Filed 6/6/18 Goodman Food Products, Inc. v. Linzer CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

GOODMAN FOOD PRODUCTS, INC., Plaintiff and Appellant, v. KENNETH A. LINZER et al., Defendants and Respondents.	B278232 consol. with B280414 (Los Angeles County Super. Ct. No. BC597624)

APPEAL from judgments of the Superior Court of Los Angeles County, William F. Fahey, Judge. Reversed.

Reed Smith, Kasey J. Curtis for Plaintiff and Appellant.

Manning & Kass, Ellrod, Ramirez, Trester, Rinat Klier Erlich, Candace E. Kallberg for Defendants and Respondents Kenneth A. Linzer, Hobart Linzer, and Linzer & Associates.

Fernald Law Group, Brandon Fernald, Gina M. McCoy for Defendants and Respondents USI of California Insurance Services, Inc. and Lloyd T. Ross.

INTRODUCTION

Goodman Food Products dba Don Lee Farms (Goodman) was involved in a lawsuit with Blueberry Hill Restaurant, Inc. (the Blueberry Hill litigation), which eventually settled. Goodman then brought this action against insurance brokers USI of California Insurance Services, Inc. and Lloyd T. Ross (collectively, USI), alleging that USI failed to tender the lawsuit to a relevant insurer. Goodman also sued its counsel in the Blueberry Hill litigation, Kenneth A. Linzer, Hobart Linzer LLP, and Linzer & Associates, P.C. (collectively, Linzer), alleging professional malpractice relating to the Blueberry Hill litigation and Linzer's simultaneous representation of Goodman and Blueberry Hill prior to that litigation.

USI demurred to Goodman's second amended complaint on the ground that Goodman's claim was time-barred. The court, focusing heavily on the date of accrual of Goodman's claims rather than Goodman's assertion of delayed discovery, sustained the demurrer and denied Goodman's request for leave to amend. We reverse, because the second amended complaint alleged sufficient facts under the delayed discovery doctrine and an alternate accrual date, and therefore Goodman alleged facts sufficient to state a viable cause of action for professional negligence that was not time-barred on the face of the complaint.

Later, Linzer moved for summary judgment on the basis that Goodman's claims were time-barred and the continuous representation tolling doctrine in Code of Civil Procedure section 340.6, subdivision (a)(2) did not apply. The trial court granted the motion. We reverse. The evidence Goodman submitted in opposition to the motion demonstrated a triable issue of fact as to whether Linzer continued to represent Goodman through October

2014, in which case Goodman's complaint would be timely. The trial court therefore erred in granting summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On October 13, 2015, Goodman filed a complaint against Linzer and USI. On February 10, 2016, Goodman filed a first amended complaint that contained the same causes of action as the original complaint but included additional factual allegations. The following facts were alleged in those complaints.

Goodman is a privately held company that produces and distributes cooked and frozen food products. Goodman hired Linzer in 2005 to represent it in relation to an agreement with Blueberry Hill Restaurant, Inc. relating to the manufacture and distribution of a vegetable patty. Blueberry Hill developed the patty, Goodman manufactured and sold the patty, and Goodman paid Blueberry Hill royalties. Goodman later began selling a vegetable patty that was similar, but gluten free. Blueberry Hill discovered Goodman was selling the similar vegetable patty, and a legal battle ensued. Goodman filed a declaratory relief action in March 2012, and Blueberry Hill sued Goodman three days later for royalties totaling more than $10 million. After a period of contentious litigation, the Blueberry Hill litigation settled in February 2015.

In October 2015, Goodman filed a complaint alleging that its insurance broker, USI, and its counsel, Linzer, mishandled the Blueberry Hill litigation. The details of the allegations against each defendant are discussed more fully below. In short, Goodman asserted that USI failed to timely tender the defense of the Blueberry Hill litigation to a relevant insurer, and asserted a cause of action for malpractice on that basis. Goodman also alleged that Linzer inappropriately represented Goodman and

Blueberry Hill simultaneously, before and during the pendency of the Blueberry Hill litigation. Goodman asserted several causes of action against Linzer, including professional negligence, breach of fiduciary duties, and negligent misrepresentation.

Following a demurrer, a motion to strike, and a denial of Goodman's request to amend the complaint, the court dismissed USI from the action with prejudice. The court later granted summary judgment in favor of Linzer. Goodman separately appealed the dismissal and summary judgment, and this court consolidated the appeals. Because the issues involving USI and Linzer are discrete, we discuss the allegations against each defendant, the court's rulings, and the appellate issues as to each defendant separately below.

USI

A. Factual and procedural background

1. *Allegations*

In its first amended complaint, Goodman asserted that the Blueberry Hill litigation began when Goodman filed a declaratory relief action on March 26, 2012, and Blueberry Hill filed a complaint for damages on March 29, 2012; the cases were consolidated. Following the commencement of that litigation, USI tendered the handling of that case to Golden Eagle, an insurer that had issued a comprehensive general liability (CGL) policy to Goodman. Defendant Ross, who worked for USI of California, represented to Goodman that he had tendered the Blueberry Hill litigation to all insurers that had a potential duty to defend or indemnify Goodman in the Blueberry Hill litigation. Goodman alleged in its complaint, however, that USI also should have tendered the case to RUSI Insurance Group under Goodman's directors' and officers' (D&O) policy, which also

carried a potential for coverage and indemnity. Goodman alleged that it was "forced to pay and incur attorney's fees and costs" to defend its "interests in the Blueberry Hill Case." It also alleged that it and Golden Eagle were required to pay Blueberry Hill a "substantial cash payment" as part of the settlement of the Blueberry Hill litigation in February 2015. Goodman asserted that its payment of attorney fees and settlement costs "could and should have been avoided" if USI had "timely tendered the Blueberry Hill Case under [the] D & O Policy issued by RUSI."

Goodman alleged that it retained coverage counsel in September 2013 in connection with a coverage dispute relating to the CGL policy. Through that counsel, Goodman learned for the first time that a claim should have been submitted to RUSI under the D&O policy. Goodman alleged that it could not have known before then that a claim should have been submitted to RUSI. Goodman entered into a tolling agreement with USI effective June 27, 2014.

Goodman asserted a single cause of action against USI for professional negligence.

