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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

JOSE FLORES, Plaintiff and Appellant, v. GERALD N. SILVER, Defendant and Respondent.	B276433 (Los Angeles County Super. Ct. No. BC584674)

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

Law Offices of Daniel B. Spitzer, Daniel B. Spitzer; Jose Flores, in pro. per for Plaintiff and Appellant.

Victoria A. Silver; Richard D. Rome for Defendant and Respondent.

The trial court granted defendant and respondent Gerald N. Silver's demurrer to plaintiff and appellant Jose Flores's legal malpractice, breach of contract, and fraud causes of action in the First Amended Complaint (FAC) without leave to amend. The trial court found that plaintiff's allegations revealed that his claims were time-barred and dismissed the case. We agree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed his original complaint in propria persona on June 10, 2015. He alleged seven causes of action: legal malpractice, fraudulent inducement, unjust enrichment, intentional misrepresentation, breach of contract, violation of Business and Professions Code section 6068, subdivision (c), and violation of Business and Professions Code section 6068, subdivision (g). Defendant demurred to the entire complaint.

On January 22, 2016, the trial court sustained the demurrer without leave to amend as to the unjust enrichment and Business and Professions Code causes of action and sustained the demurrer with leave to amend as to the legal malpractice and breach of contract causes of action because, among other reasons, they were time-barred. The trial court sustained the demurrer to the fraud claim because plaintiff failed to plead it with the required specificity.

On February 11, 2016, plaintiff, no longer in propria persona, filed the FAC in which he alleged three causes of action: breach of contract, legal malpractice, and fraud. Plaintiff averred that on or about December 2, 2008, he consulted defendant with regard to nonpayment for contracting services plaintiff had provided to Larry and Cindy Greenberg (the Greenbergs) for home improvements. At that time, plaintiff was involved in

contractor license revocation proceedings and had advised defendant of those proceedings. Defendant then relayed his experience with the Greenbergs in representing another contractor and told plaintiff that "the Greenbergs had engaged in a pattern of hiring contractors and then refusing to pay them, of 'cheating contractors.' " Defendant advised plaintiff that plaintiff had a "strong case" against the Greenbergs and agreed to represent plaintiff in recording a mechanic's lien against the Greenberg's property and bringing claims against them in the superior court. Defendant also agreed to assist plaintiff in obtaining reinstatement of his contractor's license.

Plaintiff further averred that on or about December 5, 2008, defendant filed suit on plaintiff's behalf against the Greenbergs. Plaintiff alleged causes of action for fraudulent inducement, breach of contract, common counts, and foreclosure of a mechanic's lien. On or about February 4, 2009, the Greenbergs cross-claimed for disgorgement of all monies—about $60,000—that they had paid plaintiff for his contracting services.

Plaintiff also averred that "on or about" February 24, 2010 was "the first time" plaintiff learned that he was "likely to suffer liability" to the Greenbergs for violation of Business and Profession Code section 7031.[1] To limit his liability for this

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[1] Section 7031 provides in pertinent part: "(a) Except as provided in subdivision (e), no person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action, or recover in law or equity in any action, in any court of this state for the collection of compensation for the performance of any act or contract where a license is required by this chapter without alleging that he or she was a duly licensed contractor at

violation and to resolve claims in his litigation with the Greenbergs, plaintiff "thereafter" stipulated to liability in the amount of $80,000. Although the FAC does not allege the date on which plaintiff stipulated to that judgment, as set forth in footnote 6 below, the trial court took judicial notice of the stipulated judgment, which recites that plaintiff executed it on February 21, 2011.

Plaintiff further averred that "at no time" during the litigation with the Greenbergs did defendant advise plaintiff that because plaintiff did not have a license, he could not foreclose on a mechanic's lien, and that the lien defendant had recorded on the Greenbergs' property could result in an award of attorney fees and costs against plaintiff, and disgorgement of amounts the Greenbergs had already paid plaintiff. Defendant similarly never

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all times during the performance of that act or contract regardless of the merits of the cause of action brought by the person. . . . (e) The judicial doctrine of substantial compliance shall not apply under this section where the person who engaged in the business or acted in the capacity of a contractor has never been a duly licensed contractor in this state. However, notwithstanding subdivision (b) of Section 143, the court may determine that there has been substantial compliance with licensure requirements under this section if it is shown at an evidentiary hearing that the person who engaged in the business or acted in the capacity of a contractor (1) had been duly licensed as a contractor in this state prior to the performance of the act or contract, (2) acted reasonably and in good faith to maintain proper licensure, and (3) acted promptly and in good faith to remedy the failure to comply with the licensure requirements upon learning of the failure." (Bus. & Prof. Code, § 7031, subd. (a) and (e).)

advised plaintiff that he had filed the suit against the Greenbergs without probable cause.

