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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

Estate of PATRICIA ANN MANNING, Deceased.	B232790 (Los Angeles County Super. Ct. No. KP013708)
MARNDENA MANNING et al., Petitioners and Appellants, v. PATRICIA PINTO, Objector and Respondent.	

APPEAL from an order of the Superior Court of Los Angeles County, Thomas Falls, Judge. Reversed with directions.

Law Offices of Edward A. Dzwonkowski, Edward A. Dzwonkowski; and Russ E. Boltz for Petitioners and Appellants.

Law Offices of Long & Marquis and William A. Marquis III for Objector and Respondent.

INTRODUCTION

Appellants Marndena Manning, Danielle Manning and Krystal Manning appeal from an order denying with prejudice their petition to determine ownership of property. The order followed the sustaining without leave to amend of a demurrer by respondent Patricia Pinto. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Introductory Facts*

Patricia A. Manning (decedent) died of cancer on September 14, 2006 at age 85. She had one surviving child, respondent. She had two predeceased children, Daniel and James Manning. Appellants Marndena and Danielle Manning are the adult children of Daniel Manning; appellant Krystal Manning is the adult child of James Manning.

Although decedent died in Orange County, she was domiciled and owned real property in Los Angeles County. She died intestate. No petition for probate of her estate was filed.

B. *Original Civil Action*

On November 1, 2006, appellants filed an action against respondent for partition of real property, an accounting, declaratory relief, quiet title, civil conspiracy and fraud and deceit. (*Manning v. Pinto* (Super. Ct. Orange County, No. 06CC11586).) They alleged that on April 2, 2006, decedent transferred real property located in West Covina to herself and respondent as joint tenants, without consideration, for the purpose of avoiding probate and denying appellants their interests in the property. Respondent also transferred other assets of decedent to herself in order to deny appellants their interests in the property. Respondent used her knowledge as an attorney to accomplish these transfers.

In a first amended complaint, appellants deleted the causes of action for partition of real property and an accounting, and they added causes of action for fraudulent conveyances and constructive fraud. Appellants added the allegation that the grant deed transferring the real property was not recorded until September 8, 2006. They also alleged that a purpose of the transfers was to avoid creditors, including appellants. Further, they added an alternate theory of recovery that respondent, by virtue of her confidential and fiduciary relationship with decedent, as well as her knowledge of the law, persuaded decedent to effect the transfers of property, and decedent had no intention of disinheriting appellants.

In a second amended complaint, appellants added allegations concerning their relationship to decedent as well as respondent's relationship with decedent. Appellants sought the imposition of constructive trusts on decedent's property and sought damages for constructive fraud and breach of fiduciary duty.

At some point, the action was transferred to Los Angeles Superior Court, where it was dismissed following the sustaining of a demurrer to the second amended complaint without leave to amend. On appeal, Division Three of this court affirmed the order of dismissal. (*Manning v. Pinto* (Sept. 29, 2009, B204686) [nonpub. opn.].) It held, inter alia, that appellants had no standing to assert causes of action based on respondent's alleged breach of duties owed to decedent; only decedent's personal representative or successor in interest had standing to assert such causes of action.

The court noted, "At oral argument, [appellants] and [respondent] agreed that this dispute should be litigated in the probate department of the superior court. Nothing in this opinion prohibits [appellants] from commencing a probate proceeding or bars [appellants] or decedent's personal representative from pursuing claims on behalf of the estate in probate. . . . Our opinion is not an adjudication of the merits of any potential claims by decedent's personal representative or [appellants] based on [respondent's] alleged tortious conduct towards decedent. . . ." (*Manning v. Pinto*, *supra*, B204686, fn. and citations omitted.) The court also did "not decide whether decedent's claims should

be pursued by decedent's personal representative or by [appellants] as heirs to decedent." (*Ibid*.)

C. *Subsequent Action in Probate Court*

On July 7, 2010, appellants filed the instant action with a petition to determine ownership and transfer to the estate of property and for damages based on elder abuse, fraud, undue influence, duress, and breach of fiduciary duty. Respondent filed a demurrer to the petition.

In conjunction with the demurrer, respondent requested judicial notice of the complaint, first and second amended complaints and appellate decision in the original civil action. Appellants objected to the request on several grounds, including that the documents were illegible or incomplete or had handwritten notations on them. In response, respondent submitted certified copies of the documents. In their opposition to the demurrer, appellants objected to the request for judicial notice on the ground the documents were not properly the subject of judicial notice.

The trial court sustained the demurrer with leave to amend. Appellants filed the operative first amended petition.

Respondent again demurred and requested judicial notice of the verified documents in the original civil action. The trial court sustained the demurrer without leave to amend and denied the petition.