2. *USI's Demurrer*

USI demurred to the first amended complaint. It argued that the single cause of action against it, professional negligence, was time-barred under the two-year statute of limitations in Code of Civil Procedure section 339, subdivision (1). USI asserted that because there was a 60-day deadline to tender a case to the insurer, and the Blueberry Hill litigation was initiated in March 2012, Goodman's claim "began to run in or about May 2012 (60 days after the Blueberry Hill Case was served)." Thus, the statute of limitations on Goodman's cause of action expired in May 2014. Because the malpractice case was not filed until

October 2015, USI argued that Goodman's claim against USI was time-barred.

USI also argued that the delayed discovery rule did not apply, because Goodman "was well aware of the fact that it was having to pay its own defense costs—for over a year—before retaining 'insurance counsel' to further inquire." USI asserted that Goodman was on inquiry notice from the beginning of the Blueberry Hill litigation, because "[t]he mere fact that [Goodman] did not receive coverage for the Blueberry Hill Case under any of its insurance policies constituted sufficient 'information of circumstances to put [it] on inquiry'" of potential negligence.[1] Thus, Goodman "had a duty to investigate the source of the injury" and is "charged with the knowledge that it would have gleaned from a reasonable investigation." USI contended that because Goodman did not do any investigation, it was not entitled to rely on the delayed discovery doctrine.

Goodman opposed the demurrer. It agreed that the two-year statute of limitations applied, but argued that the first amended complaint alleged sufficient facts to establish that Goodman could not have discovered the breach earlier, even in the exercise of reasonable diligence. Goodman argued that it relied on the expertise of USI as a broker, and it was "lulled into a false sense of security by Defendant Ross' representation in 2012 that by giving Golden Eagle notice of the Blueberry Hills [*sic*] Case, the Broker Defendants had tendered to all insurers

---

[1] The record contains conflicting statements about whether the Golden Eagle policy covered portions of Goodman's defense of the Blueberry Hill litigation. The conflict is inconsequential for purposes of this appeal, as the scope of Golden Eagle's coverage is not relevant to the issues addressed here.

who had a potential to defend or indemnify Goodman in connection with that claim." Goodman reiterated its allegation that it only discovered USI's breach in September 2013, when it hired coverage counsel to address issues that had arisen with Golden Eagle in relation to the CGL policy.

The trial court sustained USI's demurrer. The appellate record does not include a reporter's transcript of the demurrer hearing. In a minute order dated May 3, 2016, the court stated that the "demurrer to plaintiff's 5th cause of action to the first amended complaint is sustained with 10 days leave to amend. . . . [¶] Plaintiff is to attach . . . the tolling agreement to the amended complaint and allege the precise date plaintiff's [*sic*] started paying costs."

3. *Goodman's second amended complaint, USI's motion to strike, and Goodman's ex parte request for leave to file a third amended complaint*

Goodman filed a second amended complaint on May 13, 2016. The cause of action against USI included a new paragraph, which stated that Goodman "was spared from paying for the cost and expense of the bulk of its attorney fees and costs incurred in the Blueberry Hill case as a result of the Broker Defendants' tender to Golden Eagle, and had no reason to suspect or know that its insurance broker was in fact negligent, or the cause of the appreciable damages and harm it would begin experiencing in or about September 2013 resulting from the 'shortfall' between what Golden Eagle paid and what [Goodman] ended up having to pay for defense fees and costs beyond its self insured retention, which caused [Goodman] to seek out experienced coverage counsel in an attempt to determine why the shortfall existed."

USI moved to strike this cause of action from the second amended complaint. It argued that Goodman failed to comply with the court's order regarding required amendments to the complaint: "While the Tolling Agreement was attached, the amended pleadings did not contain the precise date that [Goodman] started paying costs, instead alleging that [Goodman] first experienced damages in September 2013." The motion continued, "[Goodman] did not allege the precise date that it began paying costs anywhere [in the complaint]. Rather, [Goodman] submitted an ambiguous argument as to why it did not 'experience' damages earlier. It cannot be assumed that experiencing damages is the equivalent of 'paying costs." USI urged that the motion to strike be granted without leave to amend.

Goodman then filed an ex parte request for leave to file a third amended complaint. Goodman argued that the second amended complaint alleged the precise date of damages—September 2013—when Goodman had to pay for defense fees "beyond its self insured retention [i.e. its deductible]." Goodman sought to amend the complaint to "incorporate portions of the D&O insurance policy at issue in this case," which would "remove all doubt about whether the claim of [Goodman] against the Insurance Broker Defendants is timely." Goodman asserted that the D&O policy period ran from December 18, 2011 to December 18, 2012, and a claim made to the insurer any time within this period would have been timely. Moreover, any claim made within 60 days of the end of the policy period would be considered timely, so under any theory of accrual "there was no harm in this case until February 18, 2013 – 60 days after the expiration of the D&O policy."

USI opposed the ex parte request. It argued that Goodman's attempt to revise the complaint was an attempt "to back-track and change course by seeking leave to amend the date that the USI Defendants purportedly breached the standard of care." It also contended that Goodman's previous allegations about the date of the alleged breach constituted a judicial admission. The court denied Goodman's ex parte application, finding that "there is no emergency."

Goodman then filed an opposition to USI's motion to strike, asserting that it had complied with the court's order because the precise date damages were incurred—September 2013—was alleged in the second amended complaint. Goodman also repeated its request for leave to amend the complaint to allege that there had been no harm until the D&O reporting period ended in February 2013. In its reply, USI opposed the request for amendment, arguing that "further amendment would be futile."

At the hearing on the motion to strike, the court told Goodman's counsel, "You did not comply with the May 3rd order, and your opposition still fails to proffer the precise date that the plaintiff began incurring costs and attorneys' fees in the prior case." The court said that the amended paragraph in the second amended complaint "is just very convoluted and seems to be avoiding the court's ruling on May 3." Goodman's counsel responded that the amended paragraph said Goodman "started incurring those costs in September of 2013. So it's not avoiding anything." The court noted that the amended paragraph alleged Goodman began "experiencing damages" in September 2013, and asked, "What does experiencing damages mean?" Counsel responded, "Well, they had harm. They had damage. That's when accrual occurred."

Goodman's counsel also asserted that the accrual issue was not important because no harm occurred until the end of the D&O reporting period, but the court redirected the discussion: "[Y]ou're still not addressing the order of May 3rd, and you're not proffering to me today the precise date on which your client started to pay costs." Goodman's counsel responded, "September, 2013. I can't give the precise day of the harm but September 2013." When the court asked if any fees or costs were paid regarding the Blueberry Hill litigation in 2012, Goodman's counsel said yes, but "[t]he shortfall, that is, when the Golden Eagle money did not cover the money that this insurance policy would have paid, occurred in September, 2013."