The FAC also recites that it was only "[i]n or about" December 2014, when the California State Bar contacted plaintiff, that he learned about disciplinary proceedings against defendant based on defendant's prosecution of plaintiff's claim against the Greenbergs. After doing his own investigation, plaintiff also learned that the Greenbergs had successfully sued defendant for malicious prosecution for $125,000 after they prevailed on their summary judgment in plaintiff's underlying case against the Greenbergs. Plaintiff attached a copy of the October 5, 2012 statement of decision in that malicious prosecution case as exhibit 1 to the FAC (statement of decision). The statement of decision recites that after the Greenbergs obtained summary judgment against plaintiff[2] in plaintiff's suit against them, plaintiff settled the Greenbergs' disgorgement cross-claim. Plaintiff incorporated these allegations in all three causes of action in the FAC.

In that statement of the decision, a different trial court found "[t]he idea that the Greenbergs had a practice of fraudulently inducing unlicensed contractors to work for them without pay apparently arose out of Silver's personal experience representing a different client in an unrelated matter." The trial court found that plaintiff's fraudulent inducement claim against the Greenbergs was filed without probable cause and with malice. It wrote that defendant was "embroiled in his perverse

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[2] We note plaintiff did not oppose that summary judgment and at that time, he was still represented by counsel.

antipathy for Greenberg" and that defendant "intended to vex and annoy Mr. Greenberg."

In contrast, the trial court found there was probable cause for filing the breach of contract and remaining causes of action in plaintiff's complaint against the Greenbergs because defendant knew plaintiff had been "a duly licensed contractor" and defendant believed he could assert that plaintiff had substantially complied with the contractor licensing laws.

Plaintiff further alleged in the FAC that on or about March 2015, after reading the 2012 statement of decision, "plaintiff understood for the first time" that defendant had brought suit against the Greenbergs with malice and absent probable cause. Plaintiff further alleged that it was "in or about March 2015, [he] learned for the first time that Silver had hidden from him the true reason he had commenced [suit] against the Greenbergs"—Silver's "antipathy for the Greenbergs and desire to punish them for what Silver said was a pattern of 'cheating contractors.' " Plaintiff incorporated all the above allegations in the FAC's three causes of action.

On the merits, plaintiff alleged defendant breached his contract and his duty of care to plaintiff by failing (1) to represent plaintiff competently in his case against the Greenbergs and in obtaining reinstatement of plaintiff's license; (2) to advise plaintiff that his mechanic's claim was not viable under Business and Professions Code section 7031; (3) to disclose that his unlicensed status exposed him to a disgorgement claim under the latter statute; and (4) to inform plaintiff of defendant's true motive for filing suit against the Greenbergs—defendant's "antipathy for the Greenbergs and desire to punish them."

Regarding the fraud claim, plaintiff alleged that when defendant first consulted with plaintiff, defendant informed plaintiff of his prior experience with the Greenbergs, i.e., the Greenbergs' hiring contractors and then not paying them, and that plaintiff had a strong case against the Greenbergs which could be enforced with a mechanic's lien despite plaintiff's suspended licensing status. Plaintiff averred that defendant "concealed from plaintiff the true reasons for his agreement to proceed with representation of plaintiff against the Greenbergs: Silver's own antipathy for and malice toward the Greenbergs." Defendant made these false representations to induce plaintiff to hire him "to further his own legal vendetta against the Greenbergs."

