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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

YOUVAL ZIV, Plaintiff and Appellant, v. ANDREA BREUER et al., Defendants and Respondents.	B284987 (Los Angeles County Super. Ct. No. BC625462)

APPEAL from a judgment of the Superior Court of Los Angeles County, Howard L. Halm, Judge. Reversed and remanded.

Pacific Holdings Group, Katherine E. Orletsky; Youval Ziv, in pro. per., for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Kenneth C. Feldman, Patrik Johansson and Roy G. Weatherup for Defendants and Respondents.

Youval Ziv, in propria persona, appeals from the dismissal with prejudice of his legal malpractice action against Andrea Breuer, Law Offices of Ilene Kurtzman, and Ilene Kurtzman (collectively respondents), entered after the trial court sustained without leave to amend respondents' demurrer. The trial court held that appellant's legal malpractice complaint was barred by the statute of limitations provided by Code of Civil Procedure section 340.6.[1] The court further held that appellant's causes of action for breach of contract and breach of fiduciary duty were barred as duplicative of the professional negligence cause of action. Construing the allegations liberally and in favor of appellant, we conclude that appellant has set forth allegations sufficient to survive demurrer. Accordingly, we reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND[2]

Around January 16, 2012, appellant and respondents entered into an agreement for respondents to provide legal services to appellant in a wrongful foreclosure action filed against appellant by Cherie Brown in Los Angeles Superior Court, case No. BC440484. Brown brought several claims against appellant, including fraud, negligent

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[1] Unspecified statutory references will be to the Code of Civil Procedure.

[2] The facts will be taken from the first amended complaint "and the exhibits incorporated by reference in that pleading. [Citation.]" (*Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1056 (*Lockton*).)

misrepresentation, and failure to disclose seller financing in connection with appellant's sale of a home to Brown.

A jury trial in case No. BC440484 commenced on April 14, 2013. The trial court granted nonsuit in favor of appellant on Brown's causes of action for fraud and negligent misrepresentation. However, according to appellant's complaint in this case, a "defective jury instruction [regarding the claim of failure to disclose seller financing] was permitted and ultimately submitted to the jury." The defective instruction resulted in a verdict against appellant and allowed damages to be awarded against him. The jury returned a verdict in favor of Brown on May 2, 2013, awarding her $392,500.

Respondents filed a notice of appeal on August 6, 2013, and represented appellant during the appeal. On April 16, 2015, Division Five of this court affirmed in part, reduced the damage award to $325,283, reversed the trial court's grant of nonsuit as to the fraud cause of action, and remanded for a limited retrial. The opinion noted that respondents had ample opportunity to request an instruction that a finding of willfulness was required to impose liability on the failure to disclose seller financing cause of action, but they failed to do so. The court further noted that the damages award could not be reduced for the rental value of the house because respondents had not submitted any evidence that would have supported such a reduction.

On May 1, 2015, respondents substituted out of appellant's appeal. Represented by new appellate counsel, appellant filed a petition for rehearing and a petition for review with the California

Supreme Court. The remittitur issued in appellant's appeal on July 23, 2015.

Appellant's complaint alleged the following. Respondents "believed they had already been substituted out of the Action, but no substitutions had been filed. However, during this time, and in the many months that followed, discussions were had between [appellant] and [respondents] regarding a resolution of the issues alleged herein. Specifically, it was discovered in a related matter by [appellant's] counsel that Brown had engaged in, and was ultimately convicted of financial fraud related felonies, which had occurred during the relevant period in the Action. These criminal proceedings had previously been concealed. That is, it appears that Brown may have provided false and misleading information to the trial court during the litigation and received a judgment on that basis. Tentative agreements were reached wherein [respondents] agreed to participate in the review and evaluation of the entire case file, with the purpose of discovering the fraudulent testimony. Because of the possibility that the judgment could be neutralized, thereby eliminating damages in this action, the parties orally agreed to forgo the filing of any legal action in connection to the defective instruction and related rent damages. [Respondents] further [stated] they were tentatively agreeable to the terms. [¶] [Appellant] and [respondents] agreement assisted [appellant] with, and sought to resolve the unsettled matters tangential to the Action. [*Sic.*] The ongoing relationship and activities in furtherance of the relationship between [appellant] and [respondents] ended when [respondents] stated their lack of intent to assist in the additional

proceedings in the Action. [¶] On or about May 16, 2016, [respondents] executed substitutions of attorney in the L.A.S.C. BC440484 Action. [¶] On or about March 28, 2016, [appellant] informed [respondents] of the intent to bring an action on the above conduct. . . . [¶] On or about March 10, 2017, the documents and files in the Action were made available for and picked up by [appellant]."

