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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 ONE

MORDECHAI KACHLON et al.,

Plaintiffs and Appellants,

v.

DANIEL J. SPIELFOGEL,

Defendant and Respondent.

No. B238406

(Los Angeles County
Super. Ct. No. BC339973)

APPEAL from an order of the Superior Court of Los Angeles County. Kevin Clement Brazile, Judge. Reversed.

Law Offices of Stewart Levin and Stewart J. Levin, for Plaintiffs and Appellants.

Nemecek & Cole, Jonathan B. Cole and Susan S. Baker for Defendant and Respondent.

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Beginning in 2002, three attorneys in succession handled legal matters for plaintiffs that in 2005 resulted in a substantial judgment being entered against them. Plaintiffs filed this legal malpractice action against the attorneys in 2005, alleging the attorneys breached their professional duties. The first attorney, whose representation of plaintiffs had ended in 2003, moved for summary judgment, arguing the action was time barred as to him. The trial court granted the motion, concluding the action was time barred because no triable issue existed as to whether (1) plaintiffs knew or should have known of the attorney's negligence or (2) suffered injury more than one year before they filed their malpractice complaint. The court also concluded the first attorney's negligence could not have proximately caused plaintiffs' damages because the negligence of the second and third attorneys constituted an intervening, superseding cause of plaintiffs' damages.

We conclude no evidence indicates when plaintiffs sustained actual injury, and no evidence indicates the intervening conduct of the second and third attorneys superseded that of the first attorney. Defendant is therefore not entitled to summary judgment.

## BACKGROUND

We glean the facts from plaintiffs' complaint and evidence submitted in connection with defendant's summary judgment motion, strictly construing the moving parties' papers and liberally construing those of the opposing party. (*Howell v. State Farm Fire & Casualty Co*. (1990) 218 Cal.App.3d 1446, 1448.)

Plaintiffs Mordechai and Monica Kachlon were owed $53,000 by Debra and Donny Markowitz, the debt represented by a promissory note and secured by a deed of trust. The Markowitzes also owed Mordechai for contractor services he had performed at their home and for a personal loan he had made.[1] These latter debts were unsecured.

In July 2002, Mordechai signed a writing acknowledging that the promissory note had been canceled and the deed of trust reconveyed in exchange for $12,000.

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[1] For clarity, we will sometimes refer to principals by their first names.

In November 2002, plaintiffs retained defendant Daniel Spielfogel, an attorney, to represent them with respect to both the secured and unsecured debts. On March 12, 2003 Spielfogel filed a complaint on behalf of Mordechai against the Markowitzes, seeking recovery for Mordechai's construction services and the unsecured personal loan. (*Kachlon v. Markowitz* (Super. Ct. Los Angeles County, 2003, No. BC291979); the *Kachlon* action) The complaint did not mention the secured debt.

Concerning the secured debt, Mordechai advised Spielfogel that he had canceled the $53,000 promissory note and reconveyed the security to the Markowitzes in exchange for $12,000, but felt they still owed the remaining balance on the note—$41,000—pursuant to an oral agreement. Mordechai also informed Spielfogel that Debra was a lawyer and that the Markowitzes would contest this claim. Spielfogel drafted a second complaint concerning the secured debt, but it was never filed.

In March, May and June 2003, plaintiffs pursued nonjudicial foreclosure on the deed of trust that had secured the $53,000 debt. These efforts were unsuccessful.

In August 2003, the Markowitzes sued plaintiffs for damages arising from the foreclosure proceedings, alleging plaintiffs recorded three notices of default after acknowledging that the underlying debt had been paid and the promissory note and deed of trust delivered to escrow for cancellation. *(Markowitz v. Kachlon* (Super. Ct. L.A. County, 2003, No. BC310492); the *Markowitz* action.) They alleged that plaintiffs falsely represented the amount due on the note, and falsely claimed the Markowitzes had defaulted, in an effort to obtain the Markowitzes' property by fraud. As a result, title to the property was clouded and its value diminished, and the Markowitzes were forced to incur attorney fees to clear title. The Markowitzes sought general damages, punitive damages, and attorney fees.

The *Markowitz* and *Kachlon* actions were consolidated.

In mid-2003, plaintiffs terminated their relationship with Spielfogel and retained a second attorney, Salvador LaVina. They also retained a third attorney, Robert Gilchrest, to litigate the consolidated lawsuits.