USI's counsel said that the defense of the Blueberry Hill litigation was tendered to Golden Eagle in April 2012, and it denied coverage in May 2012. Counsel said, "Because Golden Eagle denied coverage, Goodman Foods was forced to fund the defense of the Blueberry Hill suit after that time." USI and Ross's counsel also asserted that Goodman's request for amendment presented a "moving target" with respect to the date of the alleged breach.

The court took the motion under submission. Later the same day, the court issued a minute order stating, "The Motion to Strike is Granted. [Goodman] failed to comply with the Court's order of May 3, 2016 when it filed a Second Amended Complaint."

4. *Goodman's motion for leave to file a third amended complaint, motion for reconsideration, and dismissal of USI*

After the court denied the ex parte application and before it ruled on USI's motion to strike, Goodman filed a noticed motion requesting leave to file an amended complaint. In its

memorandum of points and authorities, which consists of only eleven lines of text, Goodman stated that it sought leave to amend its complaint to include seven additional paragraphs "that incorporate the [D&O policy]," which effectively "negates and refutes in its entirety the statute of limitations defenses previously asserted by the Insurance Broker Defendants." The proposed amended complaint included the date the Blueberry Hill litigation was initiated, and an allegation that "[n]otice of the Blueberry Hill suit under the D&O Policy would have been timely if such notice had been provided to RUSI within 60 days after the December 18, 2012 expiration date" on the policy. The proposed complaint also stated that Golden Eagle denied coverage in May 2012, and thus "Goodman Foods was forced to fund the defense of the Blueberry Hill suit after that time." However, coverage under the D&O policy was still available, and therefore "the statute of limitations for any claim arising from the negligence of the USI Defendants would not have begun to run until February 17, 2013," at the expiration of the reporting period. The proposed amended complaint also stated that "the USI Defendants finally notified RUSI of the Blueberry Hill suit on or about August 16, 2013. On August 21, 2013, RUSI denied coverage for the Blueberry Hill suit based on 'the lack of timely notice.'" Goodman noted that it entered into a one-year tolling agreement with USI on June 27, 2014.

USI opposed the motion, arguing that the proposed complaint would "contradict a well pled judicial admission concerning a critical fact—the date on which [USI] allegedly breached [its] duty of care" to Goodman. USI asserted that Goodman originally alleged that the breach occurred in March 2012, and those allegations remained in the proposed pleading,

but now Goodman was also attempting to allege that the breach did not occur until February 2013. It also said Goodman "made no attempt to explain, or even acknowledge, the contradiction within its own pleadings."

In its reply, Goodman pointed out that the proposed amendment did not change the date the alleged breach occurred, but instead clarified "when appreciable damage occurred as a result" of USI's breach. Because the cause of action was not complete with all of its elements until actual damage occurred, the date of damage was the date the cause of action accrued. Goodman also asserted that no matter when the breach occurred, USI "could have 'cured' [its] negligent failure to tender the Blueberry Hill Case to the D&O carrier at any time" before the reporting period lapsed.

At the hearing, the court stated that it was inclined to deny the motion. The judge said he did not think Goodman's counsel complied with California Rule of Court, rule 3.1324(b)(3) and (b)(4), which requires a motion to amend a pleading to include a declaration stating "[w]hen the facts giving rise to the amended allegations were discovered," and [t]he reasons "why the request for amendment was not made earlier." The court also noted that "there is still no specific allegation despite the court's admonishment on prior occasions as to when plaintiff actually began incurring paying costs from the underlying case."

As Goodman's counsel began to assert his argument that Goodman did not incur damages until the RUSI policy lapsed, the court asked, "Why do you continue to resist the court's orders to specify the date when plaintiff began paying cost[s] in the case?" Counsel said Goodman had been "paying cost[s] all along since day one," since the "date the underlying litigation was filed." The

court asked, "Where in your proposed third amended complaint do you allege that?" Goodman's counsel said that the complaint alleged that Goodman paid attorney fees in the Blueberry Hill litigation, and the court pointed out that no specific date was alleged.

Counsel for USI argued that the amended pleading did not address damages, but instead changed the date of the alleged breach: "Plaintiff is claiming . . . that we had until February 2013 to tender, and so the breach didn't occur until February 2013. So it's being categorized as the date of accrual of damages, but this is the breach date." USI's counsel also argued that Goodman had alleged that it was required to pay the costs of its defense in the Blueberry Hill litigation, showing that damages began to accrue from the start of that case.

The court denied Goodman's motion. USI moved for a judgment of dismissal. Goodman filed a motion seeking reconsideration of the court's orders denying the motion to file a third amended complaint and granting the motion to strike. Goodman made several arguments, including an assertion that the second amended complaint made clear that Goodman had to pay for defense costs from the beginning of the Blueberry Hill litigation. In addition, Goodman argued that the court's order striking the complaint with prejudice for failing to comply with a court order was essentially a terminating sanction imposed without sufficient notice or hearing.

The court denied Goodman's motion for reconsideration and granted USI's motion for judgment of dismissal. The court's order dismissed USI from the case with prejudice. Goodman appealed from that order.

B. Discussion

Goodman asserts that the court erred by striking the second amended complaint and denying Goodman leave to file a third amended complaint. A court has discretion to strike a pleading that is "not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (Code Civ. Proc., § 436, subd. (b).) "A motion to strike a pleading under Code of Civil Procedure section 436 is reviewed for abuse of discretion." (*Pacific Gas and Elec. Co. v. Superior Court* (2006) 144 Cal.App.4th 19, 23.) The scope of a court's discretion "always resides in the particular law being applied; action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an abuse of discretion." (*Choice-in-Education League v. Los Angeles Unified School Dist*. (1993) 17 Cal.App.4th 415, 422.)

Here, the purported defects in the complaints centered around the statute of limitations and accrual of Goodman's claim against USI. The parties agree that the two-year statute of limitations in Code of Civil Procedure section 339, subdivision (1) applies to Goodman's professional negligence cause of action against USI. (See *Hydro-Mill Co., Inc. v. Hayward, Tilton and Rolapp Ins. Associates, Inc*. (2004) 115 Cal.App.4th 1145, 1154 (*Hydro-Mill*) [statute of limitations for professional negligence of an insurance broker is two years].)

