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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

IN HEE LEE, Plaintiff and Appellant, v. JUDITH L. WOOD et al., Defendants and Respondents.	B235752 (Los Angeles County Super. Ct. No. BC462293)

APPEAL from a judgment of the Superior Court of Los Angeles County. Holly E. Kendig, Judge. Affirmed.

Law Offices of Chan Yong Jeong, C. Yong Jeong, Ginni Todd, J. David Likens and Brennan Mitch for Plaintiff and Appellant.

Nemecek & Cole, Jonathan B. Cole and Mark Schaeffer for Defendants and Respondents.

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Appellant In Hee Lee appeals from the judgment of dismissal following the sustaining of the demurrer of respondents Judith L. Wood and Jesse Moorman without leave to amend. Because we find that appellant's legal malpractice action was barred by the one-year statute of limitations in Code of Civil Procedure section 340.6, subdivision (a),[1] we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On appeal from a judgment of dismissal following a demurrer sustained without leave to amend, we assume the truth of all well-pleaded facts in the complaint, as well as those that are judicially noticeable, but not contentions, deductions or conclusions of fact or law. (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

In September 2006, appellant entered into an attorney-client relationship with respondents, who specialize in immigration law. On or about July 9, 2007, respondents filed an application for asylum on behalf of appellant. On or about May 19, 2008, the application was denied and appellant was ordered to be deported to South Korea. The 30-day deadline to file an appeal from the denial was June 18, 2008. Respondents did not file an appeal, and "did not tell [appellant] about the appeal deadline, about missing the appeal deadline, or about becoming undocumented."

Instead, on September 5, 2008, respondents sent appellant a letter written in Korean, which stated: "It was attorney Judith Wood's conclusion that this office decided to wait for a better time to appeal your case, meaning wait until other cases (Other cases which were denied at the Anaheim interview and waiting at the immigration court) win

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[1] All statutory references shall be to the Code of Civil Procedure, unless otherwise noted.

and leave a good precedent. This will give you a better chance. Since you have only one chance to appeal, it is better to wait than appeal now when the future is not clear."[2]

More than a year later, appellant retained new counsel to see if there were other ways to obtain asylum. In reviewing respondents' files on appellant's asylum case, appellant's new counsel discovered that respondents "failed to provide competent services" to appellant and "repeatedly made misrepresentations" to her, and "promptly thereafter, on or about February 16, 2010," appellant filed a complaint against Wood with the State Bar of New Mexico. On April 28, 2010, the New Mexico State Bar concluded that Moorman was responsible for failing to file appellant's notice of appeal.[3] On or about August 2, 2010, appellant filed a complaint against Moorman with the State Bar of California. On November 3, 2010, the California State Bar concluded that Moorman failed to advise appellant of the deportation order and of the 30-day window to appeal.

On or about September 17, 2010, appellant filed a motion to reopen her asylum case, which was granted on or about February 11, 2011. Appellant underwent an "extensive amount of inconvenience, waste of time and money only to re-obtain her right to file an appeal."

On May 25, 2011, appellant filed the instant complaint against respondents for professional negligence, breach of fiduciary duty, and fraud. Respondents demurred on the grounds that all three causes of action were time-barred under section 340.6, subdivision (a), and failed to state causes of action. Appellant opposed the demurrer, which the trial court sustained without leave to amend. The record does not contain the reporter's transcript of the hearing on the demurrer. The court's minute order states that the demurrer was sustained without leave to amend "on the ground that the plaintiff has failed to state sufficient facts to support the causes of action, and the Court is not

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[2] A copy of the letter with an English translation is attached to appellant's complaint.

[3] It is unclear if appellant meant to refer to Wood, or if she filed a complaint against both respondents.

convinced that the causes of action can be corrected." Judgment was entered in favor of respondents. This appeal followed.

DISCUSSION

I. Standard of Review.

We review de novo a trial court's sustaining of a demurrer without leave to amend, exercising our independent judgment as to whether a cause of action has been stated as a matter of law. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) We assume the truth of properly pleaded allegations in the complaint and give the complaint a reasonable interpretation, reading it as a whole and with all its parts in their context. (S*top Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 558; *People ex rel. Lungren v. Superior Court, supra*, at p. 300.) We may disregard allegations which are contrary to law or to judicially noticed facts. (*Wolfe v. State Farm Fire & Casualty Ins. Co.* (1996) 46 Cal.App.4th 554, 559–560.) "On appeal, we do not review the validity of the trial court's reasoning but only the propriety of the ruling itself." (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 517.) "'A general demurrer based on the statute of limitations is only permissible where the dates alleged in the complaint show that the action is barred by the statute of limitations. [Citation.] The running of the statute must appear "clearly and affirmatively" from the dates alleged.'" (*Lee v. Los Angeles County Metropolitan Transportation Authority* (2003) 107 Cal.App.4th 848, 854.)