In June 2005, plaintiffs suffered an adverse judgment in the litigation, the court ordering them to pay approximately $500,000 in damages and attorney fees.

Plaintiffs filed the instant malpractice lawsuit against their attorneys on September 16, 2005. Plaintiffs alleged Spielfogel failed to advise them it would be "extremely ill advised" to foreclose on the subject note and trust deed, as doing so would expose them to "liability for slander of title, legal fees of the defendants and other parties, and causes of action by Markowitz against Kachlon for fraudulent and wrongful foreclosure" and punitive damages. Spielfogel "should have strongly and specifically advised Kachlon not to pursue . . . the Trust Deed and Note foreclosure against Marko[w]itz because plaintiffs would be liable for punitive damages and attorneys fees, and other damages, if they lost the case, which was a very likely result. Particularly because Debra Markowitz, herself, was an attorney, and Kachlon was wrong to file for foreclosure of a Note already paid by Markowitz, getting sued for wrongful foreclosure was an extremely foreseeable and adverse event, and Kachlon should have been advised against it." But Spielfogel advised plaintiffs to pursue foreclosure aggressively, and otherwise "actively participated in the pursuit of this ill conceived claim." As a result, plaintiffs pursued nonjudicial foreclosure against the Markowitzes, which course ultimately resulted in liability for substantial damages. Plaintiffs' pursuit of nonjudicial foreclosure also compromised and "pollut[ed]" the *Kachlon* action, causing it to fail.

Plaintiffs alleged that after they terminated their relationship with Spielfogel and retained LaVina, LaVina negligently advised them to continue with the lawsuit against the Markowitzes "because he had a 'slam dunk' case, with 'nothing to lose.'" He also advised plaintiffs to go forward with foreclosure proceedings and negligently referred them to Gilchrest. Gilchrest told plaintiffs they "had nothing to worry about," but then bungled the litigation and failed to relay to them the Markowitzes' posttrial, walk-away settlement offer.

Spielfogel moved for summary judgment. He argued the complaint was time barred because plaintiffs were put on notice of facts giving rise to their legal malpractice

claim more than one year before they filed the malpractice lawsuit. They also suffered actual injury more than one year before filing suit, when they retained LaVina. Spielfogel further argued his allegedly negligent representation of plaintiffs was not the proximate cause of their damages because after his representation ended, both LaVina and Gilchrest encouraged plaintiffs to continue nonjudicial foreclosure against the Markowitzes.

In support of the motion Spielfogel filed a separate statement setting forth 18 facts that tracked plaintiffs' complaint. The evidence supporting the separate statement consisted solely of references to the complaint and other court documents and Spielfogel's declaration. Of note is fact No. 6, the only fact plaintiffs disputed: "The Kachlons incurred attorney fees and costs to defend the lawsuit filed by the Markowitzes beginning in August of 2003." The evidence purporting to support the fact was paragraph 20 of plaintiffs' complaint. There, plaintiffs alleged LaVina took over the *Kachlon* action in 2003 and advised them to continue to prosecute it, "thereby furthering the involvement of the Kachlons in their case against Markowitz, . . . creating even more legal fees incurred by the other parties to that case, all of which [Mordechai] became responsible to pay due to an adverse judgment and verdict against [him] in the underlying case, and thereby causing [Mordechai] to suffer other damages and liabilities, as well, when [he] lost the trial on this issue by suffering an unfavorable jury verdict at trial with Markowitz . . . on all issues, proximately causing Kachlon approximately $500,000 in damages, for attorneys fees, and other damages, and loss of his quantum meruit claim for construction services." Spielfogel inferred from paragraph 20 that plaintiffs incurred attorney fees in 2003.

Plaintiffs opposed Spielfogel's motion. They argued the attorneys who represented them after Spielfogel "mindlessly pursued Spielfogel's strategic blunders," "jumped on the Spielfogel bandwagon by proceeding incompetently and negligently," and made no effort "to correct or mitigate the effects of Spielfogel's malpractice." They argued they suffered no appreciable injury, and did not know and had no reason to know

about Spielfogel's malpractice, until June 2005, when an adverse verdict was announced in the consolidated *Kachlon*/*Markowitz* action. They filed the instant lawsuit less three months later.

