot and sustained without leave to amend as to cross-defendant Bonavida and overruled as to the second and third causes of action."[2]

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[2] The court's minute order incorporated by reference the court's written ruling. That written ruling similarly states that: "Demurrer to first cause of action is MOOT as to the Friedman Cross-Defendants and SUSTAINED without leave to amend as to

The next day, Mr. Fahs's counsel served a notice of ruling, stating that the court had ruled as follows: "The demurrer to the first count for declaratory relief is GRANTED without leave to amend. Counsel for cross-complainant Joseph Fahs dismissed this count orally in court. . . ."

b. The summary judgment motions

After the dismissal of the first cause of action, Mr. Friedman filed a motion for summary judgment on the ground the remaining causes of action in the cross-complaint, for breach of fiduciary duty, were barred by the one-year statute of

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Cross-Defendant Bonavida . . . ." In the written ruling, the words "with leave to amend" are changed by interlineation to "without leave to amend." (This is because, as explained *post*, Mr. Fahs's counsel dismissed the declaratory relief claim against Mr. Bonavida during the November 10, 2014 hearing.) In the text explaining the court's ruling, the court stated that Mr. Friedman's demurrer was moot because the cause of action had been dismissed (as to the Friedman cross-defendants only) on October 14, 2014. The court then stated its intention to rule on the demurrer as it pertained to Mr. Bonavida, and described the allegations that the Bonavida-Fahs contingency fee agreement was unconscionable, that its terms entitled Mr. Bonavida to no more than a reasonable fee, and that it was void or voidable because it violated Business and Professions Code sections 6147 and 6148. The court concluded the cross-complaint "does not specify the manner in which" the contingency fee agreement violated sections 6147 and 6148, and that "[c]auses of action based upon statutory violations must be pled with particularity." The body of the ruling then states (unlike the subsequent interlineation on the first page of the ruling) that the demurrer to the declaratory relief cause of action was sustained "with leave to amend as to Cross-Defendant Bonavida."

limitations (Code Civ. Proc., § 340.6). On the same day, Mr. Bonavida filed a joinder in that motion, and both cross-defendants filed declarations and virtually identical separate statements of undisputed facts, many of which we have recited in part 1, *ante*.

Mr. Fahs opposed, contending in substance that the statute of limitations was tolled until he suffered actual injury. That did not occur, Mr. Fahs asserted, "until there was an obligation to pay attorneys on account of the judgment" – that is, when he received his first distribution from the Marciano bankruptcy estate on July 1, 2014.

3. The Trial Court's Orders and the Judgment

On April 27, 2015, the court held a hearing on the summary judgment motions. The record does not contain a transcript of that hearing.

On May 5, 2015, the court signed an order granting summary judgment in favor of Mr. Bonavida on Mr. Fahs's cross-complaint, finding the declaratory relief action was no longer a part of the cross-complaint and the breach of fiduciary duty claims were barred by the statute of limitations.

The court's order explained the bases for its statute of limitations ruling on the breach of fiduciary duty claims, concluding the statute began to run on the Friedman overbilling claims on May 24, 2012, when Mr. Friedman provided a copy of his bills to Mr. Fahs's bankruptcy counsel. Likewise, the claim against Mr. Bonavida alleging he was aware of the Friedman overbilling and failed to communicate with Mr. Fahs and challenge the inflated billing was barred because it was based on a derivative liability theory. And the statute began to run on the claim founded on Mr. Bonavida's unconscionable fees in January

2012, when the bankruptcy trustee made a distribution of $18,378.13 directly to Mr. Bonavida, and Mr. Fahs became aware through the invoice Mr. Bonavida sent him that he was charging an hourly rate of $350 instead of the $150 rate set in the retainer agreement for defense of the Marciano litigation.

The court's summary judgment order also included this (partially incorrect) statement: "On November 10, 2014, this Court sustained Cross-Defendant Bonavida's demurrer to the first [declaratory relief] cause of action with leave to amend. Because Cross-Complainant Fahs did not amend the first cause of action, that cause of action is no longer a part of the Cross-Complaint . . . ."