Defendant demurred to the FAC.[3] Defendant made two arguments as to the breach of contract cause of action. First, the retainer agreement, attached as exhibit A to the original complaint, eschewed any promise of a favorable outcome

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[3] In that demurrer, defendant devoted much ink to ad hominem remarks about plaintiff's asserted collusion with the Greenbergs when they filed a summary judgment motion and when plaintiff stipulated to an $80,000 judgment while only being financially responsible for $8,000 of that judgment. Defendant also contended that after defendant stopped representing plaintiff, plaintiff's poor litigation outcome was caused by plaintiff's ineptitude when representing himself and when he hired inexperienced new counsel who failed to comply with discovery obligations. These assertions are outside the four corners of the FAC and thus we do not consider them in ruling on whether the trial court erred in sustaining the demurrer. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.)

and thus, plaintiff failed to allege any breach of that contract. Second, plaintiff's allegation in the FAC that on February 24, 2010, he first learned he would be liable to the Greenbergs for $60,000 for performing contracting services without a license demonstrated that plaintiff's claims were time-barred under the four-year limitations statute in Code of Civil Procedure section 337.[4]

Defendant further contended that similarly, plaintiff's legal malpractice claim is time-barred under Code of Civil Procedure section 340.6.[5] More specifically, plaintiff's trial testimony described in the 2012 statement of decision reflected his earlier knowledge of defendant's alleged malpractice and demonstrated that the claim is time-barred. Defendant did not describe the contents of that testimony. We observe that in the statement of decision, the trial court described plaintiff's testimony recounting defendant's statements to him that "Mr. Greenberg's modus operando was to hire contractors and not pay them." The trial court also found plaintiff's testimony credible despite his settlement of the Greenbergs' cross-claim against him. Finally, defendant argued that plaintiff failed to plead the elements of a professional negligence claim sufficiently.

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[4] On appeal, defendant recognizes that Code of Civil Procedure section 340.6, and not section 337, applies to plaintiff's breach of contract cause of action because that cause of action is based on defendant's alleged failure to represent plaintiff competently. Plaintiff agrees that section 340.6 applies to his breach of contract claim.

[5] Further undesignated statutory references are to the Code of Civil Procedure.

Defendant argued as to the fraud claim that plaintiff still had not pleaded fraud with the required specificity, and the FAC revealed that the fraud claim too was time-barred under the three-year limitations period in section 338, subdivision (d).

Plaintiff countered that defendant's statute of limitations argument as to his breach of contract and legal malpractice claims were tolled under section 340.6, subdivision (a).[6] More specifically, section 340.6, subdivision (a) sets forth a tiered

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[6] Section 340.6, subdivision (a) provides in pertinent part:

"(a) An action against an attorney for a wrongful act or omission, 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. . . . [I]n no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:

(1) The plaintiff has not sustained actual injury.

(2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred.

(3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation.

(4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action." (§ 340.6, subd. (a).)

statute of limitations: "[A]n action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services" must be brought within the earlier of one year from discovery of "the facts constituting the wrongful act or omission" or four years from the date of "the wrongful act or omission." Under section 340.6, subdivision (a)(3) the four-year limitations period is tolled where "[t]he attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney."

Plaintiff argued that defendant concealed his true motivation for inducing plaintiff to hire him to sue the Greenbergs and that while plaintiff suffered injury in March 2011,[7] when he stipulated to an $80,000 judgment in his suit against the Greenbergs, he could not "have discovered the cause of action because [defendant] concealed it." For the same reason, plaintiff's fraud claim was not time-barred under the three-year limitations provision in section 338, subdivision (d).[8] On the

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[7] We previously observed that plaintiff did not allege a date in the FAC on which he stipulated to such a judgment. In his opposition brief to the demurrer, plaintiff, however, referred to the signed stipulated judgment that appears as exhibit B to defendant's request for judicial notice in the trial court. The stipulated judgment recites that plaintiff executed the document on February 21, 2011. It was signed and filed by the then trial judge on March 1, 2011. The trial court in this case took judicial notice of the stipulated judgment.

[8] Section 338, subdivision (d) provides a three-year limitations period for "[a]n action for relief on the ground of fraud or mistake. The cause of action in that case is not deemed to

merits, plaintiff argued that he had pleaded his causes of action adequately.

On June 8, 2016, the trial court sustained the demurrer without leave to amend because plaintiff's claims were time-barred.[9] The trial court found that the allegations in the FAC revealed plaintiff "had reason to suspect Defendant's wrongful conduct within the period of limitations." The trial court based its finding on the allegations in the FAC that as of February 24, 2010, when plaintiff "suspected liability," or February 21, 2011, when plaintiff stipulated to a judgment in favor of the Greenbergs, "[p]laintiff should have known that the underlying action [against the Greenbergs] was without merit and had been brought by Defendant without probable cause."

