

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JANICE SAMS CESPEDES,

Plaintiff and Appellant,

v.

P.N.C. BANK et al.,

Defendants and Respondents.

B235361

(Los Angeles County
Super. Ct. No. BC412536)

APPEAL from a judgment of the Superior Court of the County of Los Angeles,
Yvette M. Palazuelos, Judge. Affirmed.

Shernoff Bidart Echeverria Bentley, Michael J. Bidart, Ricardo Echeverria, Steven
Schuetze, and Steven Messner for Plaintiff and Appellant.

Glass & Goldberg, Edmund J. Sherman and Marshall F. Goldberg for Defendants
and Respondents.

INTRODUCTION

Plaintiff and appellant Janice Cespedes (plaintiff) appeals from a judgment of dismissal following the sustaining of a demurrer without leave to amend in favor of defendant and respondent P.N.C. Bank (PNC Bank) on statute of limitations grounds. According to plaintiff, her first amended complaint stated facts sufficient to raise an estoppel to plead the statute of limitations against PNC Bank.

We hold that plaintiff's first amended complaint failed to state sufficient facts to raise an estoppel because plaintiff failed to plead with particularity that she relied on the alleged misrepresentations to her detriment. We therefore affirm the judgment of dismissal.

FACTUAL BACKGROUND

Plaintiff's first amended complaint contained the following allegations. Plaintiff was the sole beneficiary of a life insurance policy issued to her husband by codefendant Metropolitan Life Insurance Company (MetLife). On March 28, 2007, after plaintiff's husband died, she made a claim for the policy benefits to MetLife. Instead of paying the policy benefits directly to plaintiff, MetLife opened a "Total Control Account" for plaintiff. In April 2007, MetLife paid \$337,000 in life insurance benefits into the Total Control Account and issued plaintiff a checkbook to write checks for the account.

The Total Control Account was opened by MetLife, but operated and maintained by PNC Bank¹ pursuant to an agreement between MetLife and PNC Bank. Plaintiff was a "disclosed thirty party beneficiary" of the agreement, and therefore PNC Bank owed duties to plaintiff that included protecting her money from unauthorized distributions.

¹ The first amended complaint includes allegations against codefendant PFPC, Inc. which are omitted here because that entity is not a party to this appeal or the related appeal involving MetLife.

PNC Bank was the agent for MetLife in the operation of the Total Control Account, and MetLife was vicariously liable for the acts and omissions of PNC Bank.

Following her husband's death, plaintiff retained the services of a financial planner. On May 3, 2007, without plaintiff's authorization or knowledge, the financial planner forged plaintiff's signature on a check for the Total Control Account in the amount of \$237,000. Without conducting any investigation into the identity or authorization of the financial planner, MetLife and PNC Bank paid \$237,000 to the financial planner. On July 16, 2007, without plaintiff's authorization or knowledge, the financial planner forged a second check for the Total Control Account in the amount of \$5,000. Without conducting any investigation into the identity or authorization of the financial planner, MetLife and PNC Bank paid \$5,000 to the financial planner.

In February 2008, after discovering that \$242,000 plus interest was missing from her Total Control Account, plaintiff contacted MetLife requesting that it pay her the money that was wrongfully withdrawn from her Total Control Account. At the time, plaintiff was unaware that PNC Bank was responsible for the maintenance, management, and operation of the Total Control Account, and MetLife did not disclose the existence of PNC Bank at the time plaintiff made her request for payment.

Following plaintiff's report of the missing funds from her Total Control Account, MetLife and PNC Bank induced plaintiff to forego the filing of a lawsuit against them by conducting an investigation into the unauthorized distributions. Plaintiff was not informed by any defendant that she would be required to file suit within a specified period of time for the unauthorized distributions from the Total Control Account. Instead, MetLife and PNC Bank "undertook" an investigation of plaintiff's reimbursement request which induced her not to file suit against them on the unauthorized distributions.

On August 28, 2008, MetLife responded by letter to plaintiff's request to be reimbursed for the amounts wrongfully paid from her Total Control Account. MetLife informed plaintiff that it could not make a "double" payment on policy benefits already paid. MetLife therefore denied plaintiff's request for repayment. The letter from

MetLife incorrectly advised plaintiff that ERISA governed her request for repayment. The letter also advised that under ERISA, plaintiff had 60 days from the denial of her request to appeal that denial. And the letter advised that plaintiff could file a civil lawsuit under ERISA in the event her appeal was denied. Plaintiff was misled and induced by these representations into not filing suit against defendants for their refusal to return the funds wrongfully distributed from her Total Control Account. MetLife and PNC Bank did not disclose the identity of the party responsible for the payment of the forged checks and did not advise plaintiff of any statutory limitations period applicable to her suit against them for the unauthorized distributions from the Total Control Account.

