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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

FRANCOIS TABI,

Plaintiff and Appellant,

v.

KATTEN MUCHIN ROSENMAN  
et al.,

Defendants and Respondents.

B282733

(Los Angeles County  
Super. Ct. No. BC639169)

APPEAL from a judgment of the Superior Court of  
Los Angeles County, John P. Doyle, Judge. Affirmed.

Francois Tabi, in pro. per., for Plaintiff and Appellant.

Katten Muchin Rosenman, David Halberstadter and  
Charlotte S. Wasserstein for Defendants and Respondents  
Katten Muchin Rosenman LLP, Meegan Maczek, Steve Cochran,  
and Christopher Carter.

Sauer & Wagner and Gregory P. Barchie for Defendant and  
Respondent Eve Wagner.

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Plaintiff and appellant Francois Tabi challenges the trial court's dismissal of his case after sustaining defendants' demurrers without leave to amend. We have reviewed the record de novo and conclude that the trial court properly dismissed the lawsuit. We thus affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

The current lawsuit stems from litigation occurring in 2009, when Tabi filed a federal civil rights claim against police officers employed by the Los Angeles Police Department (underlying litigation). Katten Muchin Rosenman LLP, Meegan Maczek, Steve Cochran, and Christopher Carter (attorney defendants) represented Tabi in the underlying litigation. Eve Wagner served as the mediator in the underlying litigation. Tabi sued the attorney defendants and Wagner alleging causes of action for deceit, fraud, and fraudulent misrepresentation.

According to the first amended complaint and judicially noticed matters, Tabi signed a settlement agreement at the conclusion of the mediation, the terms of which awarded him \$5,000.<sup>1</sup> Tabi unsuccessfully sought to rescind the settlement agreement. Both the federal district court and the Ninth Circuit Court of Appeals denied his efforts to rescind. The Ninth Circuit court explained: In his pro se appellate brief, "Tabi failed to establish that his consent to the agreement was not informed." The Ninth Circuit also rejected "Tabi's contentions that his

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<sup>1</sup> It is undisputed that the trial court properly took judicial notice of court records. (Evid. Code, § 452, subd. (d).) We grant attorney defendants' request to take judicial notice of the docket in the underlying litigation. (*Ibid.*)

counsel, the mediator, and the district court were biased against him or otherwise violated his due process rights.”

The mediation, which led to the executed settlement agreement, occurred on August 23, 2013. Attorney defendants filed Tabi’s motion to rescind September 23, 2013. Tabi filed the current lawsuit on October 31, 2016.

### **1. First amended complaint**

In his operative complaint, Tabi described defendants as follows: “At all times relevant to this matter, Defendants were agents of the Central District Court and served its narrow interests.” Cochran, Maczek, and Carter were attorneys at Katten Muchin Rosenman LLP. Wagner was “an affiliate of the Central District Court” and referred to “herself [as] a neutral mediator.”

Tabi alleged the following underlying litigation occurred. In 2009, Tabi sued two officers alleging a violation of 42 U.S.C. 1983. The federal district court tried to “bully” Tabi into a settlement and misrepresented to him that the district court was providing free legal representation. Tabi was represented by Maczek and Carter, who were paid by the district court. Maczek made false promises to induce Tabi to sign a contract for legal representation.

Tabi further alleged that Maczek “ordered” Tabi to attend a mediation at which defendant Wagner acted as mediator. According to Tabi, “The mediation that occurred on Friday, August 23, 2013 was a dishonest and deceitful game and Defendant attorneys who accompanied [Tabi] did nothing to serve [his] interests; they served the agenda of the mediator, Eve Wagner, they served their own interests, they served the interests of the District Court.” Tabi alleged that his attorneys

“neglected to inform [him] that they had received an Arrest Report,” which according to Tabi was “concealment fraud.”

Tabi alleged: “Exhausted by the proceedings and laboring under the false belief that I had obtained all available information related to my lawsuit, I agreed to a payment of \$5000. I was deceived into signing an alleged agreement. . . .” Tabi further alleged that he signed a settlement agreement, but the agreement contained terms he did not agree to or understand. When he affixed his signature, he believed he was signing a different agreement with different terms.