Goodman alleged in its complaints that the Blueberry Hill litigation commenced in March 2012, that USI had a duty to report the Blueberry Hill litigation to RUSI under the D&O policy, USI failed to do so, and Goodman was damaged as a result. Goodman filed its lawsuit against USI on October 13, 2015. It had a tolling agreement with USI effective June 27,

2014. Thus, if Goodman's causes of action against USI accrued before June 27, 2012, its claim against USI was time-barred.

1. *Delayed discovery*

Goodman argues that it alleged adequate facts to show that its cause of action was timely under the delayed discovery doctrine, and therefore the trial court erred by holding that Goodman's claims were time-barred due to lack of a specific allegation regarding the date Goodman began paying fees and costs in the Blueberry Hill litigation. We agree.

"[S]tatutes of limitation do not begin to run until a cause of action accrues." (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806 (*Fox*).) A claim accrues "when the cause of action is complete with all of its elements." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397.) A plaintiff's suspicion of the "elements" of a cause of action refers to the "'generic' elements of wrongdoing, causation, and harm." (*Fox, supra,* 35 Cal.4th at p. 807.)

"An exception to the general rule for defining the accrual of a cause of action—indeed, the 'most important' one—is the discovery rule." (*Norgart, supra,* 21 Cal.4th at p. 397.) "The discovery rule provides that the accrual date of a cause of action is delayed until the plaintiff is aware of her injury and its negligent cause." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109 (*Jolly*).) "Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her." (*Id.* at p. 1110.) "In order to adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead 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, supra,* 35 Cal.4th at p. 809.)

"'A cause of action for professional negligence does not accrue until the plaintiff (1) sustains damage and (2) discovers, or should discover, the negligence.' [Citation.]" (*Hydro-Mill, supra,* 115 Cal.App.4th at p. 1161.) Here, the first and second amended complaints alleged that USI was negligent when it failed to tender the defense of the Blueberry Hill litigation to RUSI, but Goodman did not discover the negligence until September 2013, when Goodman retained counsel for other purposes. Goodman alleged that it did not learn that USI should have made a claim to RUSI under the D&O policy until it hired counsel to pursue a claim against a different insurer. These allegations met the requirements to demonstrate delayed discovery in a pleading under the standards of *Fox*, and therefore the court erred by finding that Goodman's claim was time-barred and the delayed discovery rule did not apply.

USI argues that Goodman had sufficient information before September 2013 to put it on inquiry notice regarding potential negligence. It also contends that "Goodman does not allege . . . that it conducted any reasonable investigation" into why it was paying its defense costs. USI is correct that a "plaintiff is held to her actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to her." (*Jolly, supra,* 44 Cal.3d at p. 1109.) However, a "demurrer based on a statute of limitations will not lie where the action may be, but is not necessarily, barred. [Citation.] In order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the

complaint; it is not enough that the complaint shows that the action may be barred." (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.)

Here, the complaints do not demonstrate affirmatively that Goodman's action was time-barred. Goodman explained that it thought Golden Eagle should be paying for defense costs under the CGL policy. Nothing on the face of the complaints suggests that Goodman had reason to know earlier than September 2013 that USI should have submitted a claim to RUSI under the D&O policy, or that Goodman had incurred defense costs as a result of that alleged breach. Thus, the face of the complaints did not demonstrate that Goodman's actions were time-barred on the basis that it should have known earlier of USI's alleged negligence.[2]

"When a plaintiff reasonably should have discovered facts for purposes of the accrual of a case of action or application of the delayed discovery rule is generally a question of fact, properly decided as a matter of law only if the evidence (or, in this case, the allegations in the complaint and facts properly subject to judicial notice) can support only one reasonable conclusion." (*Broberg v. Guardian Life Ins. Co. of America* (2009) 171 Cal.App.4th 912, 921.) Here, Goodman alleged that it could not

---

[2] Goodman asserts that this case is similar to *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805 and *Gryczman v. 4550 Pico Partners, Ltd*. (2003) 107 Cal.App.4th 1, because in those cases, the actions of the defendant affected the plaintiff's ability to discover the alleged breach. Although a defendant's actions may be relevant to whether the plaintiff's failure to discover the cause was reasonable, generally the applicability of the delayed discovery doctrine does not hinge upon the actions of the defendant.

have known earlier about USI's breach or resulting damages, and for purposes of the demurrer, those facts must be accepted as true. (See *T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 156.) USI has not pointed to allegations in the complaints or documents to be judicially noticed indicating that Goodman knew of its potential claims against USI earlier than September 2013. Thus Goodman adequately alleged facts to support the application of the delayed discovery doctrine, and the trial court erred by finding to the contrary.

2. *Accrual*

The court and parties below focused heavily on the date Goodman began incurring damages as a result of USI's alleged breach. Following USI's demurrer to the first amended complaint, the court ordered Goodman to "allege the precise date [Goodman] started paying costs." In its minute order ruling on the motion to strike, the court said it granted the motion because Goodman "failed to comply with the court's order of May 3, 2016, when it filed a Second Amended Complaint." Thus, the court struck Goodman's complaint for failure to comply with the court's order to allege the date it began paying costs in the Blueberry Hill litigation.

The court appeared to focus on the theory that the costs and attorney fees Goodman paid in the Blueberry Hill litigation constituted recoverable damages resulting from USI's alleged negligence. Indeed, such costs and attorney fees may be deemed damages. In *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, for example, an attorney failed to notify the client that it had relevant insurance coverage for a pending lawsuit, and the attorney failed to tender the handling of the lawsuit to the insurer. The Supreme Court considered the

question of when the client's damages accrued, and held that the client sustained actual injury when it paid for defense costs in the underlying litigation. (*Id*. at p. 752.)

Here, the first and second amended complaints both alleged the dates the Blueberry Hill complaints were filed (March 26 and 29, 2012), as well as the month and year in which the parties reached a settlement (February 2015). Both complaints also alleged that Goodman was forced to incur attorney fees and costs in that litigation as a result of USI's failure to tender the case under the D&O policy. "In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed." (Code Civ. Proc., § 452.) Construing these allegations liberally, it appears that Goodman alleged that it began incurring defense costs in or near March 2012.

However, in response to the court's order to allege a date it began paying costs, Goodman alleged that "the appreciable damages and harm it would begin experiencing in or about September 2013 result[ed] from the shortfall between what Golden Eagle paid and what [Goodman] ended up having to pay for defense fees and costs." The court was dissatisfied with this language, asking Goodman's counsel at the hearing on the motion to strike, "What does experiencing damages mean?" Counsel responded, "Well, they had harm. They had damage. That's when accrual occurred." Counsel also explained that "[t]he shortfall, that is, when the Golden Eagle money did not cover the money that this insurance policy would have paid, occurred in September, 2013."

