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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

SUNG TAE CHANG,

Plaintiff and Appellant,

v.

DONG JUN YOO, D.D.S., et al.,

Defendants and Respondents.

B293865

(Los Angeles County
Super. Ct. No. BC682014)

APPEAL from a judgment of the Superior Court for Los Angeles County, Stephanie M. Bowick, Judge. Affirmed.

Henry M. Lee for Plaintiff and Appellant.

Brian P. Kamel & Associates, Brian P. Kamel and Yee Lam for Defendant and Respondent Dong Jun Yoo, D.D.S.

Plaintiff Sung Tae Chang appeals from the dismissal on demurrer of his claims against Dong Jun Yoo, D.D.S. arising from allegations related to professional negligence, negligence, and breach of fiduciary duty. The trial court found that the claims that related to professional negligence were barred by the statute of limitations set forth in Code of Civil Procedure section 340.5 (section 340.5), and that the remaining claims failed as a matter of law; it sustained Yoo's demurrer without leave to amend. Chang argues that (1) the statute of limitations did not start to run until he learned of his injury, which he asserts occurred less than a year before he filed his original complaint; (2) the statute of limitations was tolled due to Yoo's misrepresentations; and (3) he should have been given leave to amend his complaint.¹ We affirm the dismissal order.

BACKGROUND

A. Original Complaint

On November 1, 2017, Chang filed a complaint against Yoo and Il S. Kim, D.D.S., Inc., dba Severance Dentistry, alleging claims for medical negligence, lack of informed consent, breach of fiduciary duty, medical battery, and fraud. The complaint alleged the following facts.²

¹ Chang raises three other minor issues that we address at the end of this opinion.

² Because this appeal involves only Yoo, our discussion of the facts is limited to allegations related to him.

On September 29, 2014, Chang went to Yoo for dental work. After viewing X-rays and conducting an examination, Yoo told Chang that he needed several implants on his left molars. Yoo bragged to Chang that he was going to set a Guinness World Record for the most dental implants performed by a dentist. He performed surgery on Chang to begin the implant procedure that same day. He did not inform Chang of any of the risks involved in getting dental implants, and did not explain how to take care of the impacted area after the surgery.

On March 3, 2015, Yoo placed the crown on the implant.³ The crown was not placed correctly, however, and had to be adjusted over the next several months. After several visits, in December 2015, a fracture had developed in the crown, so Yoo had to make a new one. Chang went back to Yoo on January 25, 2016 to have the new crown put in, but it fractured again.

On January 29, 2016, the crown fractured for a third time. Chang demanded to know why this kept happening, but Yoo told him there was nothing wrong, that the problem would go away, and that it would heal over time. Yoo then gave Chang a \$2,000 check and told him to go somewhere else to have the crown put in. In February 2016, Chang went to a different dentist to fix all of the issues caused by Yoo, which caused Chang to “suffer[] additional pain and suffering.”

³ We note that the complaint alleged that Yoo discussed Chang’s need for several implants, but it subsequently referred to a singular implant and crown.

In his first cause of action, Chang alleged medical negligence based upon Yoo's breach of the standard of care. In his second cause of action for lack of informed consent, Chang alleged that Yoo failed to inform him of the risks of dental implant surgery, and that had Chang been adequately informed of the risks he would not have consented to the procedure. Chang alleged in his third cause of action that Yoo breached his fiduciary duty owed to Chang by (1) bragging that he was going to set a Guinness World Record for the most dental implants; (2) failing to fully inform Chang of the risks of dental implant surgery; (3) failing to properly fit the crown on to the implant post; and (4) misrepresenting to Chang that everything was fine and telling him to get the crown placed by another dentist. The fourth cause of action alleged that Yoo committed medical battery by seriously damaging portions of Chang's teeth and jaw without Chang's consent. Finally, Chang alleged in his fifth cause of action that Yoo committed fraud by misrepresenting to Chang that the pain in his jaw would go away and heal over time, and that a crown could be placed by another dentist; he alleged that he discovered the fraud on July 26, 2017, when he underwent procedures to fix the dental implants Yoo had started.