II. The Complaint is Time-Barred.

A. Section 340.6 is Applicable

Section 340.6, subdivision (a) provides in relevant part: "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."

In her opposition to respondents' demurrer, appellant agreed that all three of her causes of action are subject to the one-year statute of limitations in section 340.6. She argued nevertheless that her complaint is timely because the one-year limitations period was tolled. Now, for the first time on appeal, appellant changes course by making the new arguments that her breach of fiduciary duty and fraud causes of action are not subject to section 340.6's limitations period. These arguments are not properly before us.

As recently explained in *City of Scotts Valley v. County of Santa Cruz* (2011) 201 Cal.App.4th 1, 28–29: "As a general rule, theories not raised in the trial court cannot be raised for the first time on appeal. This is a matter of fundamental fairness to both the trial court and opposing parties. [Citation.] There are exceptions to this rule, including where a new theory pertains only to questions of law based on undisputed facts. [Citation.] But even then, whether an appellate court will entertain a new theory raised for the first time on appeal is strictly a matter of discretion. [Citation.] Moreover, where a new theory contemplates a factual situation that is "'open to controversy'" and was not placed at issue in the trial court, it cannot be advocated on appeal. [Citation.] Likewise, when a party bears some responsibility for the claimed error, they are generally estopped from taking a different position on appeal or are deemed to have waived the error. [Citations.] '[W]here a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer may not use that tactical decision as the basis to claim prejudicial error.' [Citation.]"

Even if we were inclined to reach the merits of appellant's newly raised arguments, we would find they have no merit. Appellant relies solely on *David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 893, to support her position that an attorney's breach of fiduciary duty is governed by the four-year catch-all statute of limitations provided in section 343. But that case is inapposite because the client was not suing the attorney for acts that arose from the attorney-client relationship, but for acts outside of that relationship, i.e., usurping the client's business. (*David Welch Co. v.*

Erskine & Tulley, supra, at pp. 888–889.) Indeed, subsequent courts have refused to follow *Welch* on the grounds that it did not involve a breach of fiduciary duty in the context of legal malpractice. (See *Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 68 ["we agree that *Welch* should not be followed, since it did not cite any authority dealing with a breach of fiduciary duty in the context of attorney malpractice"]; *Pompilio v. Kosmo, Cho & Brown* (1995) 39 Cal.App.4th 1324, 1329 ["It is true that the Pompilios have alleged a cause of action entitled 'Breach of Fiduciary Duty.' Nevertheless, the allegations of this cause of action concern [the attorney's] acts and omissions while representing the Pompilios and sounds in legal malpractice. The authority upon which the Pompilios rely, *David Welch* [citation] applied a four-year limitations period to the plaintiff's action against its attorneys for usurping plaintiff's business after the attorney-client relationship ended. It is not pertinent here"]; *Stoll v. Superior Court* (1992) 9 Cal.App.4th 1362, 1369 [disagreeing with *Welch* because it did not cite any authority involving a breach of fiduciary duty in the context of legal malpractice and did not discuss the legislative history of section 340.6].)

Furthermore, section 340.6, subdivision (a), expressly states that it applies to "[a]n action against an attorney for a wrongful act or omission, . . . arising in the performance of professional services." Section 343, on the other hand, applies to an "action for relief not hereinbefore provided for . . . ." When more than one statute of limitations might apply to a particular claim, "a specific limitations provision prevails over a more general provision." (*Creditors Collection Service v. Castaldi* (1995) 38 Cal.App.4th 1039, 1043; *Vafi v. McCloskey* (2011) 193 Cal.App.4th 874, 881 ["the more specific statute of limitations under section 340.6 overrides the general catchall statute"].) Here, appellant's breach of fiduciary duty cause of action is governed by the one-year statute of limitations in section 340.6.

As to appellant's fraud cause of action, she correctly notes that section 340.6 specifically excludes claims for "actual fraud." She argues that she has pled a claim for actual fraud and therefore the three-year statute of limitations in section 338, subdivision (d), applicable to fraud claims generally applies here. As respondents point

out, the problem with this argument is that appellant's complaint attempts to plead *constructive* fraud, rather than *actual* fraud.