The court struck this complaint because Goodman "failed to comply with the court's order" to allege a date it began paying costs in the Blueberry Hill litigation. This was error. First, as

discussed above, because delayed discovery was adequately alleged, the precise date on which Goodman began to incur defense costs did not render Goodman's claims time-barred on the face of the complaint. Thus, the complaint should not have been stricken on the basis that the claim against USI was time-barred. Second, the first amended and second amended complaints included the dates of the Blueberry Hill litigation and the allegation that Goodman wrongly incurred defense costs associated with that litigation, which, liberally construed, should have been sufficient to demonstrate accrual. Third, as the plaintiff, Goodman was entitled to allege the accrual date as it saw fit, rather than as the court preferred it. "[P]laintiffs in any civil litigation . . . are deemed to be the masters of their complaint [citation] and are no less the masters of their litigation strategy. . . . Plaintiffs are represented by able counsel with years of civil litigation experience who made the strategic decisions to draft the Complaint as they did and to pursue Plaintiffs' claims in a particular way." (*Petersen v. Bank of America* (2014) 232 Cal.App.4th 238, 259.) As master of its own complaint, Goodman was entitled to allege either that it incurred damages in March 2012 or, as added in the second amended complaint, that it did not incur damages before September 2013.

Although a court has discretion to strike a complaint, "the court's discretion is not unlimited, especially when, as here, its exercise implicates a party's ability to present its case. Rather, it must be exercised within the confines of the applicable legal principles." (*Sargon Enterprises, Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747, 773.) The court understandably became frustrated with counsel's shifting theories of accrual. Nevertheless, it was error for the court to require Goodman to

allege its cause of action in a particular way, when Goodman already had alleged facts sufficient to state a cause of action that was not untimely on its face. The court therefore erred by striking the complaint.

3. *Request for leave to amend*

Goodman also alleges that the trial court erred by denying Goodman's motion for leave to file the third amended complaint, because "'it ordinarily constitutes an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that the defect can be cured by amendment. [Citations.]'" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 970-971.) Because we have found that the trial court erred by striking the second amended complaint, there was no need to amend the complaint to cure the purported defect in the second amended complaint. We therefore do not address Goodman's assertion that the court erred in refusing leave to amend. We also express no opinion on the viability of the theory of accrual Goodman asserted in the proposed third amended complaint should Goodman choose to pursue it in future proceedings, nor do we express any opinion on the procedural propriety of any such attempt.

In sum, the trial court erred by finding that Goodman's claim against USI was time-barred based on the allegations in the complaint, and in dismissing that claim on that basis. We therefore reverse the judgment in favor of USI.

LINZER

A. Factual and procedural background

In its complaint, Goodman alleged that Linzer simultaneously represented both Goodman and Blueberry Hill between 2005 and 2012, which involved serious conflicts of

interest. Linzer's dual representation occurred as Goodman and Blueberry Hill "became embroiled in a highly contentious business dispute" regarding the gluten free vegetable patties before the Blueberry Hill litigation was filed. The simultaneous representation eventually "resulted in the disqualification of [Linzer] from the Blueberry Hill" litigation pursuant to a disqualification order dated September 30, 2014.[3] Goodman alleged that Linzer was counsel of record in the Blueberry Hill litigation until October 28, 2014, and that Linzer continued to work for Goodman "in some capacity" until March 2015, when Linzer returned Goodman's papers and property. The malpractice action was filed on October 13, 2015.

Goodman asserted causes of action against Linzer for professional negligence, breach of fiduciary duties, fraud and deceit, negligent misrepresentation, and unjust enrichment.[4] Goodman alleged, *inter alia*, that Linzer failed to obtain consent for the simultaneous representation of Blueberry Hill, failed to provide competent legal advice regarding the agreement between Goodman and Blueberry Hill, failed to maintain the confidentiality of client information, and mismanaged the

---

[3] The disqualification order followed a ruling by Division 3 of this District granting Blueberry Hill's petition for a writ of mandate. (See *Blueberry Hill Restaurants, Inc. v. Sup. Court* (Apr. 8, 2014, No. B250597) 2014 WL 1378239.) The September 30, 2014 minute order noted that Goodman, Donald Goodman, and Daniel Goodman had moved for relief under Code of Civil Procedure section 473, and stated, "Plaintiffs [*sic*] counsel's appearance is disallowed."

[4] The parties later stipulated that the negligent misrepresentation and unjust enrichment causes of action would be dismissed.

Blueberry Hill litigation. Goodman asserted that its damages exceeded $2 million.

B. Linzer's motion for summary judgment

1. *Motion*

Linzer moved for summary judgment on the grounds that Goodman's claims were time-barred. Linzer asserted that Goodman's claims were subject to the one-year statute of limitations in Code of Civil Procedure, section 340.6, subdivision (a). Linzer also acknowledged that section 340.6, subdivision (a)(2) (section 340.6(a)(2)) states that the limitations period for legal malpractice claims is tolled as long as the "attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred." Linzer argued that this tolling provision did not save Goodman's claims.

Linzer's motion asserted that in the Blueberry Hill litigation, Blueberry Hill filed a motion to disqualify Linzer based on his prior representation of Blueberry Hill. The trial court denied that motion, and Blueberry Hill challenged the ruling in a petition for a writ of mandamus filed in the Court of Appeal. On April 8, 2014, the Court of Appeal granted the petition and ordered the trial court to grant Blueberry Hill's motion to disqualify Linzer from the case. Linzer attempted to challenge the Court of Appeal's ruling in the trial court, but on September 30, 2014, the trial court ordered Linzer disqualified from the Blueberry Hill litigation. Linzer asserted that Goodman began looking for new counsel to represent it as early as May 2013, and Goodman retained law firm Loeb & Loeb in June 2013 to represent it in the Blueberry Hill litigation. Loeb & Loeb

actually began working for Goodman on the Blueberry Hill litigation in October 2014.