Yoo filed a demurrer to the complaint that asserted, among other things, that the entire complaint was barred by the statute of limitations. That demurrer was not heard, however, because Chang filed a first amended complaint on that same day.

B. *First Amended Complaint and Demurrer*

The first amended complaint was identical to the original complaint, but with two additions. First, the first amended complaint added an allegation, on information and belief, that Yoo used his treatment of Chang to try to bolster his reputation by representing that he had performed more dental implants than any other dentist, rather than for Chang's benefit. Second, the first amended complaint added a new cause of action for negligence (in addition to the original cause of action for professional negligence). The new negligence claim alleged that Yoo owed a duty not to exceed the scope of his medical profession and to make sure that Chang was safe during his visits to Yoo's practice, but that Yoo breached that duty by "boasting about the numerosity of dental implants he was going to perform on [Chang]."

Yoo filed a demurrer to the entire first amended complaint on the ground it was barred by the statute of limitations, and to each of the causes of action on the ground that each did not allege facts sufficient to state a cause of action. Yoo argued that all of Chang's causes of action arose from his allegation of professional negligence, therefore all were subject to section 340.5, which requires a plaintiff to file any claim for professional negligence within one year after discovery of the plaintiff's purported injury. Given Chang's allegations that he "demanded an explanation [from Yoo] of what was wrong and why the crown was not fitting properly" in January 2016, and that he went to another dentist in February 2016 to "fix all of the issues caused by YOO," Yoo argued that Chang's lawsuit filed in November 2017 was too late and thus was barred under section 340.5.

In addition to raising the statute of limitations bar, Yoo argued that the newly alleged negligence claim was generally duplicative of the medical negligence claim, but to the extent the claim was based upon Yoo's alleged boasting, it necessarily failed. Yoo contended there is no duty not to boast, but even if there were, Chang did not and could not allege a causal connection between the boasting and harm to Chang. With regard to the cause of action for lack of informed consent, Yoo argued the claim failed because Chang failed to allege that he suffered from any purportedly undisclosed risk. He argued that the breach of fiduciary duty claim failed because it was entirely duplicative of the other defective claims, and the medical battery claim failed because Chang consented to the procedure at issue. Finally, Yoo argued that the fraud claim failed because Chang failed to allege with proper specificity any facts to show that Yoo acted with an intent to defraud. Yoo asked that the demurrer be sustained without leave to amend because there were no facts Chang could allege to avoid the bar of the statute of limitations.

In opposing Yoo's demurrer, Chang argued that the statute of limitations did not bar his claims because he did not become aware of the injury until July 2017, when he first started experiencing immense pain in his left side molar. With regard to the negligence claim, Chang did not address the lack of duty or causal connection, and instead argued that the claim differed from the medical negligence claim. He argued that the lack of informed consent claim was sufficient because Yoo failed to inform him of the risk of bone loss, and that he experienced bone loss due to the improper implant. He also argued that

his breach of fiduciary duty claim was not duplicative of his other claims because, unlike those other claims, it involved the violation of a fiduciary relationship. With regard to his medical battery claim, Chang argued that it was sufficiently pled because, although he consented to an implant procedure, Yoo exceeded the scope of his consent by inserting the implant the wrong way. Finally, Chang argued that he properly alleged that Yoo intended to defraud him by misrepresenting to him that everything was fine and that there were no issues with the implant, in an attempt to avoid having Chang come after him for money. Chang asked the trial court to overrule the demurrer or, in the alternative, to grant him leave to amend to “clarify” his claims. He did not, however, explain how those claims would be “clarified.”

In his reply, Yoo noted that Chang’s opposition relied upon several “facts” that were not alleged in either the original or the first amended complaint. He argued that the trial court should disregard those “facts,” particularly Chang’s assertion that he was not aware of any injury from Yoo’s alleged professional negligence until July 2017, because they contradict the allegations of the complaint.