Appellant filed his initial complaint on June 29, 2016, and he filed the operative complaint (the first amended complaint) on May 2, 2017. The complaint alleged three causes of action: negligence, breach of contract, and breach of fiduciary duty. Respondents demurred to the complaint. They asserted that all three causes of action were barred by the statute of limitations in section 340.6 because appellant knew of the alleged malpractice on or before May 4, 2015. Respondents further asserted that the breach of contract and breach of fiduciary duty causes of action failed to state facts sufficient to constitute a cause of action. The trial court sustained the demurrer without leave to amend. The court entered judgment in favor of respondents and ordered the case dismissed.

DISCUSSION

"We review the ruling sustaining the demurrer de novo, exercising independent judgment as to whether the complaint states a cause of action as a matter of law. [Citation.]" (*Kan v. Guild Mortgage Co.* (2014) 230 Cal.App.4th 736, 740.) "The court is to accept as true all allegations of fact contained in the complaint. [Citation.] When a demurrer is sustained, the reviewing court must determine whether the

complaint alleges sufficient facts to state a cause of action, adopting a liberal construction of the pleading and drawing all reasonable inferences in favor of the asserted claims. [Citation.]" (*Candelore v. Tinder, Inc.* (2018) 19 Cal.App.5th 1138, 1143.)

"""A demurrer based on a statute of limitations will not lie where the action may be, but is not necessarily, barred. [Citation.] In order for the bar . . . to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows that the action may be barred."" [Citation.]" (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1232 (*Lee*).)

Section 340.6, subdivision (a) provides in part that "[a]n 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. . . . Except for a claim for which the plaintiff is required to establish his or her factual innocence, in 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: [¶] . . . [¶] (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred."

Appellant contends that the statute of limitations was tolled because his attorney-client relationship with respondents continued despite the filing of the substitution of attorney form after the appellate

court affirmed in part and remanded. He relies on allegations that he and respondents continued to hold discussions and reached "tentative agreements" in order to obtain a resolution in case No. BC440484. Appellant further contends that he needed to maintain a relationship with respondents because the appellate court had remanded the matter for retrial on the fraud cause of action.

The tolling provision at issue here is the continuing representation provision in section 340.6, subdivision (a)(2): "in 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: [¶] . . . [¶] The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred." "'This "continuous representation" rule was adopted in order to "avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired."' [Citation.]" (*Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 567-568 (*Jocer*).)

The question we must answer is whether the complaint sufficiently alleges that respondents continued to represent appellant until they substituted out of the superior court case in May 2016, thus tolling the statute of limitations. Respondents do not dispute the allegation that they did not execute substitutions of attorney in the superior court until May 16, 2016. Instead, they argue that the fact that they substituted out of the appeal in May 2015 and did not

thereafter work for appellant conclusively establishes that they no longer represented appellant. We are not convinced.

In reviewing the complaint, we must be mindful of the standard of review. Unlike the summary judgment cases on which respondents rely, "'"[o]ur only task in reviewing a ruling on a demurrer is to determine whether the complaint states a cause of action. . . ."' [Citation.]" (*Leasequip, Inc. v. Dapeer* (2002) 103 Cal.App.4th 394, 400.) We are to construe the allegations of the complaint liberally and draw all reasonable inferences in favor of the plaintiff. (*Coleman v. Medtronic, Inc.* (2014) 223 Cal.App.4th 413, 422; *Bank of New York Mellon v. Citibank, N.A.* (2017) 8 Cal.App.5th 935, 952.) Moreover, a demurrer is not the appropriate procedural vehicle "for determining the truth of disputed facts or what inferences should be drawn where competing inferences are possible. [Citation.]" (*CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 635.)