PROCEDURAL BACKGROUND

Plaintiff filed her original complaint against MetLife and her financial planner on April 24, 2009. Over a year later, on October 14, 2010, plaintiff added PNC Bank as a doe defendant. Although the doe amendment did not specify which of the six causes of action were directed at PNC Bank, presumably plaintiff intended to name PNC Bank as a defendant in the same causes of action in which MetLife had been named—breach of the implied covenant of good faith and fair dealing, breach of contract, negligence, and violation of Commercial Code section 4401.² PNC Bank responded to the complaint with a demurrer on, inter alia, statute of limitations grounds. The trial court granted the demurrer with 20 days leave to amend.

Following the ruling on the first demurrer, plaintiff filed a first amended complaint asserting causes of action for breach of contract, negligence, and violation of Commercial Code section 4401 against PNC Bank. In response, PNC Bank filed a second demurrer on, inter alia, statute of limitations grounds. The trial court granted that demurrer without leave to amend. The trial court subsequently entered a judgment of dismissal based on

² The fifth and sixth causes of action for fraud and conversion named the financial planner only.

the order sustaining the demurrer without leave to amend. Plaintiff filed a timely notice of appeal from the judgment.

DISCUSSION

A. Standard of Review

“On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126 [119 Cal.Rptr.2d 709, 45 P.3d 1171].) Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. (*Ibid.*; *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967 [9 Cal.Rptr.2d 92, 831 P.2d 317] (*Aubry*).) When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. (*Zelig, supra*, 27 Cal.4th at p. 1126.) And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse. (*Ibid.*)” (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.)

B. Estoppel to Assert Statute of Limitations Defense³

Plaintiff does not contend on appeal, as MetLife does in the related appeal, that the 12-month limitations period in Code of Civil Procedure section 340, subdivision (c) is inapplicable to her claims against PNC Bank. Instead, she argues that PNC Bank was

³ Plaintiff’s opening brief contains a point heading that refers to both the doctrines of equitable estoppel and waiver. But in the text of her argument, she discusses only equitable estoppel. Her discussion of the doctrine of waiver and how it applies to her contentions on appeal is made for the first time in her reply brief. Because we do not consider contentions raised for the first time in a reply brief (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4), we address here only the issue raised by plaintiff’s opening brief—equitable estoppel.

equitably estopped from asserting the statute of limitations due to MetLife's investigation of her request for reimbursement and its subsequent representations about (i) plaintiff's claims being governed by ERISA; (ii) plaintiff having 60 days to appeal MetLife's decision under ERISA; and (iii) plaintiff being required to file a civil lawsuit under ERISA. According to plaintiff, MetLife's investigation and ERISA representations suggested to plaintiff that her reimbursement request would be considered fairly by MetLife and, if a lawsuit became necessary, her claims would be governed by ERISA and would not accrue until her appeal was denied by MetLife.

We note at the outset that the first amended complaint does not contain any allegations that PNC Bank made any of the representations on which the estoppel claim is based. To the contrary, the first amended complaint alleges that plaintiff was unaware of PNC Bank's existence at the time the representations were made by MetLife. Thus, there is a threshold issue concerning whether PNC Bank can be estopped based on MetLife's independent representations to plaintiff. For purposes of our analysis, however, we will assume without deciding that the general agency allegations in paragraph 25 of the first amended complaint were sufficient to hold PNC Bank responsible for MetLife's representations.

In making her estoppel argument, plaintiff invokes "the venerable principle that "[o]ne cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought." (*Carruth v. Fritch* (1950) 36 Cal.2d 426, 433 [224 P.2d 702], quoting *Howard v. West Jersey & S. S. R. Co.* (N.J. Ch. 1928) 102 N.J. Eq. 517 [141 A. 755, 757-758].)" (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 383.) "Our decision in *Lantzy*[, *supra*,] 31 Cal.4th 363 . . . provides guidance. There, we explained, "'Equitable estoppel . . . comes into play only after the limitations period has run and addresses . . . the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period.

[Equitable estoppel] is wholly independent of the limitations period itself and takes its life . . . from the equitable principle that no man [may] profit from his own wrongdoing in a court of justice.” [Citations.]’ (*Lantzy, supra*, at p. 383.) . . . ‘To create an equitable estoppel, ‘it is enough if the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss.” . . . “Where the delay in commencing action is induced by the conduct of the defendant it cannot be availed of by him as a defense.”’ (*Benner v. Industrial Acc. Com.* (1945) 26 Cal.2d 346, 349-350 [159 P.2d 24], italics & citation omitted.)” (*Atwater Elementary School Dist. v. California Dept. of General Services* (2007) 41 Cal.4th 227, 232-233.)