According to allegations in the first amended complaint, on August 28, 2013, Tabi received a copy of the arrest report, which was relevant to his civil rights lawsuit. He “realized that [he] had signed a release agreement, an alleged settlement, in error and without full knowledge.” He requested that his lawyers move to rescind the settlement agreement. In the context of a motion to rescind, Maczek “falsified” his declaration. Maczek attributed statements to Tabi that he did not make. Specifically, Tabi alleged that the declaration improperly stated: “ ‘During mediation Ms[.] Wagner provided Plaintiff’[s] Counsel with a copy of the Arrest Report and read excerpts from the Arrest Report aloud. . . .’ ” Tabi alleged: “Maczek claimed that the above highlighted words belonged to my declaration. The above highlighted words do not belong to my declaration dated September 23, 2013 and were not part of my experience during mediation on August 23, 2013.”

According to Tabi, as a result of the misrepresentation in his declaration, the federal district court denied his motion to rescind the settlement agreement. Attorney Carter falsely informed Tabi that he did not have the right to appeal from the

district court's denial of his motion to rescind. Tabi alleged that he fired defendant attorneys on or about November 7, 2013 because they deceived and defrauded him.

With respect to Wagner, Tabi alleged: "After having informed me that a black man could not win, Eve Wagner read from a document which I assumed was the opposing party's mediation brief. . . .Eve Wagner read briefly from her document, arrived quickly at a section that she claimed she could not understand and then she proposed we begin negotiations towards a settlement." Tabi alleged that Wagner did not read his deposition. Tabi also alleged that Wagner "deceive[d]" him into signing a document he had not read. Because the settlement agreement was altered and contained terms Tabi had not read, it was a forgery. Tabi alleged that "[a]t all times relevant to this matter, Defendants were agents of the Central District Court and served its narrow interests." He alleged that "Eve Wagner was an affiliate of the Central District Court, . . . ."

## **2. Defendants' demurrers to the first amended complaint**

Wagner demurred to the first amended complaint on the ground that it was barred by the statute of limitations and that the alleged claims against her were barred by the mediator privilege. Attorney defendants also demurred to the first amended complaint. They argued that all causes of action were barred by the applicable statute of limitations. They also argued that Tabi failed to state a cause of action.

## **3. Tabi's opposition to the demurrers**

Tabi opposed the demurrers. Tabi claimed that he "lost a unique opportunity to bring rogue Police Officers to justice, and

to expose wrongdoing within the Los Angeles Police Department” and estimated that his lawsuit was worth “at least \$250,000.”

#### **4. The trial court sustained the demurrers and dismissed the lawsuit**

The trial court sustained defendants’ demurrers without leave to amend. The court concluded that all claims were time-barred. With respect to the attorney defendants, the trial court concluded that all of Tabi’s claims were based on alleged legal malpractice. The court further concluded that Wagner had immunity and that Tabi failed to state a cause of action for fraud or breach of fiduciary duty sufficiently. The trial court’s order dismissed the case. We deem the trial court’s order to be a judgment of dismissal. (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 544.)

### **DISCUSSION**

“In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory.” (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162.) “[W]e accept as true all properly pleaded facts.” (*Id.* at p. 156.) “If the complaint does not state facts sufficient to constitute a cause of action, the appellate court must determine whether there is a reasonable possibility that the defect can be cured by amendment.” (*Phoenix Mechanical Pipeline, Inc. v. Space Exploration Technologies Corp.* (2017) 12 Cal.App.5th 842, 847.) The plaintiff bears the burden on appeal of showing how the complaint may be amended to state a cause of action. (*T.H. v. Novartis Pharmaceuticals Corp.*, *supra*, 4 Cal.5th at p. 162.)

**A. The Trial Court Properly Sustained the Attorney Defendants' Demurrer to the First Amended Complaint**

As set forth below, the gravamen of Tabi's allegations against attorney defendants is legal malpractice, and his causes of action are barred by the one-year statute of limitations. "An injury suffered by reason of a defendant's conduct gives rise to a single cause of action, regardless of how many theories are pled by the complaint. [Citation.] Where the injury is suffered by reason of an attorney's professional negligence, the gravamen of the claim is legal malpractice, regardless of whether it is pled in tort or contract." (*Kracht v. Perrin, Gartland & Doyle* (1990) 219 Cal.App.3d 1019, 1022.) "The statute of limitations to be applied is determined by the nature of the right sued upon, not by the form of the action or the relief demanded." (*Day v. Greene* (1963) 59 Cal.2d 404, 411.)