On September 16, 2015, Mr. Bonavida served a request for correction of the court's May 5, 2015 order. The request stated that Mr. Fahs had dismissed the declaratory relief cause of action "with prejudice at the November 10, 2014 hearing on Bonavida's demurrer," and the court had ruled accordingly that Mr. Bonavida's demurrer to that cause of action "was granted without leave to amend." Mr. Bonavida asked the court "therefore . . . to correct [its order] *nunc pro tunc* to reflect Fahs' request for dismissal of his first cause of action with prejudice and this Court's granting of Bonavida's demurrer to Fahs' first cause of action without leave to amend."

On September 18, 2015, the trial court corrected the May 5, 2015 order, nunc pro tunc, to state that: "On November 10, 2014, this Court sustained Cross-Defendant Bonavida's demurrer to the first cause of action without leave to amend. Because Cross-Complainant Fahs ~~did not amend the first cause of action~~ was not given leave to amend, that cause of action is no longer a part of

the Cross-Complaint . . . ." (We have inserted the underlining and the stricken text to show the changes.)

On September 22, 2015, judgment was entered in favor of Mr. Bonavida on the cross-complaint in the *Friedman* lawsuit. The judgment recited the court's rulings sustaining Mr. Bonavida's demurrer to the declaratory relief claim without leave to amend and the court's order granting summary judgment. The judgment ordered that Mr. Fahs recover nothing on his cross-complaint against Mr. Bonavida and dismissed Mr. Fahs's cross-complaint with prejudice as to Mr. Bonavida.

4. The Motion To Vacate the Judgment as Void

Mr. Fahs, who had substituted new counsel, filed a motion for an order "determining whether the Judgment . . . on Fahs' Cross-Complaint against Alain Bonavida is void and, if so, for an order vacating the Judgment." The stated grounds for this motion were that Mr. Bonavida "has taken the position" (in the *Bonavida* lawsuit, not in this lawsuit) that Mr. Fahs's former counsel dismissed the declaratory relief claim in this case with prejudice; former counsel denied doing so; and in any event Mr. Fahs did not authorize his former counsel to do so, rendering the judgment void. The motion asked the court to "first determine whether Fahs' former counsel dismissed the [declaratory relief claim] with prejudice or without prejudice," and if he did so with prejudice, to vacate the void judgment. The motion included supporting declarations from Mr. Fahs and former counsel.

Mr. Bonavida opposed the motion, contending Mr. Fahs could have sought reconsideration of the court's demurrer ruling almost a year ago and could not do so now.

In his November 13, 2015 reply, Mr. Fahs says: "Fahs is not asking the Court to reconsider its ruling at the demurrer hearing. The Court's ruling was based upon Fahs' counsel's dismissal of the First Cause of Action, and Fahs does not seek to set aside the dismissal, but only to make sure that it is not mistakenly given claim preclusive effect. Fahs merely asks that the judgment state the circumstances under which the dismissal occurred."

On November 17, 2015, the trial court denied Mr. Fahs's motion. The trial court cited authority holding that an attorney's unauthorized dismissal may be vacated at any time, but that doing so "requires strong and convincing proof, and the longer the delay in the application for relief the stronger and more convincing the factual proof should be." (*Romadka v. Hoge* (1991) 232 Cal.App.3d 1231, 1236.)

The court acknowledged former counsel's declaration denying having dismissed with prejudice, and Mr. Fahs's declaration that he did not authorize a dismissal with prejudice, but found "insufficient evidence that Fahs' former counsel dismissed without prejudice." (At the hearing, the court said that "[t]here's been a big delay in seeking relief; and the longer the delay, the stronger the factual proof should be. Here, I don't have much proof.")

The court observed that its action sustaining the demurrer without leave to amend after hearing oral argument "is consistent with a dismissal with prejudice because there would be no need for the Court to grant leave to amend the first cause of action if Fahs' former counsel indicated the first cause of action was being dismissed. To the extent the Court erred in granting without leave to amend, this would constitute judicial error

which must be addressed on appeal – it would not make the judgment void. The Court finds insufficient evidence that the judgment is void for an unauthorized dismissal with prejudice of the [declaratory relief] cause of action in Fahs' cross-complaint."

