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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MASOUD BAMDAD,

Plaintiff and Appellant,

v.

MICHAEL H. ARTAN et al.,

Defendants and Respondents.

B270338

(Los Angeles County
Super. Ct. No. BC571149)

APPEAL from a judgment of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Affirmed.

Masoud Bamdad, in pro. per., for Plaintiff and Appellant.

Michael H. Artan, in pro. per., for Defendants and Respondents.

Masoud Bamdad appeals from the judgment in favor of defendants Michael H. Artan and Law Offices of Michael H. Artan (collectively Artan) after the trial court sustained Artan's demurrer without leave to amend and dismissed Bamdad's action. We conclude the demurrer was properly sustained, although on a basis different from the trial court's reasoning. We therefore affirm.

BACKGROUND

In 2009, Bamdad, a physician and surgeon, was convicted in federal court on 10 counts of illegally prescribing oxycodone and three counts of illegally prescribing oxycodone to persons under the age of 21. (See *United States v. Bamdad* (9th Cir. Nov. 23, 2011, Nos. 10-50373, 10-50396) 459 Fed. Appx. 653, 2011 WL 5869527.) For a period of approximately four months between his conviction and sentencing, Artan represented Bamdad in posttrial matters. On Bamdad's motion, the district court terminated Artan's representation on June 21, 2010, and another attorney began to appear for Bamdad on June 28, 2010.¹ Thereafter, Bamdad was sentenced to 25 years in prison, and was ordered to serve six years of supervised release after completing his sentence and to pay a \$1 million fine.

While serving his sentence, Bamdad has unsuccessfully pursued postconviction relief through a direct appeal and federal habeas petitions in the Central District of California and the Southern District of Illinois (where he is currently in custody).

Bamdad filed the instant complaint against Artan on January 30, 2015. In it he alleges that after his conviction, he fired his trial lawyer for poor performance and refusal to file

¹ Several attorneys represented Bamdad during his criminal proceedings.

posttrial motions. He then submitted 14 pro se posttrial motions, which the trial court tentatively denied, ordering Bamdad to hire an attorney to help with the motions. Bamdad alleges he retained Artan to present proper posttrial motions and, if needed, represent him in sentencing. After obtaining an extension to prepare posttrial motions, Artan ultimately resubmitted only one motion, combining arguments from one or more of Bamdad's previous pro se motions, and informed the court that no additional motions were needed, as all issues that could be raised had been. Bamdad alleges that when he confronted Artan, Artan did not explain his performance, and instead only filed under-seal motions and sought to be removed from the case. Bamdad also alleges Artan never participated in sentencing, as he had been retained to do.

The complaint alleges causes of action for legal malpractice, misrepresentation, breach of fiduciary duty, willful misconduct, breach of contract, negligent and intentional infliction of emotional distress, and unjust enrichment, all premised on Artan's failure in providing legal services. Bamdad prayed for \$10 million in actual damages and \$30 million in punitive damages.

Artan demurred, arguing Bamdad failed to plead that he is factually innocent, the action was barred by the one-year statute of limitations in Code of Civil Procedure section 340.6, and Bamdad could not plead facts establishing causation and damages. With the demurrer and his reply, Artan submitted several court records, requesting they be judicially noticed.

The trial court concluded the action was time-barred, sustained the demurrer without leave to amend, and ordered the case dismissed. Bamdad timely appealed.

DISCUSSION

Bamdad argues the trial court erred in dismissing his case without leave to amend. He asserts the action is not time-barred because the limitations period has been tolled on various grounds, including his continuing efforts to obtain postconviction relief.

We conclude the demurrer was properly sustained because Bamdad did not plead he was actually innocent or had obtained postconviction exoneration, and he failed to show he can amend his complaint to allege those necessary facts.

I. Standard of Review

We review de novo the dismissal of a civil action after a demurrer is sustained. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879.) In doing so, “we determine whether the complaint states facts sufficient to constitute a cause of action.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) “We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.” (*Ibid.*) If any proper ground for sustaining the demurrer exists, we will affirm even if the trial court sustained the demurrer on an improper ground or the defendant failed to raise the proper ground in the trial court. (*Cantu v. Resolution Trust Corp.* at p. 880, fn. 10.) To establish that a cause of action has been adequately pleaded, a plaintiff must demonstrate he or she has pleaded “facts sufficient to establish *every element of that cause of action*. [Citation.] Thus, if the defendant[] negate[s] *any* essential element of a particular cause of action, this court should sustain the demurrer to that cause of action.” (*Id.* at pp. 879-880.)