"'Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship.'" (*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 562, quoting 2 Miller & Starr, Cal. Real Estate (2d ed. 1989) Agency, § 3:20, p. 119, fn. omitted.) It is characterized by the failure of a fiduciary to disclose a material fact to his principal. (*Salahutdin v. Valley of California, Inc.*, *supra*, at p. 562.) "[A] breach of a fiduciary duty *usually* constitutes constructive fraud." (*Id*. at p. 563.) "Constructive fraud allows conduct insufficient to constitute actual fraud to be treated as such where the parties stand in a fiduciary relationship. The difference between actual fraud and constructive fraud is primarily in the type of *conduct* which may be treated as fraudulent, such as a failure to disclose material facts within the knowledge of the fiduciary." (*Estate of Gump* (1992) 1 Cal.App.4th 582, 601; Civ. Code, § 1573 ["Constructive fraud consists: [¶] 1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or, [¶] 2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud"].)

Appellant's fraud cause of action is based on respondents' failure to inform her of the 30-day deadline to file an appeal and that they had missed the deadline, which caused her stay in the United States to be illegal and subjected her to deportation. Appellant's opening brief effectively concedes that her claim is for constructive fraud: "In the present case, it is obvious that the duty to affirmatively speak was imposed upon Respondents as Appellants' former lawyers"; "As Appellants' immigration attorneys, Respondents clearly had a duty of disclosure to Appellant . . . ."

Appellant's reliance on *Quintilliani v. Mannerino*, *supra*, 62 Cal.App.4th at pages 69 to 70 does not assist her. There, the court noted: "[T]he exception for actual fraud in section 340.6 was intended to apply to intentional fraud, not constructive fraud resulting from negligent misrepresentation. Constructive fraud may result from a breach of

fiduciary duty, regardless of intent or motive, and the Legislature intended to only except instances of actual fraud on grounds that acts of actual fraud should not be treated as legal malpractice." *Quintilliani* relied on *Stoll v. Superior Court, supra*, 9 Cal.App.4th at page 1368, which noted the scholarly article that led to the enactment of section 340.6 recommended that the statute specifically exclude "actual" fraud because "'constructive fraud may arise from a fiduciary breach regardless of the attorney's intent or motive.'"

Accordingly, appellant's fraud cause of action is governed by the one-year statute of limitations in section 340.6, and not the three-year statute of limitations in section 338, subdivision (d).

B. Appellants' Claims Were Not Tolled

Appellant contends that her three causes of action were tolled under section 340.6. We disagree.

Section 340.6, subdivision (a) provides that the limitations 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."

Appellant argues that her claims were tolled under section 340.6, subdivision (a)(3), because respondents concealed their wrongful acts and omissions. But appellant ignores that this exclusion applies only to the four-year limitation period, which is not at play here.

Appellant also argues that her claims were tolled while she pursued her "administrative remedies" of filing complaints with the State Bars of New Mexico and California. But our Supreme Court has made clear that the four specific grounds upon which section 340.6's limitation period may be tolled are the exclusive grounds for

tolling. (See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 756 ["The Legislature expressly disallowed tolling under any circumstances not stated in the statute"]; *Laird v. Blacker* (1992) 2 Cal.4th 606, 618 ["Section 340.6, subdivision (a) states that 'in no event' shall the prescriptive period be tolled except under those circumstances specified in the statute. Thus, the Legislature expressly intended to disallow tolling under any circumstances not enumerated in the statute"].) Pursuing an administrative remedy is not one of the specified grounds for tolling the statute.

Even if it were, pursuit of a State Bar complaint is not an administrative remedy. As respondents note, the State Bar cannot adjudicate respondents' alleged legal malpractice or award appellant the relief she seeks (e.g., monetary damages). (*Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 381 ["the State Bar does not provide an adequate administrative remedy and the exhaustion doctrine is inapplicable"].) Indeed, the California Rules of Professional Conduct expressly state that the State Bar only has the power to discipline attorneys for violations of those rules. (Rules of Prof. Conduct, rule 1-100(A).) Thus, appellant's State Bar complaints could not and did not provide her with any relief.

Appellant's complaint makes clear that she discovered respondents' alleged wrongdoing by February 2010, at the latest. The complaint alleges that appellant's new counsel reviewed respondents' files on appellant's asylum case and discovered that respondents had "failed to provide competent services" to appellant, and that "promptly thereafter, on or about February 16, 2010, Plaintiff filed a complaint against Defendant Wood with the State Bar of New Mexico." Indeed, appellant concedes in both her opposition to respondents' demurrer, as well as her opening brief on appeal, that she discovered respondents' wrongdoing on or about February 16, 2010. Because appellant did not file her complaint against respondents until more than one year later on May 25,

2011, her complaint against respondents is barred by the one-year statute of limitations in section 340.6, subdivision (a).[4]

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ

[4] In light of our conclusion, we need not reach the issue of whether appellant's complaint pled facts sufficient to state causes of action.