Plaintiffs supported the opposition mainly with Mordechai's declaration. Mordechai declared Spielfogel represented him with respect to both the contractor fee collection matter and the promissory note collection. Spielfogel advised Mordechai to institute nonjudicial foreclosure proceedings against the Markowitzes and, once those proceedings were begun, encouraged him to pursue them, as doing so would put pressure on the Markowitzes to settle the *Kachlon* action. Mordechai declared that after he left Spielfogel, he was represented by LaVina. When he began getting legal bills from LaVina, he told LaVina he "was not interested in spending more money on the case," but would perform contractor work on his home.

As noted, plaintiffs disputed only Spielfogel's fact No. 6, which, citing only paragraph 20 of the complaint stated, "The Kachlons incurred attorney fees and costs to defend the lawsuit filed by the Markowitzes beginning in August of 2003." Plaintiffs argued nothing in the complaint supported this fact, as they alleged only that they retained LaVina in 2003, not that they incurred or paid attorney fees then.

In his reply, Spielfogel argued Mordechai's declaration that he retained LaVina "after" leaving Spielfogel, and sometime after that "began getting legal bills" from him, was evidence that plaintiffs actually incurred attorney fees, and thereby sustained injury, in 2003.

On December 19, 2011, the trial court entered an order granting Spielfogel's motion for summary judgment. It found no triable issue existed as to whether the action was time barred because the *Markowitz* complaint notified plaintiffs of Spielfogel's alleged negligence more than one year before they filed their malpractice suit, and they suffered injury when they instituted nonjudicial foreclosure proceedings against the Markowitzes, also more than one year before filing suit. The court also concluded plaintiffs could not establish that Spielfogel's negligence was the proximate cause of their

harm because it was undisputed that two attorneys in succession succeeded him and encouraged continued pursuit of nonjudicial foreclosure.

Plaintiffs appealed from the resulting judgment.

## DISCUSSION

### 1. Standard of Review

A "motion for summary judgment shall be granted 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); *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.)[2] Once the moving defendant has met its burden, the burden shifts to the plaintiff to show that a triable issue of material fact exists as to each cause of action. (§ 437c, subd. (p)(2).) A triable issue of material fact exists where "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*., *supra*, 25 Cal.4th at p. 845.)

We review the trial court's ruling on a motion for summary judgment de novo. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 60.) "We liberally construe the evidence in support of the party 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), accepting as true the facts shown by the evidence offered in opposition to summary judgment and the reasonable inferences that can be drawn from them (*Spitzer v. Good Guys, Inc*. (2000) 80 Cal.App.4th 1376, 1385). If the material facts are in conflict, the factual issues must be resolved by trial. (*Hernandez v. Department of Transportation* (2003) 114 Cal.App.4th 376, 382.)

### 2. Whether Plaintiffs' Legal Malpractice Action is Time Barred

The limitations period for legal malpractice is set forth in section 340.6, which states, in relevant part: "(a) An action against an attorney for a wrongful act or omission,

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[2] All undesignated statutory references are to the Code of Civil Procedure.

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, or four years from the date of the wrongful act or omission, whichever occurs first. . . . [T]he period shall be tolled during the time that . . . [¶] (1) The plaintiff has not sustained actual injury." (§ 340.6, subd. (a)(1).)

"The test for actual injury under section 340.6 . . . 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. . . . [D]etermining when actual injury occurred is predominantly a factual inquiry. [Citations.] When the material facts are undisputed, the trial court can resolve the matter as a question of law in conformity with summary judgment principles." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 (*Jordache*).) One example of damages compensable in a malpractice action are attorney fees incurred to defend a third party lawsuit. (*Id*. at p. 759.)

Spielfogel argues plaintiffs suffered actual injury when they incurred attorney fees and costs to defend the lawsuit filed by the Markowitzes. Again citing paragraph 20 of plaintiffs' complaint, Spielfogel argues plaintiffs incurred these attorney fees in August 2003, when they retained LaVina. The argument is without merit. Plaintiffs alleged in paragraph 20 only that they *retained* LaVina in 2003, not that they incurred attorney fees then. Spielfogel presented no evidence, for example fee invoices or deposition testimony, indicating the date plaintiffs first became indebted to LaVina for attorney fees.

Spielfogel argues Mordechai's own declaration filed in opposition to the motion for summary judgment establishes that he incurred fees to LaVina upon that attorney's retention. The argument is without merit. Mordechai stated only that he retained LaVina after Spielfogel and at some point began getting invoices from him. He did not state when LaVina performed any work on his behalf or when he received the invoices.