The trial court found that Chang’s claims for medical negligence, lack of informed consent, medical battery, and fraud were governed by section 340.5 because all of those claims were based upon Yoo’s alleged professional negligence in the placement of the implant/crown and prognosis for recovery. Addressing the issue of when the statute began to run, the court noted that the first amended complaint alleged that Chang “demanded to know what was wrong [with the implant and crown] on January 29, 2016 and [Yoo] instructed [Chang] to seek help

from another dentist.” The court also noted that Chang alleged that “he sought the assistance of another dentist to ‘fix the implant started by Yoo’ in or around February 2016.” Thus, the court found that Chang was aware there was a problem with the implant/crown and saw another dentist to get it fixed no later than February 2016. Therefore, the court concluded the statute of limitations expired in February 2017, well before Chang filed his lawsuit. Moreover, because the allegations in the first amended complaint demonstrate that Chang would be unable to cure the untimeliness of the medical negligence-related claims, the court sustained the demurrer to the medical negligence, lack of informed consent, medical battery, and fraud claims without leave to amend.

The trial court found that the negligence and breach of fiduciary duty claims were not governed by section 340.5 to the extent they were based upon allegations regarding Yoo boasting about setting a world record for most dental implants. However, the court found there was no authority to support the proposition that a dentist has a duty to refrain from boasting about the number of dental implants he has performed, nor was there any basis to conclude that such boastful statements would have any foreseeable effect on Chang or cause him harm. Therefore, the court sustained without leave to amend the negligence and breach of fiduciary duty claims. Chang appeals.⁴

⁴ Chang filed his notice of appeal on November 8, 2018, stating he was appealing from an order entered September 10, 2018. That order was the order sustaining the demurrer without leave to amend, which is not appealable. (*Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1695.)

DISCUSSION

Chang’s primary arguments on appeal are (1) the statute of limitations did not start to run until July 24, 2017, because Chang did not have reason to suspect injury caused by Yoo until he experienced intolerable pain on that date; (2) the statute of limitations was tolled by Yoo’s misrepresentations about the pain Chang was experiencing and the problems with the crown; and (3) the trial court erred by denying Chang leave to amend his complaint. None of his arguments is persuasive.

A. *Standard of Review*

“When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint’s properly pleaded or implied factual allegations. [Citation.] Courts must also consider judicially noticed matters. [Citation.] In addition, we give the complaint a reasonable interpretation, and read it in context. [Citation.] If the trial court has sustained the demurrer, we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with

However, an order dismissing the complaint against Yoo was entered on December 17, 2018. We will interpret the notice of appeal as applying to the order of dismissal. (*Gu v. BMW of North America, LLC* (2005) 132 Cal.App.4th 195, 202-203.)

an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]” (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

B. *Discovery of the Injury*

Section 340.5 provides, in relevant part: “In an action for injury or death against a health care provider based upon such person’s alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first.” Chang argues that his complaint for professional negligence was timely filed because the injury he suffered was bone deterioration, and he was not aware (and could not have been aware) of that injury until July 24, 2017, when he experienced excessive pain in his jaw. The fault in Chang’s argument lies in the fact that the bone deterioration was not the initial injury Chang suffered as a result of Yoo’s alleged professional negligence; rather, it was an *additional* (albeit significant) injury that manifested later.

As explained in *Bispo v. Burton* (1978) 82 Cal.App.3d 824 (*Bispo*), a case relied upon by Chang, the “injury” referenced in section 340.5, which starts the running of the limitations period for a professional negligence claim, occurs when the “plaintiff ‘suffers appreciable harm.’”

(*Id.* at p. 831, quoting *Larcher v. Wanless* (1976) 18 Cal.3d 646, 656.) The *Bispo* court observed: “Each case necessarily will turn on its own particular circumstance. It could well be that an injury or pathology will not manifest itself for some period after the last treatment by a physician. On the other hand, that injury or pathology may manifest itself and the patient will suffer known appreciable harm at a time prior to the ‘ultimate’ result. In the latter case, the [limitations] period will start to run at the point at which the ‘appreciable harm’ is first manifested.” (*Ibid.*)

In the present case, the first manifestations of appreciable harm caused by Yoo’s alleged professional negligence were described in the complaint: the improper placement of the implant, which caused the crown to fracture repeatedly and caused Chang pain in his jaw.⁵ The allegations of the complaint make clear that Chang was aware of this injury no later than February 2016. The complaint alleges that (1) that the crown did not fit properly when it was first placed on the implant in March 2015, and had to be adjusted several times between March and December 2015; (2) the crown fractured three times and had to be replaced; (3) Chang demanded an explanation as to why the crown was not fitting properly in late January 2016, and Yoo told him to go to a different dentist; (4) Chang continued to feel pain, even after Yoo told