Linzer argued that Goodman's claims against Linzer accrued on April 8, 2014, when the Court of Appeal issued its order that Linzer be disqualified from the Blueberry Hill litigation. In the alternative, Linzer asserted that Goodman's claims accrued no later than September 30, 2014, when the trial court ruled that Linzer was disqualified from the case. Linzer contended that because Goodman's malpractice case was filed on October 13, 2015, Goodman's claims were time-barred. Linzer acknowledged that it generated billing statements with entries relating to Goodman after September 30, 2014, but said, "Those entries either relate to other matters (not the [Blueberry Hill] litigation), to the representation of Daniel and Donald Goodman individually (such as the claim that Linzer ghost wrote an objection filed by Donald Goodman on October 14, 2016 [*sic*] to the September 30, 2016 [*sic*] hearing), and administrative entries relating to the transfer of files to Loeb & Loeb."

With its motion, Linzer submitted copies of bills it sent to Goodman for September, October, and November 2014, showing attorney billing entries from those time periods. The bills for September and October state, "In Reference To: General Representation." The November bill states, "In Reference To: Insurance Coverage." In a declaration, attorney Kenneth Linzer said, "The last billing entry on [Linzer's] invoices to Goodman for services for representation in connection with the underlying lawsuit is October 8, 2014, when I reviewed the reporter's transcript and wrote a letter to [Blueberry Hill's] counsel." Linzer also said that he "ghost wrote an Objection to a Notice of Ruling filed on October 14, 2014," which Daniel Goodman filed in

pro per on behalf of himself, individually. Linzer said that because he had been disqualified from representing Goodman Food Products, and the objection was filed on behalf of Donald Goodman, the objection did not qualify as continued representation of Goodman Food Products for purposes of section 340.6(a)(2).

2. *Opposition*

Goodman opposed the motion. It argued that its malpractice claims were not time-barred, because Linzer continued to represent Goodman in the Blueberry Hill litigation "until at least October 23, 2014," when Linzer "first began the process of transferring" Goodman's files to Loeb & Loeb. With its opposition, Goodman submitted a billing invoice from Linzer for October 2014, which stated, "In Reference To: Insurance Coverage." (By contrast, the October 2014 statement submitted by Linzer with its motion for summary judgment stated, "In Reference To: General Representation.") The statement submitted by Goodman showed an entry on October 8, 2014, which included, "Review reporter's transcript of 09/3/14 hearing." An entry dated October 14, 2014, stated, "Prepare notice of objection to notice of rulings at September 30, 2014 hearing." Entries dated October 15, 16, and 19 mention working on case strategies in light of the court's September 30, 2014 ruling. Additional entries throughout the month discuss work relating to transferring the file to Goodman's new attorneys. Goodman's attorney, Michael Reznick, stated in his declaration that the statement was a true and correct copy of Linzer's October 2014 invoice, which was produced in discovery.

Goodman also submitted a declaration by Donald Goodman, president of Goodman Food Products. Donald

Goodman stated that Linzer rendered "substantive legal services to [Goodman], Danny [Daniel Goodman], and me through the month of October 2014 and well into November 2014." Goodman also submitted a declaration by attorney Keith A. Meyer, who advised Goodman regarding insurance coverage in relation to the Blueberry Hill litigation. Meyer stated that he received an email from Linzer inquiring about insurance coverage for settlement of the Blueberry Hill litigation on October 16, 2014; the email was attached. Goodman also submitted the declaration of Mark D. Campbell, an attorney who worked at Loeb & Loeb. Campbell said that Linzer transferred the case files to Loeb & Loeb around October 23, 2014, and that Loeb & Loeb first appeared on behalf of Goodman in the Blueberry Hill litigation on October 28, 2014.

3. *Reply*

In reply, Linzer cited section 340.6(a)(2), and said none of the evidence filed with Goodman's opposition demonstrated that any "activity occurred 'regarding the specific subject matter in which the alleged wrongful act or omission occurred.'" Linzer argued that the October 8, 2014 billing entry was the last representation of Goodman as stated in Linzer's declaration. Linzer objected to the invoice showing additional billing entries as lacking authentication and foundation. Linzer also said the October 16, 2014 email to Meyer "shows that Donald Goodman was still in contact with Linzer," but did not show that Linzer was representing Goodman in relation to the Blueberry Hill litigation.

4. *Hearing and ruling*

At the hearing, counsel for Goodman argued that whether Linzer was representing Goodman or individual parties presented a triable issue of fact. Counsel for Linzer discussed the

objection to the October 2014 billing statement submitted with Goodman's opposition to the motion. Linzer's counsel agreed that Linzer produced the document in discovery, but said he objected to the use of it in opposition to the motion "[b]ecause I don't believe that in the opposition, counsel can attach it. I think his client should have declared, 'This is an invoice that I received,' rather than having it attached through counsel." Linzer's counsel also stated that the invoice constituted Linzer's business record, but he objected that the descriptions of the work contained within the invoice constituted hearsay.

The court took the motion under submission, and later granted the motion in a written order. The court noted that it "ruled on defendants' Objections to plaintiff's evidence . . . rendering much of plaintiff's proffered evidence inadmissible." Using a proposed order submitted by Linzer, the court sustained Linzer's objections to Goodman's counsel's reference to the October 2014 billing invoice, and sustained the objection to the invoice itself. In the same order, the court sustained Linzer's objection to Donald Goodman's statement that Linzer continued working for Goodman through October 2014, on the grounds that it lacked foundation, called for a legal conclusion, and, citing section 340.6(a)(2), said the statement failed to note that the legal work was for the "specific subject matter in which the alleged wrongful act or omission occurred."

The court noted that Linzer stated in his declaration that he did not work for Goodman on the Blueberry Hill litigation after October 8, 2014; Linzer's "limited work after that date consisted of administrative tasks regarding the transfer of the case to another law firm and having a few conversations with the Goodmans in their individual capacity." The court continued,

"Linzer acknowledges that he assisted Donald Goodman individually by drafting an Objection to an October 8, 2014 Notice of Ruling, which Donald Goodman then filed in pro per." This "limited assistance to a long-time client . . . cannot objectively be considered as anything more than a favor. Indeed, the fact that the Objection had to be filed in pro per makes the point that Goodman Products [*sic*] and the Goodmans knew that Linzer could no longer represent them in the underlying case. Similarly, a few conversations between a lawyer and his clients in the days following the lawyer's removal from a case cannot objectively be considered 'continuing representation.'" The court concluded, "On this record, the . . . one year statute of limitations bars Goodman's claim in this case."

The court also said that alternatively, "The statute of limitations began running no later than September 30, 2014." On that date, the court in the Blueberry Hill litigation held that Linzer could no longer represent the parties in that litigation, and thus "a 'bright line' test can and should be used. Where, as here, an attorney has been removed from a case by a court of competent jurisdiction, that attorney's representation on the matter ends." The court therefore held that the motion was "granted on statute of limitations grounds."