Mr. Fahs filed a timely notice of appeal from the judgment in favor of Mr. Bonavida on Mr. Fahs's cross-complaint, and from the trial court's post-judgment order denying his motion to vacate the judgment as void.

5. Pending Motions on Appeal

a. Mr. Fahs's request for judicial notice

Along with his opening brief on appeal, Mr. Fahs filed a motion for judicial notice of various pleadings and a ruling filed in the *Bonavida* lawsuit. They are relevant, Mr. Fahs tells us, because they "demonstrate . . . Bonavida's motivation for requesting" the trial court to state that Mr. Fahs's declaratory relief cause of action was dismissed with prejudice. Mr. Fahs says this is so Mr. Bonavida can use the dismissal "for retraxit/res judicata purposes" in the *Bonavida* lawsuit. (The judgment does not state that Mr. Fahs dismissed his declaratory relief claim with prejudice. It recites that the court sustained the demurrer to the declaratory relief claim "without leave to amend." The summary judgment order says the same thing, and adds that, "[b]ecause [Mr. Fahs] was not given leave to amend, that cause of action is no longer a part of the Cross-Complaint . . . .")

We deny the request. Mr. Bonavida's motivation is not relevant to the only issues on appeal: whether the trial court's rulings were erroneous. Nothing in the pleadings in the *Bonavida* lawsuit assists in resolving those issues. Indeed, in his reply brief, Mr. Fahs tells us that Mr. Bonavida's "res

judicata/retraxit argument" is "not at issue in this appeal," and is mentioned "solely to provide broader context for the Court." We necessarily confine our review to the points that *are* at issue.

b. Mr. Bonavida's motion to dismiss the appeal

After the record and Mr. Fahs's opening brief were filed, Mr. Bonavida filed a motion to dismiss the appeal. He asserts we have no jurisdiction to consider the appeal, because under Code of Civil Procedure section 426.30 (section 426.30), Mr. Fahs was required to assert his claims against Mr. Bonavida as a compulsory cross-complaint in the *Bonavida* lawsuit, and his failure to do so prevented him from asserting those claims in this (the *Friedman*) lawsuit. Mr. Fahs did not file a cross-complaint in the *Bonavida* lawsuit, instead filing an answer and, on the same day, filing a cross-complaint against Mr. Bonavida in the *Friedman* lawsuit. Therefore, the argument goes, Mr. Fahs "cannot be deemed 'aggrieved' " by the judgment and order from which he appeals, and has no standing to appeal.

Because Mr. Bonavida failed to raise this claim in the trial court, it is forfeited and we deny his motion. Instead of challenging the cross-complaint in the trial court on this ground, Mr. Bonavida litigated the merits by way of demurrer and summary judgment. His answer to the cross-complaint asserted 34 affirmative defenses, none of which included section 426.30. Accordingly, he cannot raise the point on appeal. (See *Hulsey v. Koehler* (1990) 218 Cal.App.3d 1150, 1153 [holding section 426.30 "must be specially pleaded as an affirmative defense" and "[f]ailure to so plead section 426.30 constitutes a waiver of this defense"]; *id.* at p. 1158 ["as a statutory bar to splitting a cause of action, section 426.30 must be specially pleaded. It is well established that a rule against splitting of actions is for the

benefit of the defendant and is waived by the failure to specifically plead the defense."].)[3]

In short, Mr. Bonavida's failure to raise this issue in the trial court precludes him from doing so now. His assertions that section 426.30 is "jurisdictional," and that Mr. Fahs lacked standing to file the cross-complaint in this action, find no support in legal authorities. Accordingly, the motion to dismiss is denied.

DISCUSSION

Mr. Fahs contends that (1) the judgment on the declaratory relief cause of action must be reversed, and (2) the statute of limitations does not bar his breach of fiduciary duty claims. We find no merit in either contention.

1. The Declaratory Relief Claim

Mr. Fahs proffers several reasons why "the judgment for Bonavida on the declaratory relief action must be reversed." He contends the trial court erred "by refusing to grant leave to amend," and by "failing to find the demurrer to be moot," and by "denying the motion to vacate the judgment."