When a demurrer “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; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.” (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.)

II. The Trial Court Properly Sustained the Demurrer.

The elements of a legal malpractice action are “(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.” (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1199 (*Coscia*).)

To succeed on a claim for legal malpractice arising from a criminal proceeding, a plaintiff must prove, in addition, that he or she is actually innocent. (*Coscia, supra*, 25 Cal.4th at pp. 1199-1200.) As a prerequisite to proving actual innocence, “a plaintiff must obtain postconviction relief in the form of a final disposition of the underlying criminal case.” (*Id.* at p. 1205.) This requirement is grounded in the principles that criminal defendants are provided constitutional and statutory guarantees against ineffective assistance of counsel, and that guilty defendants should not be able to profit from their wrongdoing or shift responsibility for the consequences of their illegal behavior to their criminal defense counsel. (*Id.* at pp. 1203-1204; *Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 537-538, 542-543.) Moreover, the factual innocence requirement avoids the risk of inconsistent resolutions in criminal and civil proceedings, serves

judicial economy by precluding malpractice actions where a criminal defendant has been denied relief on the basis of ineffective assistance of counsel, and encourages attorneys to represent criminal defendants by reducing meritless malpractice claims. (*Coscia*, at p. 1204.)

These policy considerations apply equally to any cause of action premised on criminal counsel's professional conduct, and such causes of action thus require proof of actual innocence as shown by postconviction exoneration. (See *Lynch v. Warwick* (2002) 95 Cal.App.4th 267, 270, fn. 1, 273-274; see also *Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 67-69 [legal malpractice statute of limitations applied to claims for breach of contract, breach of fiduciary duty, and negligent misrepresentation based on legal matters or intertwined legal and nonlegal matters]; *Kracht v. Perrin, Gartland & Doyle* (1990) 219 Cal.App.3d 1019, 1022-1023 [all causes of action arising out of an attorney's alleged professional negligence subject to rules governing assignability of malpractice claims].)

Here, all causes of action in the complaint are based on Artan's conduct in providing legal services to Bamdad. Bamdad failed to allege he is actually innocent or has achieved postconviction exoneration. The demurrer was therefore properly sustained as to all causes of action, although on a basis different from the statute of limitations ground on which the trial court based its decision.

III. The Trial Court Properly Denied Leave to Amend.

We next consider whether the trial court abused its discretion in denying leave to amend. As noted above, it is an abuse of discretion for a trial court to deny leave to amend if there is a reasonable possibility that defects in a complaint can

be cured. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.) The plaintiff bears the burden to prove the trial court abused its discretion by showing how the complaint can be amended to cure the defects. (*Ibid.*) The plaintiff may meet this burden by submitting a proposed amended complaint or, on appeal, presenting facts and demonstrating how they establish a cause of action. (*Cantu v. Resolution Trust Corp., supra*, 4 Cal.App.4th at p. 890.)

Bamdad has not met his burden. As discussed previously, to successfully plead any cause of action based on Artan's conduct in providing legal services to him, he must plead that he has achieved postconviction exoneration demonstrating his actual innocence. On appeal, he avers that he is "still in the middle of his endeavor to obtain relief from his unconstitutional conviction and confinement" and that he has open cases in different federal courts. Among these, he states that his criminal case was recently reopened for consideration of previously unadjudicated claims, and if relief is denied on those claims, he will seek review by the Ninth Circuit Court of Appeals. Thus, Bamdad's own briefing demonstrates that he has not obtained postconviction relief showing he is actually innocent.

Moreover, judicially noticeable court records submitted by Artan and other publicly available court records show the following:

(1) Bamdad's conviction was affirmed on direct appeal in 2011, and the Supreme Court denied certiorari. (See *United States v. Bamdad, supra*, 459 Fed. Appx. 653, 2011 WL 5869527, cert. den. (2012) 132 S.Ct. 2726.)