Judgment was entered in Linzer's favor shortly thereafter, and Goodman timely appealed.

C. Discussion

Summary judgment is appropriate if "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) "There is a triable issue of material fact if . . . the evidence would allow a

reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) "We review the trial court's grant of summary judgment de novo and decide independently whether the parties have met their respective burdens and whether facts not subject to triable dispute warrant judgment for the moving party as a matter of law." (*Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480, 1484.)

Goodman asserts on appeal that summary judgment should not have been entered because there was a triable issue of fact as to when Linzer's representation of Goodman ended, and therefore whether the tolling provision in section 340.6(a)(2) applied. Linzer asserts that the evidence demonstrated the tolling provision was not applicable.

A cause of action against an attorney for professional negligence has a statute of limitations of one year, "except that the period shall be tolled" as long as "[t]he attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred." (§ 340.6(a)(2).) "The continuing representation provision applies only when the continuing representation involves the specific subject matter as to which the negligence occurred, and is not applicable when there is a continuing relationship between the client and the attorney involving only unrelated matters." (*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1528.) "An objective standard is used to determine whether an attorney's representation has been continuous." (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 887.) If an objective "analysis discloses . . . a

triable issue of material fact, summary judgment may not be granted." (*Worthington v. Rusconi* (1994) 29 Cal.App.4th 1488, 1499.)

This case was filed on October 13, 2015. The parties agree that Goodman's claims accrued before October 13, 2014. Thus, the claims against Linzer may be deemed timely only if the statute of limitations was tolled until October 13, 2014 or later. We find that the evidence presented demonstrates a triable issue of fact as to whether Goodman's claims were tolled.[5]

Linzer stated in his declaration that he worked on the Blueberry Hill litigation on October 8, 2014, and his firm's "invoices to Goodman after October 8, 2014 do not contain any billing to Goodman for services rendered in connection with the underlying related cases." However, Goodman submitted the declaration of attorney Keith Meyer, who stated that Linzer contacted him regarding settlement of the Blueberry Hill litigation on October 16, 2014. On a motion for summary judgment, the evidence must be liberally construed in support of the party opposing summary judgment, and any doubts

---

[5] Goodman asserts that Linzer failed to meet its initial burden on summary judgment, because Linzer failed to submit the relevant October 2014 invoice, and the invoice submitted showed that Linzer did substantial work for Goodman in October 2014. However, Linzer stated that this work was not related to the Blueberry Hill litigation, and instead was for Donald Goodman or related to other matters. This explanation was sufficient to meet Linzer's initial burden of proof on summary judgment. (See, e.g., Code Civ. Proc., § 437c, subd. (o)(2); *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 469 [a defendant relying on an affirmative defense in moving for summary judgment has "an initial burden of production to make a prima facie showing" that defense applies].)

concerning the evidence must be resolved in favor of that party. (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 705.) Based on this evidence alone, there is a conflict in the evidence as to whether Linzer continued working on the Blueberry Hill litigation after October 8, 2014, and the trial court erred in not resolving any doubts in favor of Goodman.

Goodman submitted additional evidence that Linzer continued working for Goodman after October 8, 2014. Donald Goodman stated in his declaration that Linzer continued working for Goodman "through the month of October 2014 and well into November 2014." Goodman also submitted Linzer's October 2014 billing invoice, referencing "Goodman Food Products, Inc. [¶] dba Don Lee Farms" at the top. The invoice included entries on October 14, 15, 16, and 19 that reflected work on case strategies in light of the court's September 30, 2014 ruling in the Blueberry Hill litigation.

The court sustained objections to Donald Goodman's declaration and the October 2014 billing statement. Goodman asserts that the court's ruling on the objections was erroneous.[6] In reviewing a summary judgment on appeal, we "'"consider[ ] all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained."' [Citation.] We liberally construe the evidence in support of the party

---

[6] Linzer argues on appeal that the court's evidentiary rulings were correct. However, it does not cite any legal authority in the section of its brief discussing the court's ruling relating to the October 2014 invoice. In the section addressing Donald Goodman's declaration, Linzer cites only cases stating generally that incompetent evidence cannot create a triable issue of fact, and cites no authorities regarding the admissibility of Donald Goodman's statements.

opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.) We review the trial court's rulings on evidentiary objections by applying the abuse of discretion standard.[7] (*Miranda v. Bomel Const. Co., Inc.* (2010) 187 Cal.App.4th 1326, 1335; *Great American Ins. Companies v. Gordon Trucking, Inc.* (2008) 165 Cal.App.4th 445, 449.)

The court sustained Linzer's objection to the October 2014 billing statement in a proposed order written by Linzer, which cited authentication grounds, lack of foundation, hearsay, and because it was "vague and ambiguous as to what the content means." This was erroneous. Linzer's counsel told the court at the hearing that the document was a business record, and that it had been produced in discovery. The parties' agreement that the document was a business record produced by Linzer in discovery abrogated any concerns about hearsay or foundation. (See Evid. Code, § 1271.) Linzer asserts no arguments on appeal to the contrary.

The court's authentication ruling was also erroneous. "Although writings must be authenticated before they are

---

[7] Goodman points out that the standard of review for evidentiary objections on summary judgment is unsettled, and encourages us to review the court's evidentiary rulings de novo. (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535 ["[W]e need not decide generally whether a trial court's ruling on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo"].) We follow the weight of authority and apply the abuse of discretion standard. (See Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2016) ¶ 8.168, p. 8-146.)

received into evidence or before secondary evidence of their contents may be received ([Evid. Code,] § 1401), a document is authenticated when sufficient evidence has been produced to sustain a finding that the document is what it purports to be ([Evid. Code,] § 1400). As long as the evidence would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility." (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 321.) A writing may be authenticated by a party's admission that it is authentic. (Evid. Code, § 1414, subd. (a).) Here, both parties agreed that the document was what it purported to be, so sustaining the objection on authentication grounds was error.

Moreover, to the extent there was any confusion about the import of the information contained in the billing statement, any doubts should have been resolved in favor of Goodman as the nonmoving party. For example, Linzer argued that the bills did not show that he worked on the Blueberry Hill litigation or that he worked for Goodman, but that he was working on other matters for Donald Goodman and Daniel Goodman individually. This could render the tolling of section 340.6(a)(2) inapplicable, because that provision requires that the attorney "continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred." The plaintiff here is Goodman, and the matter at issue is the Blueberry Hill litigation, so work for Donald or Daniel Goodman on other matters would not toll Goodman's statute of limitations.