First, the trial court did not "refus[e] to grant leave to amend" the declaratory relief claim. On the contrary, the trial court fully intended to grant leave to amend, for precisely the reasons Mr. Fahs asserts: the claim was not pled with particularity. But counsel then told the court "that there was no need to argue the demurrer to the First Cause of Action

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[3] We also note that a party (such as Mr. Fahs) who has failed to assert a cause of action in a compulsory cross-complaint may apply for leave to do so "at any time during the course of the action," and the court "shall grant" such leave "if the party who failed to plead the cause acted in good faith." (Code Civ. Proc., § 426.50.) And, "[t]his subdivision shall be liberally construed to avoid forfeiture of causes of action." (*Ibid.*)

because . . . I was voluntarily dismissing it. I pointed out that declaratory relief is not appropriate where one party has already filed a claim for breach of contract." (See *Osseous Technologies of America, Inc. v. DiscoveryOrtho Partners LLC* (2010) 191 Cal.App.4th 357, 360 [trial court sustained demurrer to complaint for declaratory relief because declaratory relief was unnecessary where facts as pleaded amounted to a breach of contract dispute; "court did not abuse its discretion by sustaining the demurrer without leave to amend and entering judgment accordingly"].) We necessarily reject the claim that the court "refus[ed] to grant leave to amend," or that it abused its discretion when it did exactly what Mr. Fahs's counsel suggested it should do.

Second, Mr. Fahs contends that Mr. Bonavida's joinder to Mr. Friedman's demurrer "did not make any argument about Bonavida's contingency fee agreement," and therefore "was procedurally and substantively deficient and could not support sustaining the demurrer without leave to amend . . . ." We see nothing in the authorities cited that restricts the trial court's discretion to allow Mr. Bonavida's joinder in a demurrer, or that requires him to present a separate argument. Moreover, as we have seen, Mr. Fahs's counsel advised the court it was unnecessary to argue the demurrer to the declaratory relief claim, because he was dismissing the claim.

Third, Mr. Fahs is correct in observing that the demurrer to the declaratory relief claim was, in effect, "moot," because Mr. Fahs dismissed it at the hearing, and there was therefore no longer any claim to which Mr. Bonavida could demur. But, as we now explain, it does not follow that the judgment for Mr. Bonavida should have been vacated as "void," or that

Mr. Fahs should now be permitted to amend his cross-complaint for declaratory relief.

On the contrary, one thing is incontrovertible: the declaratory relief claim was voluntarily dismissed at the hearing, *before* the court ruled on the demurrer to it. The legal effect of such a dismissal is to deprive the court of jurisdiction to rule on the claim. As the trial court accurately stated in its summary judgment ruling (both before and after Mr. Bonavida asked for and obtained the nunc pro tunc correction): "that cause of action is no longer a part of the Cross-Complaint."

The Supreme Court made this clear in *Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781. In discussing then-subdivision 1 of Code of Civil Procedure section 581 (permitting a plaintiff to dismiss an action at any time before actual commencement of trial), the court said: "Apart from certain omitted and irrelevant statutory exceptions, a plaintiff's right to a voluntary dismissal pursuant to subdivision 1 appears to be absolute. [Citation.] Upon the proper exercise of that right, *a trial court would thereafter lack jurisdiction to enter further orders in the dismissed action*." (*Wells,* at p. 784, italics added.)

Accordingly, the trial court's order ruling that the demurrer to the declaratory relief claim was sustained without leave to amend was, in effect, superfluous, because there was no declaratory relief claim upon which to rule. To the extent it was error for the trial court to state the demurrer was sustained without leave to amend (a point on which we need not opine), any error was in the court's reasoning, not in the result. (Thus the court's summary judgment order states that "[b]ecause [Mr. Fahs] was not given leave to amend, that cause of action is no longer a part of the Cross-Complaint . . . ." The court's

reasoning is incorrect; the cause of action was no longer a part of the cross-complaint because Mr. Fahs dismissed it, not because the court refused leave to amend.)

In short, after the trial court later granted summary judgment on the remaining breach of fiduciary duty claims, it was completely proper for the court to enter judgment for Mr. Bonavida. (Indeed, while Mr. Fahs filed objections to the order granting summary judgment, his only objection was to language indicating that the " 'cross-complaint is stricken in its entirety' " (on the ground there was only a motion for summary judgment, not a motion to strike the cross-complaint), so Mr. Bonavida "is entitled to have a summary judgment entered in his favor," not to an order " 'striking' the cross-complaint." Mr. Fahs made no objection to the language in the proposed order stating that the declaratory relief claim was "no longer a part of the Cross-Complaint," or to the language entering judgment against Mr. Fahs.)