D. *Allegations of First Amended Petition*[1]

In their first amended petition, appellants alleged as follows: James Manning lived with and cared for decedent for about 20 years, until his death in March 2005.

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[1] When reviewing a challenge to the sustaining of a demurrer, we assume the truth of the facts alleged in the pleading but do not assume the truth of the contentions, deductions or conclusions of law. (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247.)

After his death, decedent became lethargic and depressed; she stopped eating and her health deteriorated. She suffered from dementia.

Respondent took over the role of caretaker, although decedent remained in her own home. However, in mid-July 2006, when decedent's health was deteriorating and she was concerned about dying alone, decedent agreed to move in with respondent.

Despite decedent's deteriorating condition, respondent rarely took decedent to the doctor for medical treatment. Decedent told respondent that she had found blood in her stool, but instead of taking decedent to the doctor, respondent told her the blood was caused by hemorrhoids and gave decedent a topical treatment. Decedent died of colon cancer.

Respondent was a licensed attorney and employed by a title insurance company. On April 2, 2006, while she was decedent's caretaker, respondent prepared and gave decedent a grant deed transferring decedent's home to herself and respondent as joint tenants. Decedent owned the home free and clear, and respondent gave her no consideration for the transfer. Respondent did not record the grant deed until six days before decedent's death, when the death appeared imminent and decedent would be unable to respond to questions about the transfer.

Respondent also induced decedent to make her a joint tenant with right of survivorship of her bank accounts, again with no consideration. Decedent did not understand the nature of a joint tenancy with right of survivorship and did not intend for respondent to receive all of her property upon her death, to the exclusion of appellants.

On August 10, 2006, decedent was taken to the hospital by ambulance. It was discovered that decedent had lost a lot of blood and was severely malnourished. Tests to determine the cause of the blood loss revealed that decedent had stage four colon cancer, and there was cancer in other parts of her body as well. Surgery could not be performed due to decedent's malnourished condition. She was transferred to a nursing home in an attempt to improve her health sufficiently that she could undergo surgery. The attempt was unsuccessful and she was returned to the hospital, where she died on September 14.

After the decedent's death, respondent obtained decedent's personal property and the proceeds of her life insurance, in part by making false statements to the bank, the Department of Motor Vehicles, and the insurance company that she was the sole person entitled to possession of the property.

DISCUSSION

A. *Standard of Review*

On appeal from a judgment or order following the sustaining of a demurrer, we apply the de novo standard of review. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515.) We assume the truth of the allegations in the complaint but do not assume the truth of the contentions, deductions or conclusions of law. (*California Logistics, Inc. v. State of California*, *supra*, 161 Cal.App.4th at p. 247.) The question before us is "whether the complaint states facts sufficient to constitute a cause of action." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

The court should not sustain a demurrer without leave to amend if the complaint, liberally construed, can state a cause of action under any theory or if there is a reasonable possibility the defect can be cured by amendment. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) The demurrer also may be sustained without leave to amend where the nature of the defects and previous unsuccessful attempts to plead render it probable plaintiff cannot state a cause of action. (*Krawitz v. Rusch* (1989) 209 Cal.App.3d 957, 967.) The plaintiff bears the burden of proving the trial court erred in sustaining the demurrer or abused its discretion in denying leave to amend. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459; *Coutin v. Lucas* (1990) 220 Cal.App.3d 1016, 1020.)

In addition to the factual allegations of the complaint, we also consider matters which have been or may be judicially noticed. (*Sacramento Brewing Co. v. Desmond, Miller & Desmond* (1999) 75 Cal.App.4th 1082, 1085, fn. 3.) The trial and appellate courts ruling on a demurrer also "may properly take judicial notice of a party's earlier

pleadings and positions as well as established facts from both the same case and other cases. [Citations.] The complaint should be read as containing the judicially noticeable facts, 'even when the pleading contains an express allegation to the contrary.' [Citation.] A plaintiff may not avoid a demurrer by pleading facts or positions in an amended complaint that contradict the facts pleaded in the original complaint or by suppressing facts which prove the pleaded facts false. [Citation.]" (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 877, italics omitted; see also, *Hendy v. Losse* (1991) 54 Cal.3d 723, 742-743.)

B. *Judicial Notice*

Appellants first contend the trial court erred in taking judicial notice of the documents from the prior civil case. Assuming arguendo that the trial court did indeed take judicial notice of these documents,[2] appellants have failed to show any error.

Under Evidence Code section 452, subdivision (d), judicial notice may be taken of court records. Appellants point out that under this subdivision, we can take judicial notice of the existence of the records but not the truth of facts asserted in the records. (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564.) What appellants fail to do, however, is to point to anything in the record showing that the trial court took judicial notice of the *truth* of the facts asserted in the documents in the prior civil case.