⁵ Although Chang asserts in his appellant’s opening brief that he “was not feeling any pain at the time that [Yoo] ended his services with [him],” that assertion is belied by his statement later in his brief that Yoo “misrepresented material facts concerning the nature of the pain [Chang] was experiencing,” as well as his allegation in his fraud cause of action that Yoo “misrepresented to [Chang] that the pain in his jaw would go away.”

him the pain would go away; and (5) Chang went to another dentist in or around February 2016 “to try and fix all of the issues caused by YOO.”

Thus, Chang was aware by February 2016 that he had been injured by Yoo’s alleged professional negligence, even if he did not yet know the full extent of his injuries. Under section 340.5, therefore, he had to file his professional negligence lawsuit by February 2017. Because he did not file his complaint until November 2017, the trial court properly found that his professional negligence claims were time-barred.

C. *Tolling of the Statute of Limitations*

Chang contends the one-year limitation set forth in section 340.5 was tolled until July 24, 2017 because Yoo misrepresented material facts concerning the nature of the pain Chang was experiencing and falsely stated that the issues with the crown/implant were resolved by replacing the crown. Chang argues that he had no reason to suspect that those representations were false until he visited his new dentist on July 24, 2017, after experiencing increasing pain in his jaw.

In making this argument, Chang relies upon *Brown v. Bleiberg* (1982) 32 Cal.3d 426 (*Brown*), in which the Supreme Court held that a physician’s misrepresentations regarding the operation he performed on the plaintiff tolled the then four-year (now three-year) limitation period until the plaintiff discovered the negligent cause of her injury. His reliance is misplaced. *Brown* involved the affirmative concealment of the true nature of the procedure the physician had performed. (*Brown*,

supra, 32 Cal.3d at pp. 430-431.) That is not the case here. Here, Yoo did not affirmatively conceal the nature of the procedure; he simply asserted that there was nothing wrong. But the allegations of the complaint show that Chang was well aware that there *was* something wrong, and he went to another dentist to get it fixed in February 2016. Therefore, Chang knew, or should have known, that Yoo's representations were false no later than February 2016. As such, the statute of limitations was not tolled.

D. *Denial of Leave to Amend*

Chang contends the trial court abused its discretion by denying him leave to amend the complaint, arguing that the complaint's misuse of the terms "crown" and "implant" throughout caused confusion in determining the exact date he became aware that something was wrong with the implant. Chang fails, however, to explain exactly where those terms were misused and how the purported "correction" would change the result. As the trial court observed in its ruling denying leave to amend, "[t]he burden of demonstrating a reasonable possibility that the defect can be cured by amendment 'is squarely on the plaintiff.'" (*McKenney v. Purepac Pharmaceutical Co.* (2008) 167 Cal.App.4th 72, 78.) Chang failed to meet that burden. Accordingly, we find the trial court did not abuse its discretion in sustaining the demurrer without leave to amend.

E. *Additional Issues*

Chang raises three additional issues on appeal that need little discussion.

First, he argues the trial erred in denying his motion under Code of Civil Procedure section 473 to set aside the dismissal based upon attorney mistake. However, there is no such motion, or order denying it, in the record before us (apparently, it is the subject of a subsequently-filed appeal). Therefore, this issue is not appropriately raised in this appeal.

Second, Chang argues that his claim for negligence (as opposed his claim for professional negligence) is not barred by the section 340.5 statute of limitations. The trial court, however, did not sustain the demurrer to the negligence claim on statute of limitations grounds. Rather, the court found that Chang failed to demonstrate any basis for finding that Yoo owed him a duty not to boast, or that Yoo's boasting caused Chang any harm. Chang does not raise any issue as to that ruling.

Finally, Chang argues that Il Kim, Inc., dba Severance Dentistry should not be dismissed. However, the record does not include any order that that entity was dismissed. Therefore we need not address this argument.

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DISPOSITION

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

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WILLHITE, J.

We concur:

MANELLA, P. J.

CURREY, J.