However, much of the evidence contradicts Linzer's assertions. For example, Meyer's declaration stating that Linzer contacted him about settling the Blueberry Hill litigation on

October 16, 2014, showed that Linzer was doing work relating to that litigation. In addition, the billing entries on October 14, 15, 16, 19, and 20 related to the disqualification order and strategies in the case moving forward, including preparation of a memo regarding case strategies. Perhaps Linzer would claim that such work was for the benefit of the Goodmans individually rather than Goodman Food Products, but the veracity of such a claim is an issue for the trier of fact. "'Continuity of representation ultimately depends . . . on evidence of an ongoing mutual relationship and of activities in furtherance of the relationship.'" (*Nielsen v. Beck* (2007) 157 Cal.App.4th 1041, 1049.) Here, there was ample evidence to establish a triable issue as to whether Linzer's representation of Goodman on issues relating to the Blueberry Hill litigation continued to October 13, 2014 and beyond.

In *Nielsen v. Beck, supra*, 157 Cal.App.4th 1041, client Nielsen hired attorney Beck to assist with multiple legal issues including a bankruptcy and an unlawful detainer action. By August 2004, Nielsen had become dissatisfied with Beck's representation, and consulted with another attorney about replacing Beck. (*Id*. at p. 1045.) Nielsen and Beck signed a substitution of attorney form on August 26, 2004, but they continued to discuss legal matters. In a bill for his services, Beck wrote that he spoke with Nielsen on September 9, 14, and 18, 2004 regarding case strategies. (*Id*. at p. 1046.) Nielsen filed a legal malpractice action against Beck on September 2, 2005, and Beck asserted in a motion for summary judgment that Nielsen's claim was time-barred, because Nielsen made clear that he was dissatisfied with Beck's representation in August 2004. The trial court granted the motion.

The Court of Appeal reversed. The question in the Court of Appeal was whether the continuous representation tolling of section 340.6(a)(2) applied. The court said, "On September 9, 14, and 18, 2004, Robert Nielsen placed telephone calls to Beck asking for advice. There is evidence that during these three telephone calls, Beck rendered professional services. Beck's October 2004 billing statement requested payment for 'professional services rendered' and described the services Beck rendered as 'negotiations, options and strategy.' Beck testified in his deposition that during these telephone calls, Robert Nielsen asked for advice as to procedure, negotiations, and tactics to resolve the [underlying] case, and Beck was responsive to those requests. Thus, there is evidence from which a trier of fact could conclude that there was an ongoing mutual relationship and activities in furtherance of that relationship through September 18, 2004. If the trier of fact so concludes, then the statute of limitations would not have expired because the lawsuit was filed on September 2, 2005." (*Nielsen v. Beck, supra*, 157 Cal.App.4th at p. 1051.)

The court also held that Beck's explanations about the nature of the calls did not justify summary judgment: "Beck states that he was simply being cordial when he discussed the pending litigation with Robert Nielsen and that the three conversations do not evidence a continuing relationship. This may be the conclusion that a trier of fact reaches. However, the fact that Robert Nielsen continued to ask Beck for advice even after the substitution of attorney form was signed, and Beck apparently provided advice, creates sufficient evidence that may convince a trier of fact to the contrary." (*Id*. at p. 1052.)

Linzer argues that *Nielsen v. Beck* is not on point because in this case "it has been demonstrated" that contacts by Linzer after October 8, 2014 "were not about the specific subject matter of the 2012 lawsuit and were not services for" Goodman. However, the evidence here is very similar to that presented in *Nielsen*. The billing entries, Donald Goodman's declaration, and Meyers's declaration all suggested that Linzer was working for Goodman on issues relating to the Blueberry Hill litigation through October 2014. Although a trier of fact ultimately may find that Linzer's representation was for Donald Goodman individually, or that Linzer's work did not relate to the Blueberry Hill litigation, in the context of a motion for summary judgment the evidence was sufficient to demonstrate a triable issue of fact as to the "continuous representation" tolling provision in section 340.6(a)(2).

Linzer also asserts that its disqualification from the Blueberry Hill litigation on September 30, 2014 is a "clear cutoff date that terminates the relationship." Linzer states that because it was barred from representing Goodman as of that date, there was no way that it could represent Goodman with respect to the "specific subject matter" of the Blueberry Hill litigation, as required by section 340.6(a)(2). Goodman asserts that such a "bright line" test is inappropriate to determine continuous representation tolling under section 340.6(a)(2).

Official withdrawal or substitution of attorney is not the determining factor with respect to tolling under section 340.6(a)(2); instead, the question is when the attorney-client relationship ended. As the court stated in *Nielsen*, ""The rule is that, for purposes of the statute of limitations, the attorney's representation is concluded when the parties so agree, and that

result does not depend upon formal termination, such as withdrawing as counsel of record."" (*Nielsen, supra*, 157 Cal.App.4th at p. 1049.)

Similarly, the Court of Appeal in *Flake v. Neumiller & Beardslee* (2017) 9 Cal.App.5th 223, 230 stated, "The end of an attorney-client relationship is not always signaled by a bright line . . . ." The attorney in that case encouraged the court to find that representation ended at the time the attorney withdrew from the underlying case. In rejecting this contention, the *Flake* court stated, "[T]he formal act of withdrawing does not demarcate the end of the professional relationship in the context of the legal malpractice statute of limitations." (*Id*. at p. 230.) Instead, "The client's reasonably objective belief controls in all cases." (*Id*. at p. 231.) Where there is "'evidence of an ongoing mutual relationship and of activities in furtherance of the relationship,'" the tolling of section 340.6(a)(2) applies. (*Id*. at pp. 231-232; see also *Gonzalez v. Kalu* (2006) 140 Cal.App.4th 21, 30 [where attorney abandoned client's claims and stopped communicating with client, "the representation ends when the client actually has or reasonably should have no expectation that the attorney will provide further legal services."].)

Thus, the date of disqualification does not cut off the tolling period as a matter of law, and the evidence presented demonstrates that there is a triable issue as to this question. The trial court therefore erred in granting summary judgment, and we reverse the judgment on that basis.[8]

---

[8] Linzer requests that we find that Goodman's action lacked merit, and thus sustain the summary judgment on substantive grounds. We decline to make such findings on appeal in the first instance.

DISPOSITION

Both judgments in favor of defendants are reversed. Goodman is entitled to its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.