That brings us to the heart of Mr. Fahs's proffered justification for reversal of the court's order denying the motion to vacate the judgment. His claim is this: "If this court concludes the trial court ruled Fahs' former attorney dismissed the first cause of action against Bonavida with prejudice though Fahs did not consent, neither the facts nor law support such a finding." The short answer to this contention is that the nature of Mr. Fahs's dismissal is not an issue for decision by this court on this appeal.

As should be apparent from our discussion just above, the judgment entered on Mr. Fahs's cross-complaint was entirely proper. His protestations about Mr. Bonavida's *contentions* in the trial court, and about Mr. Bonavida's claims of retraxit in the

Bonavida litigation, have nothing to do with the propriety of the ruling that is on appeal in this case: the trial court's refusal to vacate the judgment as void.

We have no reason to opine on whether or not Mr. Fahs's former attorney dismissed the declaratory relief claim with or without prejudice. The point is that the claim was dismissed, voluntarily, and was no longer a part of Mr. Fahs's cross-complaint after he did so, including when the court later entered the judgment.

Notably, Mr. Fahs told the trial court, in his motion to vacate the judgment, that he did *not* seek to set aside the dismissal, but only "to make sure that it is not mistakenly given claim preclusive effect." But that was not an issue for the trial court, or this court, to determine *in this case.*[4] It is a matter that may be determined in the case where, apparently, Mr. Bonavida is asserting that the dismissal operates as a retraxit. The only issue before this court is whether it was error for the trial court to refuse to vacate the judgment. Clearly it was not.

In sum, the declaratory relief claim was no longer a part of this case after it was voluntarily dismissed. Consequently, there is no basis for Mr. Fahs's claim that the judgment thereafter

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[4] The trial court did not make any such determination in this case, nor did it determine that Mr. Fahs dismissed his claim with prejudice. The court observed that its action sustaining the demurrer without leave to amend was "consistent with a dismissal with prejudice," but that any error in its ruling would be judicial error remediable on appeal, and would not make the judgment void. As noted earlier, the court found "insufficient evidence that the judgment is void for an unauthorized dismissal with prejudice of the [declaratory relief] cause of action in Fahs' cross-complaint." That conclusion is clearly correct.

entered in Mr. Bonavida's favor is void. Mr. Fahs's desire "to make sure that [his dismissal of the claim] is not mistakenly given claim preclusive effect" is a question for another day, and in another case. The trial court in this case had no occasion to rule on the nature of the dismissal, which removed the declaratory relief claim from this case, and the ensuing judgment does not purport to embrace that point. There is no basis for finding the judgment void.

2. The Breach of Fiduciary Duty Claims

The trial court granted summary judgment on Mr. Fahs's breach of fiduciary duty claims based on the one-year statute of limitations in Code of Civil Procedure section 340.6 (section 340.6). We find no error in the trial court's conclusion that Mr. Fahs's claims were time-barred.

As we discuss *post*, Mr. Fahs sustained actual injury and the statute began to run on his claims against Mr. Bonavida not later than May 23, 2013, when Mr. Bonavida filed his notice of lien in the bankruptcy court. (See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 750 (*Jordache*) [reaffirming principle that "actual injury may consist of impairment or diminution, as well as the total loss or extinction, of a right or remedy"; " '[W]hen malpractice results in the loss of a right, remedy, or interest, or in the imposition of a liability, there has been actual injury regardless of whether future events may affect the permanency of the injury or the amount of monetary damages eventually incurred.' "].) Even if we were to find the cross-complaint relates back to the filing of the complaint on July 3, 2014, the cross-complaint was filed more than a year after Mr. Fahs sustained actual injury.

a. The standard of review

A defendant moving for summary judgment must show "that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to the cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) Where summary judgment has been granted, we review the trial court's ruling de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) We consider all the evidence presented by the parties in connection with the motion (except that which was properly excluded) and all the uncontradicted inferences that the evidence reasonably supports. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) We affirm summary judgment where all the papers submitted show that no triable issue of material fact exists and that the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)

b. This case

Section 340.6 states: "An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission . . . ." (*Id.*, subd. (a).) This period is tolled during the time that "[t]he plaintiff has not sustained actual injury." (*Id.*, subd. (a)(1).)