Spielfogel argues it was plaintiffs' burden to establish when they incurred fees to LaVina, given that it is undisputed they retained him in 2003. He offers no principle or precedent for shifting the burden in that circumstance to the party opposing summary judgment, and we are aware of none.

Citing *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217 (*Foxborough*), Spielfogel argues that exposure to liability itself constitutes actual injury. The argument is meritless. As stated, the test for actual injury is whether the plaintiff has sustained damages compensable in a malpractice action. (*Jordache*, *supra*, 18 Cal.4th at p. 743.) No precedent of which we are aware would permit recovery of damages in a malpractice lawsuit for mere exposure to third party litigation.

*Foxborough* is distinguishable. There, the malpractice victim retained an attorney to secure an automatic right to annex property. Through the attorney's negligence, the automatic right was lost. The client then "had to resort to the more onerous, expensive, and unpredictable task of obtaining annexation" by other means, the very situation it hired the attorney to avoid. (26 Cal.App.4th at p. 227.) The court held that "when 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." (*Ibid*, italics added.)

Even accepting for purposes of argument the *Foxborough* court's dictum that *imposition* of a liability constitutes actual injury for purposes of the tolling statute, here no liability was imposed on plaintiffs until 2005, when they suffered an adverse judgment in third party litigation.

Spielfogel cites *Apple Valley Unified School Dist. v. Vavrinek, Trine, Day & Co.* (2002) 98 Cal.App.4th 934, an accounting malpractice case, for the proposition that "a party's alteration of its legal position in reliance on its counsel can constitute actual injury even though the party may be able to avoid or reduce the injury through subsequent legal action." (*Id*. at p. 951.) The distinction between that case and this is the limitations

statute involved. *Apple Valley* dealt with section 339, subdivision 1, and its two-year limitations period for suits "upon a contract, obligation or liability not founded upon an instrument of writing . . . ." (§ 339, subd. 1; *Apple Valley*, *supra*, 98 Cal.App.4th at p. 941.) "The standards for beginning that limitations period result from judicial decisions rather than legislative enactment. [Citations.] In section 340.6, the Legislature established a detailed, explicit, and exclusive scheme for commencing and tolling the legal malpractice limitations periods. The Legislature did not establish a comparable scheme for section 339." (*Jordache*, *supra*, 18 Cal.4th at p. 764.) Therefore, *Apple Valley* does not provide rules for legal malpractice actions. (See *Jordache*, at p. 764.)

**3. Causation**

The trial court granted summary judgment on the independent ground that plaintiffs could not establish causation because the negligence of LaVina and Gilchrest was an intervening, superseding cause that severed the causal nexus between Spielfogel's negligence and plaintiffs' damages. We disagree.

"To state a cause of action for legal malpractice, a plaintiff must plead '(1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence.' [Citation.] To show damages proximately caused by the breach, the plaintiff must allege facts establishing that, '*but for* the alleged malpractice, it is more likely than not the plaintiff would have obtained a more favorable result.' (Citations.)" (*Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 179.)

Generally, "if the risk of injury is reasonably foreseeable, the defendant is liable. An independent intervening act is a superseding cause relieving the actor of liability for his negligence only if the intervening act is highly unusual or extraordinary and hence not reasonably foreseeable. [Citations.] Reasonable foreseeability in this context is a question for the trier of fact." (*Cline v. Watkins* (1977) 66 Cal.App.3d 174, 178.) The

failure of a subsequent actor to prevent harm threatened due to a former actor's negligent conduct is not a superseding cause of harm unless circumstances arise that cause the duty to prevent harm to shift from the former to the subsequent actor. (Rest.2d Torts, § 452.) Specifically, a negligent attorney is not relieved of the consequences of his or her lack of care because a subsequently retained attorney could have avoided the injury had he or she not also been negligent. (*Cline v. Watkins*, at p. 180.)

Here, nothing in the record—no lapse of time or other circumstance—suggests Spielfogel's duty to prevent harm to his clients shifted to successor counsel upon their retention. Spielfogel was therefore not relieved of the consequences of his alleged negligence, even though LaVina and Gilchrest might have avoided plaintiffs' injury had they not been negligent.

**4. Conclusion**

In sum, triable issues exist as to whether plaintiffs suffered actual injury more than one year before filing their malpractice lawsuit and whether Spielfogel's conduct caused their injury. Therefore, summary judgment was improper.

**DISPOSITION**

The judgment is reversed. Appellants are to recover their costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.