For a defendant to be equitably estopped from asserting a statute of limitations defense, the plaintiff must be “directly prevented . . . from filing [a] suit on time.” (*Lantzy, supra*, 31 Cal.4th at p. 385.) “The defendant’s statement or conduct must amount to a misrepresentation bearing on the *necessity* of bringing a timely suit; the defendant’s mere denial of *legal liability* does not set up an estoppel. (*Vu [v. Prudential Property & Casualty Ins. Co.* (2001)] 26 Cal.4th 1142, 1149-1153; *Neff v. New York Life Ins. Co.* (1947) 30 Cal.2d 165, 174-175 [180 P.2d 900].)” (*Id.* at p. 384, fn. 18.) “An estoppel ‘arises as a result of some conduct by the defendant, *relied on by the plaintiff*, which induces the belated filing of the action.’ (3 Witkin, Cal. Procedure (3d ed. 1985) Actions, § 523, p. 550.) According to Witkin, ‘[t]he estoppel cases appear to fall roughly into three classes: (1) Where the plaintiff is aware of his cause of action and the identity of the wrongdoer, but the latter by affirmative acts induces the plaintiff to refrain from suit. (2) Where the plaintiff is unaware of his cause of action and his ignorance is due to false representations by the defendant. (3) Where the plaintiff is unaware of the identity of the wrongdoer and this is due to fraudulent concealment by the defendant.’ (*Ibid.*)” (*Prudential-LMI Com. Insurance v. Superior Court* (1990) 51 Cal.3d 674, 689-690, italics added.) “‘As with other general equitable principles, application of the equitable tolling doctrine requires a balancing of the injustice to the plaintiff occasioned by the bar of his claim against the effect upon the important public interest or policy expressed by

the . . . limitations statute.’ (*Addison* [*v. State of California* (1978)] 21 Cal.3d 313, 321.)” (*Id.* at p. 372.)

Although plaintiff specifically alleged the ERISA representations as a basis for her estoppel claim, she provided no specific allegations which would suggest or imply that she *relied* on those representations to her detriment. For example, there are no allegations that state, in effect, that upon receiving the letter from MetLife containing the alleged ERISA misrepresentations, she understood that a longer limitations period applied to her claims and based on that, she refrained from taking any further action during the limitations period to pursue or file suit on her claims. Similarly, there are no allegations that plaintiff filed an ERISA action in reliance on the representations concerning ERISA. The first amended complaint is also silent on the issue of when plaintiff retained legal counsel concerning her claims against MetLife and PNC Bank, or why her lawsuit was not filed earlier. Absent some specific allegations on the detrimental reliance element of her estoppel claim, plaintiff failed to state facts sufficient to constitute that defense to the statute of limitations.

Plaintiff contends that she adequately pleaded reliance. She did not, however, specify that she relied on the alleged misrepresentations or that MetLife intended to deceive her. And her bare conclusion of being misled and induced is unsupported by any specific facts. Because estoppel to assert the statute of limitations is based upon fraudulent misrepresentations or fraudulent concealment, it must be pleaded with particularity. “There can be no doubt that, in a proper case, where a party fraudulently conceals the existence of a cause of action against him, or fraudulently conceals material facts that induces a person not to prosecute a known cause of action, the statute of limitations is tolled and the fraudulent person is estopped from pleading the statute of limitations. [Citations.] To allege such a cause of action the fraud must be alleged with the usual particularity required in such actions. The existence of such fraud must be alleged clearly and unequivocally, and must not rest upon inferences.” (*Bank of America v. Williams* (1948) 89 Cal.App.2d 21, 25; see also *Ateeq v. Najor* (1993) 15 Cal.App.4th 1351, 1358.)

As discussed, plaintiff did not plead the particular facts that would show how she was induced or that she relied on the ERISA representations to her detriment and that such reliance was objectively reasonable. Instead, she merely concluded that she was “misled and induced into not filing within the statutory period.” She does not allege facts as to the way in which she was so induced and how she relied on any misrepresentation or concealment. Because plaintiff was required to provide a more particularized set of allegations in support of her generalized reliance allegations, but failed to do so, she did not plead adequately an equitable estoppel.

The trial court found that plaintiff had pleaded sufficient facts to state an equitable tolling defense. According to the trial court, the allegations concerning MetLife’s investigation of plaintiff’s request for reimbursement were sufficient to state a claim that the statute was tolled during the investigation, i.e., between March and August 2009. But the trial court also concluded that even when the tolling period was added to the applicable 12-month limitations period, plaintiff’s claims were nevertheless time-barred. Plaintiff does not challenge on appeal the trial court’s ruling on equitable tolling, thereby limiting her challenge on appeal to the ruling on equitable estoppel. Therefore, assuming without deciding that the statute of limitations was tolled during the six-month period of the investigation, we agree with the trial court’s conclusion that plaintiff’s claims against PNC Bank were nevertheless time-barred.

DISPOSITION

The judgment of dismissal is affirmed. Each party is to bear her or its own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.