Mr. Fahs's cross-complaint shows he was aware of the alleged breaches of fiduciary duty at some time in 2012, and he does not suggest otherwise. He contends, however, that he did not sustain actual injury, and so the statute of limitations did not start to run, until he actually recovered the entire judgment in the Marciano litigation in January 2015. We disagree.

The governing legal authority is *Jordache*, where the court enunciated the principles that apply here.

"[T]here are no short cut 'bright line' rules for determining actual injury under section 340.6. [Citations.] Instead, actual injury issues require examination of the particular facts of each case in light of the alleged wrongful act or omission." (*Jordache, supra,* 18 Cal.4th at p. 761, fn. 9.) When the material facts are undisputed, as in this case, "the trial court can resolve the matter as a question of law in conformity with summary judgment principles." (*Id*. at p. 751.)

In *Jordache,* the court was presented with the same legal question we have in this case (except that here the attorney's conduct is an alleged breach of fiduciary duty): "When does a former client--having discovered the facts of its attorneys' malpractice--sustain actual injury so as to require commencement of an action against the attorneys within one year?" (*Jordache, supra,* 18 Cal.4th at p. 747.) Guidance from *Jordache* includes the following points.

Under section 340.6, "the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence. [¶] The test for actual injury under section 340.6, therefore, is whether the plaintiff has sustained any damages compensable in an action, other than one for actual fraud, against an attorney for a wrongful act or omission arising in the performance of professional services." (*Jordache, supra,* 18 Cal.4th at p. 751.)

"Actual injury refers only to the legally cognizable damage necessary to assert the cause of action. There is no requirement that an adjudication or settlement must first confirm a causal nexus between the attorney's error and the asserted injury. The

determination of actual injury requires only a factual analysis of the claimed error and its consequences. The inquiry necessarily is more qualitative than quantitative because the fact of damage, rather than the amount, is the critical factor." (*Jordache, supra,* 18 Cal.4th at p. 752.) "[T]he inquiry concerns whether 'events have developed to a point where plaintiff is entitled to a legal remedy, not merely a symbolic judgment such as an award of nominal damages.' [Citation.] However, once the plaintiff suffers actual harm, neither difficulty in proving damages nor uncertainty as to their amount tolls the limitations period." (*Jordache,* at p. 752.)

"An existing injury is not contingent or speculative simply because future events may affect its permanency or the amount of monetary damages eventually incurred. [Citation.] Thus, we must distinguish between an actual, existing injury that might be *remedied or reduced* in the future, and a speculative or contingent injury that might or might not *arise* in the future." (*Jordache, supra,* 18 Cal.4th at p. 754; see *id.* at pp. 743, 750 [reaffirming principles reiterated in *Adams v. Paul* (1995) 11 Cal.4th 583 (*Adams*) and other cases; "*Adams* recognized that actual injury may consist of impairment or diminution, as well as the total loss or extinction, of a right or remedy"; " 'when malpractice results in the loss of a right, remedy, or interest, or in the imposition of a liability, there has been actual injury' "].)

Here, it is undisputed that on May 23, 2013, Mr. Bonavida filed a copy of his notice of lien with the bankruptcy court. (About a year earlier, on April 2, 2012, he had served Mr. Fahs and others with the notice of lien, and Mr. Fahs's bankruptcy counsel acknowledged receipt of Mr. Bonavida's lien assertions.) The notice of lien states in part that, "in accordance with a

written fee agreement, [Mr. Bonavida] has and claims a lien *ahead of all others* on Joseph Fahs' claims in this action and on the underlying judgment and related causes of action in the California state action, *Joseph Fahs v. Georges Marciano, et al.,* Case No. BC 375 824. This lien puts all parties, including the Trustee in this matter, David K. Gottlieb, and his counsel . . . on notice that said lien applies to any settlement of Mr. Fahs' claims as a Petitioning Creditor / Judgment Debtor and exists to secure payment for legal services rendered and costs and expenses advanced on his behalf."