In *Jocer*, the defendant attorney represented the appellants in an action against an employee. The employee prevailed, and the judgment and fee award were affirmed, becoming final in January 2006. The attorney subsequently represented the appellants in a malicious prosecution action filed by the employee, but substituted out of the action in July 2006. Following numerous other proceedings, the appellants filed a claim for legal malpractice against the former attorney in July 2007. The trial court sustained the attorney's demurrer on statute of limitations grounds. We reversed the dismissal in part. (*Jocer*, *supra*, 183 Cal.App.4th at p. 577.) As pertinent here,

we concluded that the appellants' allegation that the former attorney "assisted appellants with matters related to the fee award in the first action after January 2006 . . . [was] sufficient to avoid a demurrer." (*Id.* at p. 571.)

In *Laclette v. Galindo* (2010) 184 Cal.App.4th 919 (*Laclette*), the defendant attorney represented the plaintiff client in settlement negotiations. For two years after the agreement was reached, the trial court retained jurisdiction over the settlement, the client made payments pursuant to the settlement, and the attorney remained counsel of record. However, the attorney had no contact with the client during that two-year period. At the end of the two years, the client filed an action against the attorney for legal malpractice and breach of fiduciary duty. The trial court granted the attorney's summary judgment motion, reasoning that the client suffered injury and discovered facts commencing the one-year statute of limitations when she first became obligated to make the settlement payments two years earlier. The trial court further reasoned that she had no contact with the attorney, and the attorney provided no legal services after the settlement was reached. The appellate court reversed, stating that "we cannot say as a matter of law that [the client] could not reasonably expect [the attorney] to represent her in the event of issues arising concerning the performance of the settlement. We reject [the attorney's] theory that the two-year hiatus, when no legal services were required of [the attorney] with respect to the settlement agreement, had the effect of implicitly terminating [his] representation of [the client]." (*Id.* at p. 922.)

The court in *Laclette* explained that, for purposes of the continuous representation tolling provision in section 340.6, subdivision (a)(2), "'the representation ends when the client actually has or reasonably should have no expectation that the attorney will provide further legal services. [Citations.] That may occur upon the attorney's express notification to the client that the attorney will perform no further services, or, if the attorney remains silent, may be inferred from the circumstances. Absent actual notice to the client that the attorney will perform no further legal services or circumstances that reasonably should cause the client to so conclude, a client should be entitled to rely on an attorney to perform the agreed services and should not be required to interrupt the attorney-client relationship by filing a malpractice complaint. After a client has no reasonable expectation that the attorney will provide further legal services, however, the client is no longer hindered by a potential disruption of the attorney-client relationship and no longer relies on the attorney's continuing representation, so the tolling should end. To this extent and for these reasons, we conclude that continuous representation should be viewed objectively from the client's perspective . . . .' [Citation.]" (*Laclette*, *supra*, 184 Cal.App.4th at p. 928.) The court concluded that a triable issue of material fact remained as to whether the attorney continued to represent the client "despite the lengthy hiatus when no legal services were required with respect to the settlement agreement." (*Ibid.*)

Here, according to the facts alleged in the complaint, similar to *Laclette*, respondents remained appellant's counsel of record in the trial

court throughout the ostensible running of the statute of limitations. The complaint alleges that, during this period, appellant and respondents orally agreed that respondents would review the trial court case file in exchange for appellant not filing a legal malpractice action, and that their relationship ended when respondents "stated their lack of intent to assist in the additional proceedings in the Action [case No. BC440484]." Moreover, there is no dispute that case No. BC440484 had been remanded for a limited retrial. Respondents did not execute a substitution of attorney in case No. BC440484 until May 16, 2016, and appellant's case files were not made available to him until March 10, 2017. Drawing all reasonable inferences in favor of appellant, we conclude that these allegations support the inference that appellant had a "'reasonable expectation that the attorney will provide further legal services'" until he received the "'actual notice'" from respondents that they would not. (*Laclette*, *supra*, 184 Cal.App.4th at p. 928.) "'[T]he client's awareness of the attorney's negligence does not interrupt the tolling of the limitations period so long as the client permits the attorney to continue representing the client regarding the specific subject matter in which the alleged negligence occurred.' [Citation.]" (*Lockton*, *supra*, 184 Cal.App.4th at p. 1068; see also *O'Neill v. Tichy* (1993) 19 Cal.App.4th 114, 117 ["In this case we hold this statutory tolling period is unaffected by the plaintiff's knowledge of the attorney's wrongful act or omission, as long as the representation continues"].)