As to plaintiff's fraud claim, the trial court rejected plaintiff's argument that it was not until plaintiff learned of the State Bar investigation of defendant and the successful malicious prosecution lawsuit that plaintiff became aware of "Defendant's malice toward the Greenbergs." Under the facts alleged in the FAC, "plaintiff knew at the time he retained Defendant on 12/2/2008 that Defendant had engaged in past litigation with the Greenbergs and believed that they had a pattern of cheating contractors. By 2/24/10 or 2/21/11 Plaintiff therefore had sufficient information to investigate all of his claims against

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have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." (§ 338, subd. (d).)

[9] Defendant also filed a motion to strike. In light of its ruling on defendant's demurrer, the trial court did not rule on that motion. Neither party addresses the motion to strike on appeal; we do not either.

Defendant, and the statute of limitations began to run at that point."[10]

On June 8, 2016, the court filed its order dismissing plaintiff's claims with prejudice. Plaintiff timely appealed from that dismissal. (§ 581, subd. (d); § 904.1, subd. (a)(1).)

DISCUSSION

A. Standard of Review

We review the trial court's sustaining of the demurrer without leave to amend de novo. "[O]ur task is to determine whether the complaint states facts sufficient to constitute a cause of action" taking all well-pleaded allegations of material fact as true. (*Community Water Coalition v. Santa Cruz County Local Agency Formation Com.* (2011) 200 Cal.App.4th 1317, 1323.) "In an appeal from a judgment based on an order sustaining a demurrer for failure to state a cause of action, the reviewing court treats the demurrer as admitting all material facts properly pleaded and, giving the complaint a reasonable interpretation, independently determines whether the complaint states a cause of action under any legal theory." (*Harris v. Wachovia Mortgage,*

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[10] At the time plaintiff filed his opening brief on appeal, he was represented by counsel. Plaintiff was in propria persona when he filed his reply. He argues in his reply that the February 24, 2010 date in the FAC "was introduce[d] by plaintiff's former counsel . . . as a typing error" and that the proper date should have been February 21, 2011. In reviewing a ruling on a demurrer, we cannot consider assertions that are not in the pleading at issue. We thus do not consider plaintiff's contention based on former trial counsel's asserted "typing error."

FSB (2010) 185 Cal.App.4th 1018, 1022.) The complaint is read "as a whole and its parts in their context." (*Amarel v. Connell* (1988) 202 Cal.App.3d 137, 141.) A trial court's denial of leave to amend is reviewed for abuse of discretion. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

B. Analysis

On appeal, plaintiff and defendant essentially make the same arguments regarding defendant's statute of limitations defense that they pursued in the trial court. Defendant also appears to have abandoned his attack on the adequacy of plaintiff's pleading except as to plaintiff's fraud cause of action.

Plaintiff, however, makes a new argument, to wit, "there are two independent events of malpractice" alleged in the FAC, and the limitations periods in section 340.6 run separately as to each of those events. (Boldface omitted.) Describing the first event of malpractice, plaintiff states "[a]s of February 21, 2011, the acts of malpractice known to [him] were that [defendant] had brought an action, apparently based on faulty legal reasoning, which ended up causing [plaintiff] liability to the Greenbergs." Plaintiff contends that the second event of malpractice was defendant's concealment "that [defendant] had brought the action against the Greenbergs in order to punish them, based on his animus against them deriving from prior litigation experience."

As to the first act of malpractice, plaintiff acknowledges his "cause of action for malpractice, based on facts known to him at that time, accrued on February 21, 2011, when he signed a stipulation for judgment against him." In contrast, plaintiff argues as to the second, and "separate malpractice claim," it was only in December 2014, when he "learned for the first time of

[defendant's] animus, as recited in the Statement of Decision in the Malicious Prosecution Action."

"The general rule for defining the accrual of a cause of action sets the date as the time 'when, under the substantive law, the wrongful act is done,' or the wrongful result occurs, and the consequent 'liability arises.' " (*Nogart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397 (*Nogart*).) A limitations period "ordinarily commences at the time when the obligation or liability arises, regardless of the plaintiff's ignorance of the cause of action." (*Utility Audit Co. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 962.)