It seems clear that the filing of a lien on Mr. Fahs's prospective recovery in the bankruptcy proceeding constituted an "impairment or diminution" of Mr. Fahs's "right or remedy" in that bankruptcy proceeding. (*Jordache, supra,* 18 Cal.4th at p. 750.) It is equally clear that " 'events [had] developed to a point where [Mr. Fahs was] entitled to a legal remedy . . . .' " (*Id.* at p. 752.) We do not doubt that, had Mr. Fahs promptly brought a suit contesting Mr. Bonavida's lien and asserting his claims of breach of fiduciary duty, those claims could have been adjudicated without awaiting Mr. Fahs's actual recovery in the bankruptcy proceeding. Mr. Bonavida's lien on Mr. Fahs's recovery is not "a speculative or contingent injury that might or might not *arise* in the future" (*id.* at p. 754) -- it arose on May 23, 2013, impairing Mr. Fahs's right to recovery in the bankruptcy proceeding.

While the facts are different, the point is illustrated in *Village Nurseries v. Greenbaum* (2002) 101 Cal.App.4th 26. In that case, the plaintiff's former lawyer advised the plaintiff incorrectly about perfecting the plaintiff's mechanics lien on real property. The Court of Appeal found the plaintiff's malpractice

claim was barred by section 340.6, because the plaintiff "was actually injured by defendants' alleged malpractice when a bankruptcy trustee asserted a viable argument against the validity of [the plaintiff's] liens on the ground they were not properly perfected." (*Id.* at p. 31; see *id.* at p. 40 [rejecting the plaintiff's contention that it did not sustain actual injury until the bankruptcy court determined the plaintiff's liens were invalid]; see also *Adams, supra,* 11 Cal.4th at p. 591, fn. 5 ["In some circumstances, the loss or substantial impairment of a right or remedy itself may constitute actual injury and may well precede quantifiable financial costs."].) That is the case here.

Mr. Fahs insists that *Fracasse v. Brent* (1972) 6 Cal.3d 784 (*Fracasse*) is "[t]he controlling case on when the statute of limitations begins to run on contingency fee agreements" – that is, not until the contingency (recovery of the judgment) occurs. That may be so, but it does not help Mr. Fahs.

Fracasse does not involve a client's claim for malpractice or breach of fiduciary duty, but rather a claim for declaratory relief by a discharged attorney against his client, to recover compensation under a contingency fee agreement. The attorney sought a declaration that the contract was valid and he had a one-third interest in any monies ultimately recovered by the client. (*Fracasse, supra,* 6 Cal.3d at pp. 786-787.) *Fracasse* found the action was premature, holding that (1) an attorney discharged is entitled to recover the reasonable value of his services rendered to the time of discharge; and (2) "the cause of action to recover compensation for services rendered under a contingent fee contract does not accrue until the occurrence of the stated contingency." (*Id.* at pp. 788, 792.) In *Fracasse*, these rules made it "clear that there is no present controversy such as

would justify the court in exercising its discretion to entertain an action for declaratory relief . . . ." (*Id.* at pp. 792-793.)

In short, cases are not authority for points not at issue. *Fracasse* tells us nothing about the accrual or tolling of the statute of limitations on a client's malpractice or breach of fiduciary duty claim against his former attorney. Indeed, it does not mention the applicable statute of limitations, and concerns only the accrual of a cause of action for attorney compensation and the absence of a justiciable controversy on that point.

Here, the governing legal authorities confirm that Mr. Fahs was actually injured by Mr. Bonavida's alleged breach of fiduciary duty when Mr. Fahs's right to recovery in the bankruptcy proceeding was substantially impaired or diminished by the filing of Mr. Bonavida's lien in the bankruptcy court on May 23, 2013. Even if we deem the cross-complaint to have been filed on the date of filing of the *Friedman* lawsuit on July 3, 2014, the cross-complaint is time-barred.

DISPOSITION

The judgment and the order denying the motion to vacate the judgment are affirmed. Mr. Bonavida shall recover his costs on appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.