It is a well-established rule of appellate review that we start with the presumption that the judgment of the trial court is correct. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133; *Fleishman v. Superior Court* (2002) 102 Cal.App.4th 350, 357.) The appellants have "the burden of showing reversible error by an adequate record." (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; *Robbins v. Los Angeles Unified School Dist.* (1992) 3 Cal.App.4th 313, 318.) Meeting this burden requires citations to the record to direct the court to the pertinent evidence or other matters in the record which demonstrate

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[2] The order sustaining the demurrer does not indicate whether the trial court granted the request for judicial notice.

reversible error. (Cal. Rules of Court, rule 8.204(a)(1); *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115; *Culbertson v. R. D. Werner Co., Inc.* (1987) 190 Cal.App.3d 704, 710.)

In the absence of any showing in the record that the trial court erroneously took judicial notice of the truth of the facts asserted in the court records of the prior civil case and sustained respondent's demurrer based on those facts, appellants have failed to meet the burden of showing reversible error.

C. *Elder Abuse*

Appellants first contend their cause of action for elder abuse is not barred by the statute of limitations, in that the limitations period under Welfare and Institutions Code section 15657.7 is four years, and they filed this action on July 7, 2010, less than four years after the decedent's death on September 14, 2006. We agree that the cause of action for financial elder abuse is not barred by the statute of limitations.

The limitations period contained within Welfare and Institutions Code section 15657.7 is for financial abuse of an elder. It provides that a cause of action for financial abuse of an elder "shall be commenced within four years after the plaintiff discovers or, through the exercise of reasonable diligence, should have discovered, the facts constituting the financial abuse."

"'Financial abuse' of an elder or dependent adult occurs when a person or entity does any of the following: [¶] (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both. [¶] (2) Assists in taking, secreting, appropriating, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both." (Welf. & Inst. Code, § 15610.30, subd. (a).)

Respondent acknowledges that appellants have alleged financial elder abuse in their first amended petition. She asserts, however, that these allegations are contradicted by allegations in the complaints in the prior civil action. In that action, they alleged that decedent transferred the real property located in West Covina to herself and respondent

as joint tenants, without consideration, for the purpose of avoiding probate and denying appellants their interests in the property. The two conspired to deprive appellants of their interests in the property. In other words, respondent did not defraud decedent, but the two engaged in a conspiracy.

As stated above, on demurrer we "may properly take judicial notice of a party's earlier pleadings and positions as well as established facts from both the same case and other cases. [Citations.] The complaint should be read as containing the judicially noticeable facts, 'even when the pleading contains an express allegation to the contrary.' [Citation.] A plaintiff may not avoid a demurrer by pleading facts or positions in an amended complaint that contradict the facts pleaded in the original complaint or by suppressing facts which prove the pleaded facts false. [Citation.]" (*Cantu v. Resolution Trust Corp., supra*, 4 Cal.App.4th at p. 877, italics omitted; see also, *Hendy v. Losse, supra*, 54 Cal.3d at pp. 742-743.)[3]

In the prior civil action, appellants pled an alternate theory of liability, namely, that "based on [respondent's] confidential and fiduciary relationship with her mother . . . , [respondent's] knowledge of the law and real estate, Decedent's lack of knowledge of the law and real estate, and [respondent's] knowledge that her mother would die intestate, that Decedent had no intention to disinherit her grandchildren but that [respondent] persuaded her mother to transfer title of Decedent's assets to [respondent], without valuable consideration, without disclosure of the consequences, as a means for [respondent] to inherit the entire estate to the exclusion of [appellants] and other creditors, without paying probate fees and taxes. [Respondent's] concealment of the true facts was intentional, deliberate and designed to induce reliance by her mother, to the detriment of [appellants] . . . ."

This alternate theory of liability in the original civil action is not inconsistent with a claim of elder abuse. Hence, there is a reasonable possibility that appellants can state a

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3 We take judicial notice of the content of the allegations, but not of their truth. (*Sosinsky v. Grant*, *supra*, 6 Cal.App.4th at p. 1564.)

cause of action for financial elder abuse, and they should be given leave to amend as to this cause of action. (*Schifando v. City of Los Angeles*, *supra*, 31 Cal.4th at p. 1081.)

D. *Equitable Tolling*

Appellants next assert that the statute of limitations was equitably tolled as to their causes of action for physical elder abuse, breach of fiduciary duty and wrongful death. In making this assertion, they acknowledge that this action was filed after the expiration of the applicable limitations period of three years.