An exception to this precept is the discovery rule. "[T]he uniform California rule is that a limitations period dependent on discovery of the cause of action begins to run no later than the time the plaintiff learns, or should have learned, the *facts* essential to his claim." (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 897.) As the *Nogart* court observed, "the plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof—when, simply put, he at least 'suspects . . . that someone has done something wrong' to him . . . , 'wrong' being used, not in any technical sense, but rather in accordance with its 'lay understanding.' " (*Nogart*, *supra,* 21 Cal.4th at pp. 397-398.)

Plaintiff asserts that as of February 21, 2011, (1) he knew of defendant's faulty "legal reasoning" causing liability to the Greenbergs in the form of a stipulated judgment for $80,000, and (2) that a malpractice claim based on that faulty legal reasoning "accrued" as of February 21, 2011. Given these assertions, his negligence claim would be time barred under section 340.6

because plaintiff filed his complaint only on June 10, 2015, which is beyond the one-year and four-year outside limitation period in section 340.6.

Plaintiff's breach of contract claim is similarly time-barred under section 340.6. As detailed above, plaintiff alleged that defendant breached his contract with plaintiff by failing to represent plaintiff competently in pursuing plaintiff's claims against the Greenbergs and in obtaining reinstatement of plaintiff's contractor's license. Section 340.6 governs contract claims, such as these, whose merits are based on violation of an attorney's duty of care or professional obligations. "[F]or any wrongful act or omission of an attorney arising in the performance of professional services, an action must be commenced within one year after the client discovers or through the use of reasonable diligence should have discovered the facts constituting the wrongful act or omission. In all cases other than actual fraud, whether the theory of liability is based on the breach of an oral or written contract, a tort, or a breach of a fiduciary duty, the one-year statutory period applies." (*Levin v. Graham & James* (1995) 37 Cal.App.4th 798, 805.)

To the extent plaintiff's fraud claim is based on the same faulty "legal reasoning," it too would be barred under the discovery rule in section 338, subdivision (d). "Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110 (*Jolly*).) Plaintiff alleged in the FAC that in December 2008, defendant informed him of defendant's distaste for the Greenbergs whose alleged modus operandi was to cheat contractors. Plaintiff states

that he was aware as of February 21, 2011 of defendant's faulty legal reasoning and liability to the Greenbergs in the case underlying the Greenbergs' malicious prosecution suit. Indeed, plaintiff testified on behalf of the Greenbergs in that malicious prosecution suit, which testimony logically had to have preceded the October 5, 2012 statement of decision in that malicious prosecution suit.

At the very least, these facts put plaintiff on inquiry notice as of February 21, 2011, that defendant may have had an ulterior motive in inducing plaintiff to sue the Greenbergs. "A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, [he] must decide whether to file suit or sit on [his] rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; [he] cannot wait for the facts to find [him]." (*Jolly*, *supra*, 44 Cal.3d at. p. 1111.) Thus, the three-year limitations period in section 338, subdivision (d) expired well before plaintiff filed his complaint in June 2015.

The same fate awaits plaintiff's self-styled independent claim based on defendant's alleged concealment of his animus towards the Greenbergs. Plaintiff argues he discovered that claim only after being contacted by the State Bar in 2014 and reading the statement of decision in 2015.

As explained above, as of February 21, 2011, plaintiff had knowledge of his injury—a settlement payment to the Greenbergs—as a result of plaintiff having sued them. Plaintiff also knew by that date defendant's advice was faulty. Plaintiff also had reason to suspect by February 21, 2011 that defendant had induced him to sue the Greenbergs not for plaintiff's

benefit, but instead, to satisfy defendant's grudge against the Greenbergs. More specifically, plaintiff alleged that defendant had discussed that very grudge with plaintiff in late 2008 during defendant's consultation with him about suing the Greenbergs and when defendant advised plaintiff that he had a "strong case" against the Greenbergs.

Under *Jolly*, *supra*, these alleged facts reveal that by no later than February 21, 2011, plaintiff should have suspected that his settlement payment to the Greenbergs was caused by defendant's wrongdoing—defendant's ulterior motive in inducing plaintiff to bring a legally unsound claim against the Greenbergs. These allegations reveal once again that the three-year fraud limitations statute began to accrue on plaintiff's concealment claim no later than February 21, 2011, and plaintiff's complaint filed on June 10, 2015 is thus time-barred.

DISPOSITION

The judgment is affirmed. Silver is awarded his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.