(2) Bamdad has unsuccessfully sought postconviction relief through a form of federal habeas relief available by motion in his

criminal case. (28 U.S.C. § 2255; hereafter § 2255 motion.) Notably, the district court concluded Bamdad had not shown that any of the attorneys who represented him in posttrial proceedings, including Artan, rendered ineffective assistance. (*United States v. Bamdad* (C.D.Cal. May 6, 2013, Nos. CR-08-0506, CV-12-5399).) The Ninth Circuit Court of Appeals has declined to issue any certificate of appealability or given permission for Bamdad to file a successive § 2255 motion.

(3) Bamdad sought and was denied two writs of habeas corpus pursuant to title 28 United States Code section 2241 in the Southern District of Illinois. (*Bamdad v. Holder* (S.D.Ill. Aug. 21, 2014, No. 14-cv-853-DRH) 2014 WL 4124235; *Bamdad v. Walton* (S.D.Ill. Sept. 23, 2015, No. 15-cv-886-DRH) 2015 WL 5582069, *affd.* (7th Cir. 2016 No. 15-3379), *cert. den. sub nom. Bamdad v. Powers* (2016) 137 S.Ct. 324.)

(4) On October 7, 2016, the district court in Bamdad's criminal case issued an order responding to filings in which Bamdad asserted the court had failed to adjudicate certain claims from his § 2255 motion. The court rejected the assertion. (*United States v. Bamdad* (C.D.Cal. Oct. 7, 2016, Nos. CR 08-0506, CV 12-5399, CV 14-9726).)

In sum, Bamdad is unable to amend his complaint to plead that he has achieved postconviction exoneration demonstrating his actual innocence. There was no abuse of discretion in denying leave to amend.

Relying on *Coscia*, Bamdad asserts his case should have been held in abeyance pending a final disposition of his criminal case, or should have been dismissed without prejudice.²

² Bamdad also asserts *Coscia* recognized that a legal malpractice lawsuit may at times provide a way to prove factual

When the Supreme Court decided *Coscia*, Code of Civil Procedure section 340.6 provided that a legal malpractice action must 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.” (*Coscia, supra*, 25 Cal.4th at p. 1206, citing former Code Civ. Proc., § 340.6, subd. (a).) The Court recognized that requiring a plaintiff to obtain postconviction relief as a prerequisite to a legal malpractice claim could lead to unfair results because the limitations period might run before relief could be obtained. (*Id.* at p. 1207.) The Court concluded that a criminal legal malpractice action should be stayed while the plaintiff pursues postconviction remedies. (*Id.* at pp. 1210-1211.)

Effective January 1, 2010, Code of Civil Procedure section 340.6, subdivision (a) was amended to add the following language: “If the plaintiff is required to establish his or her factual innocence for an underlying criminal charge as an element of his or her claim, the action shall be commenced within two years after the plaintiff achieves postconviction exoneration in the form of a final judicial disposition of the criminal case.” (Stats. 2009, ch. 432, § 2.) The Supreme Court has not had occasion to consider the effect of this new limitations period on the analysis in *Coscia*. However, with the statutory amendment, its concern about unfairness no longer exists. There is thus no

innocence in an underlying criminal case. In fact, the Court declined to decide whether exceptional circumstances might ever exist in which that would be appropriate. (*Coscia, supra*, 25 Cal.4th at p. 1205, fn. 4.)

need to stay a case where a plaintiff has not achieved exoneration in an underlying criminal matter but might do so in the future.

Although circumstances might exist in which such a stay remains appropriate (for example, if a plaintiff filed a legal malpractice action while the direct appeal from a criminal conviction was pending), such circumstances are not present here. As discussed previously, Bamdad was convicted several years ago, his criminal appeal was decided against him, and his habeas petitions under title 28 United States Code sections 2255 and 2241 were denied. Bamdad contends his habeas proceedings in the Central District of California have been reopened and he intends to appeal any adverse decision to the Ninth Circuit Court of Appeals, but those proceedings are unlike a direct appeal and do not justify a stay.

Because Bamdad cannot allege facts showing that he is factually innocent and has achieved postconviction exoneration in the form of a final judicial disposition of his criminal case, his claims against Artan are fatally defective. This holding, however, does not preclude Bamdad from filing a new malpractice action against Artan in the future if he obtains postconviction exoneration and is able to plead actual innocence on that basis. In that event, Bamdad will be able to file a new action within two years of the date of his exoneration.

DISPOSITION

The judgment is affirmed. Artan is entitled to recover costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

JOHNSON, J.

LUI, J.