As we stated in *Lockton*, "'the attorney's representation does not end "until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for

withdrawal.'" [Citation.]" (*Lockton*, *supra*, 184 Cal.App.4th at pp. 1064-1065; see also *Jocer*, *supra*, 183 Cal.App.4th at p. 571 ["'so long as there are unsettled matters tangential to a case, and the attorney assists the client with these matters, he is acting as his representative'"].) Here, the complaint alleges that respondents agreed to review the case file; also, the matter had been remanded for retrial. The allegations of the complaint thus do not permit the inference that the agreed tasks occurred, appellant consented to termination, or that respondents had withdrawn.

Respondents rely on *Shaoxing City Maolong Wuzhong Down Products, Ltd. v. Keehn & Associates, APC* (2015) 238 Cal.App.4th 1031 (*Shaoxing*) to argue that assisting new counsel's transition does not qualify as representation. However, the complaint does not allege that respondents' role was to assist new counsel. This is particularly true because new counsel substituted into the appeal only, while respondents remained counsel of record in the superior court. There are no allegations to support the inference that respondents remained involved solely to assist a transition to new appellate counsel.

Respondents also rely on *GoTek Energy, Inc. v. SoCal IP Law Group, LLP* (2016) 3 Cal.App.5th 1240 (*GoTek*), which, like *Shaoxing*, involved the review of a grant of summary judgment.[3] The facts of

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[3] Respondents also argue that this matter is controlled by *Flake v. Neumiller & Beardslee* (2017) 9 Cal.App.5th 223. Like *Shaoxing* and *GoTek*, *Flake* is distinguishable because it involved the review of a summary judgment motion. Moreover, the record in *Flake* clearly showed that the attorney filed a motion to be relieved as counsel more than a year before the

GoTek are very different from the facts alleged in appellant's complaint. There, the defendant law firm admitted its failure to timely file applications for patent rights in June or July of 2012. The plaintiff client retained new counsel in September 2012 to file a legal malpractice action against the defendant law firm. In November 2012, the defendant withdrew from representation and the plaintiff asked the defendant to transfer all files to new counsel. Unlike *GoTek*, there are no allegations here that appellant hired new counsel to file a malpractice action; to the contrary, the complaint alleges that appellant agreed to forego a malpractice action in order for respondents to evaluate the superior court case file. Nor did appellant ask respondents to transfer the case files. Instead, the complaint alleges that respondents "executed substitutions of attorney in [case No.] BC440484" on May 16, 2016, and made the files available for appellant to pick up on March 10, 2017.

Respondents further contend that that there "is nothing in the record" to indicate that appellant believed respondents continued to represent him. However, we review the allegations of the complaint, and these allegations are sufficient to defeat the statute of limitations.

We reiterate the words of our supreme court in *Lee*: "'"'A demurrer based on a statute of limitations will not lie where the action

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client sued for legal malpractice. (*Id.* at p. 226.) At oral argument, respondents' counsel cited *Sharon v. Porter* (G056706, Sept. 18, 2019) ___ Cal.App.5th ___, but that case involved the review of a court trial on stipulated facts, not a demurrer. The stipulated facts showed that the client suffered actual injury more than a year before he filed the legal malpractice action.

may be, but is not necessarily, barred. [Citation.] In order for the bar . . . to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows that the action may be barred."" [Citation.]" (*Lee*, *supra*, 61 Cal.4th at p. 1232.) Construing the allegations of the complaint liberally and drawing all reasonable inferences in favor of appellant, it appears that the statute limitations began to run, at the earliest, on May 16, 2016, when respondents executed substitutions of attorney in the trial court. Appellant filed his complaint on June 29, 2016, within the one-year statute of limitations. We therefore reverse the judgment and the judgment of dismissal and remand the matter with directions that the trial court vacate its prior order and enter a new order overruling the demurrer.[4]

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[4] Because we reverse on this ground, we do not consider appellant's other contentions.

DISPOSITION

The judgment and order of dismissal are reversed, and the case is remanded with directions that the trial court vacate its prior order and enter a new order overruling the demurrer. Appellant is entitled to costs on appeal.

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WILLHITE, J.

We concur:

MANELLA, P. J.

CURREY, J.