Although actual fraud is governed by a three-year statute of limitations (Code Civ. Proc., § 338, subd. (d)),<sup>2</sup> where the gravamen of the claim is legal malpractice, a plaintiff cannot avoid the application of the statute of limitations by applying a different label. (*Foxen v. Carpenter* (2016) 6 Cal.App.5th 284, 291-294.) Unless a plaintiff alleges actual fraud, claims that depend on an obligation an attorney "has *by virtue of* being an attorney—in the course of providing professional services" are governed by the statute of limitations for attorney malpractice. (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1229.)

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<sup>2</sup> Further undesignated statutory references are to the Code of Civil Procedure.

Legal malpractice as opposed to actual fraud “consists of the failure of an attorney ‘to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.’” (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 180, superseded by statute on another ground as explained in *Gordon v. Law Offices of Aguirre & Meyer* (1999) 70 Cal.App.4th 972, 977.) The statute of limitations for legal malpractice applies “to claims whose merits necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services. . . . By contrast . . . section 340.6(a) does not apply to a claim for wrongdoing—for example, garden-variety theft—that does not require proof that the attorney has violated a professional obligation, even if the theft occurs while the attorney and the victim are discussing the victim’s legal affairs. Section 340.6(a) also does not apply to a claim arising from an attorney’s performance of services that are not ‘professional services,’ meaning, ‘services performed by an attorney which can be judged against the skill, prudence and diligence commonly possessed by other attorneys.’” (*Lee v. Hanley, supra*, 61 Cal.4th at pp. 1236-1237.)

Here, all of Tabi’s claims against attorney defendants depend on proof that the attorney defendants violated their professional obligations to him. With respect to the attorney defendants, the nature of the right sued upon was based on their representation of Tabi prior to the mediation, at the mediation, and after the mediation until Tabi fired them. Tabi alleged no misrepresentation or concealment concerning nonlegal matters or matters outside the scope of their representation of him. Thus,



although he asserts that his “complaint is not about professional negligence,” his allegations belie that assertion. The nature of the alleged wrongful conduct involves performing professional services; Tabi does not allege actual fraud.

The statute of limitations for legal malpractice is one year. (§ 340.6, subd. (a).) It commences when “the plaintiff actually or constructively discovers the facts of the wrongful act or omission.” (*Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP* (2011) 195 Cal.App.4th 265, 275.) The statute is tolled until the plaintiff suffers actual injury, i.e., until the plaintiff is entitled to a legal remedy. (*Id.* at pp. 275-276.) The limitations period is not tolled beyond four years from the date of the wrongful act or omission. (§ 340.6, subd. (a).)

Tabi’s allegations demonstrate that he did not timely file the instant lawsuit against attorney defendants. Tabi alleged that he realized on or about August 28, 2013 that “I had signed a release agreement, an alleged settlement, in error and without full knowledge.” In his memorandum in opposition to defendants’ demurrers, Tabi indicated that he obtained a copy of the settlement agreement from the Central District Court in December 2013. Tabi did not file the lawsuit within one year of the mediation or within one year of learning that his settlement agreement of the underlying litigation was in error.

To the extent Tabi is arguing that the lawsuit did not accrue until the litigation on his motion to rescind ended, his argument lacks merit. *Pompilio v. Kosmo, Cho & Brown* (1995) 39 Cal.App.4th 1324 explains that under circumstances similar to this case, the litigation accrued when the plaintiff—here Tabi—signed the settlement agreement. In *Pompilio*, the plaintiffs and defendants settled a lawsuit during an arbitration proceeding.

(*Id.* at p. 1325.) The plaintiffs were dissatisfied with the terms of the settlement and sued the attorneys who had represented them. (*Id.* at p. 1326.) About three years later, the trial court entered judgment based on the settlement agreement. (*Id.* at p. 1326.) The *Pompilio* court held that the statute of limitations began to run when the plaintiffs settled their dispute in the underlying litigation because at that time, they altered their legal status vis a vis the opposing party. (*Id.* at pp. 1325, 1328-1329.) The fact that the *Pompilios* “resisted enforcement of the settlement agreement and sought to set it aside” did not toll the statute of limitations. (*Id.* at p. 1329; see also *Turley v. Wooldridge* (1991) 230 Cal.App.3d 586, 593 [actual injury occurred on the date of execution of a marriage termination agreement even though it could have been challenged in subsequent court proceedings].) Similarly here, the injury occurred when Tabi signed the settlement agreement, and he did not file his lawsuit within one year of that date.