As explained in *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, "The equitable tolling of statutes of limitations is a judicially created, nonstatutory doctrine. [Citations.] It is 'designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff's claims—has been satisfied.' [Citation.] Where applicable, the doctrine will 'suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness.' [Citation.] [¶] . . . [¶]

"Broadly speaking, the doctrine applies '"[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one."' [Citations.] Thus, it may apply where one action stands to lessen the harm that is the subject of a potential second action; where administrative remedies must be exhausted before a second action can proceed; or where a first action, embarked upon in good faith, is found to be defective for some reason. [Citation.]

"Its application in such circumstances serves 'the need for harmony and the avoidance of chaos in the administration of justice.' [Citation.] Tolling eases the pressure on parties 'concurrently to seek redress in two separate forums with the attendant danger of conflicting decisions on the same issue.' [Citations.] By alleviating the fear of claim forfeiture, it affords grievants the opportunity to pursue informal remedies, a process we have repeatedly encouraged. [Citations.] The tolling doctrine does so without compromising defendants' significant 'interest in being promptly apprised of claims against them in order that they may gather and preserve evidence'

because that notice interest is satisfied by the filing of the first proceeding that gives rise to tolling. [Citations.] Lastly, tolling benefits the court system by reducing the costs associated with a duplicative filing requirement, in many instances rendering later court proceedings either easier and cheaper to resolve or wholly unnecessary. [Citations.]" (*McDonald v. Antelope Valley Community College Dist.*, *supra*, 45 Cal.4th at pp. 99-100, fn. omitted.)

Under the doctrine of equitable tolling, "[a] plaintiff will be relieved 'from the bar of a limitations statute when, possessing several legal remedies he, reasonably and in good faith, pursues one designed to lessen the extent of his injuries or damage.' [Citation.]" (*Stalberg v. Western Title Ins. Co.* (1994) 27 Cal.App.4th 925, 932; see also *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 379-380.) That is, the plaintiff may pursue "alternate procedures" (*McDonald v. Antelope Valley Community College Dist.*, *supra*, 45 Cal.4th at p. 103) for the purpose of lessening injuries or damage or for rendering a lawsuit unnecessary (*id*. at p. 100; *Stalberg*, *supra*, at pp. 932-933).

Appellants cite no authority for the proposition that the doctrine of equitable tolling applies where a party files the wrong action in the wrong court, the opposing party obtains dismissal of the action, and the party tries again by filing a different action in a different court after the expiration of the limitations period.[4]

We observe that the Probate Code contains what is in effect a tolling provision, which would have allowed appellants to pursue the civil action as an alternative to probate. Probate Code section 854 provides that "[i]f a civil action is pending with respect to the subject matter of a petition filed pursuant to this chapter," which the instant action purportedly is, "and jurisdiction has been obtained in the court where the civil action is pending prior to the filing of the petition, upon request of any party to the civil

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[4] Appellants cite *Afroozmehr v. Asherson* (1988) 201 Cal.App.3d 704 for this proposition, but the case was ordered not to be published on August 1, 1988. Their citation to this case is "a clear violation of California Rules of Court, rule 8.1115. Appellant[s'] counsel should know better. It goes without saying we have not considered such improper authority." (*People v. Wallace* (2009) 176 Cal.App.4th 1088, 1105, fn. 9.)

action, the court shall abate the petition until the conclusion of the civil action. . . ." Appellants did not avail themselves of this provision.

In sum, appellants have failed to demonstrate that they can overcome the bar of the statute of limitations as to their remaining causes of action (*Ballard v. Uribe*, *supra*, 41 Cal.3d at p. 574; *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546), and therefore that the trial court erred in sustaining respondent's demurrer without leave to amend as to those causes of action (*Stafford v. Ballinger* (1962) 199 Cal.App.2d 289, 295; accord, *Forman v. Chicago Title Ins. Co.* (1995) 32 Cal.App.4th 998, 1019, fn. 10, dis. opn. of Woods, J.).[5]

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[5] We note that in the remainder of appellants' arguments, they nowhere address the decision in the prior civil action, in which the court held that they do not have standing to assert causes of action based upon respondent's allegedly tortious conduct toward decedent. They also do not address the claim in respondent's demurrer that they have no standing to bring an action to determine ownership of property pursuant to Probate Code section 850, subdivision (a)(2), outside of the probate process. (See *id*., § 856.5.) As to their cause of action for financial elder abuse, however, there should be no problem with standing, as a cause of action for financial elder abuse may be brought by "[a]n intestate heir whose interest is affected by the action" where there is no personal representative of the decedent. (Welf. & Inst. Code, § 15657.3, subd. (d)(1)(A).)

DISPOSITION

The order is reversed. The trial court is directed to vacate its order sustaining respondent's demurrer without leave to amend and to enter a new order granting leave to amend as to the cause of action for financial elder abuse. Appellants are to recover costs on appeal.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.