The statute of limitations for legal malpractice has a tolling period during the time an attorney continues to represent a client in the same matter. (*Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP, supra*, 195 Cal.App.4th at p. 275.) Here, Tabi alleged that he fired his counsel on or about November 7, 2013. He did not file a lawsuit within a year of the time he fired counsel. Therefore, the trial court properly sustained attorney defendants’ demurrer to the first amended complaint.

Finally, even if the three-year statute of limitations for fraud applied here, Tabi alleges no viable cause of action against attorney defendants. The only alleged misconduct occurring within the limitations period was attorney Carter’s failure to

advise Tabi that he could appeal the denial of his motion to rescind the settlement agreement to the Ninth Circuit Court of Appeals. However, other allegations show that Tabi was not harmed by that incorrect advice because Tabi appealed to the Ninth Circuit and that court considered his appeal on the merits. Tabi therefore cannot demonstrate damages from that alleged misconduct.

**B. The Trial Court Properly Sustained Wagner's Demurrer to the First Amended Complaint**

With respect to defendant Wagner, all of her alleged misconduct occurred during the mediation. Tabi alleged that she was unprepared for the mediation, made inappropriate remarks, and deceived him into signing a document he had not read. For the reasons set forth below, Tabi's claims against Wagner for fraud are barred by the statute of limitations.

"An action for relief on the grounds of fraud or mistake must be commenced within three years. However, such action is not deemed accrued 'until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.' [Citation.] The courts interpret discovery in this context to mean not when the plaintiff became aware of the specific wrong alleged, but when the plaintiff suspected or should have suspected that an injury was caused by wrongdoing. The statute of limitations begins to run when the plaintiff has information which would put a reasonable person on inquiry. A plaintiff need not be aware of the specific facts necessary to establish a claim since they can be developed in pretrial discovery. Wrong and wrongdoing in this context are understood in their lay and not legal senses." (*Kline v. Turner* (2001) 87 Cal.App.4th 1369, 1373-1374.)

Here, based on the allegations in the first amended complaint, Tabi learned “[a]round” August 28, 2013 that he “had signed a release agreement, an alleged settlement, in error and without full knowledge.” Tabi also alleged that “[d]uring mediation, Eve Wagner revealed herself as a racist, reactionary propagandist, desperate and dissolute, accomplished in the multiple vices, whose only hope of harvest lay in the exploitation of racial divisions and racial inequalities.” The allegations in the operative complaint indicate that Tabi was aware or should have been aware of Wagner’s alleged misconduct at the time of or shortly after the mediation. He did not file his lawsuit against her within three years of the time he was on inquiry notice of Wagner’s alleged wrongs.<sup>3</sup>

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<sup>3</sup> Tabi demonstrates no error in the trial court’s conclusion that Wagner’s conduct was protected by quasi-judicial immunity extended to mediators. This conclusion is the same under federal and state law. General Order No. 11-10 governs the alternative dispute resolution program for the Central District of California. Section 3.10 of that order provides that mediators participating in the program “are performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity.” Thus, quasi-judicial immunity extended to Wagner. (Cf. *Wagshal v. Foster* (1994) 28 F.3d 1249, 1254 [“absolute quasi-judicial immunity extends to mediators”]; see also *Todd v. Ellis* (E.D. Cal., July 2, 2014, 2:13-CV-0273-MCE) 2014 WL 2993793 [mediators acting within scope of authority are immune from civil lawsuits].)

Under state law, “[A]bsolute quasi-judicial immunity is properly extended to . . . neutral third parties for their conduct in performing dispute resolution services which are connected to the judicial process” including the mediation “of pending disputes.” (*Howard v. Drapkin* (1990) 222 Cal.App.3d 843, 860.) Here, the alleged wrongdoing—including allegations of racial bias and

**C. The Trial Court Properly Denied Tabi Leave to Amend the First Amended Complaint**

Tabi argues that he should have been granted leave to amend his complaint. He proposes several amendments, none of which would alter our conclusion that his lawsuit is barred by the statute of limitations. To the extent Tabi is trying to assert a cause of action for breach of fiduciary duty against attorney defendants, the statute of limitations is identical to that governing legal malpractice. (*Stoll v. Superior Court* (1992) 9 Cal.App.4th 1362, 1363 [“we hold that the statute of limitations within which a client must commence an action against an attorney on a claim for legal malpractice or breach of a fiduciary duty is identical”].) Tabi fails to demonstrate he could amend his complaint in a manner that would make his lawsuit filed on October 31, 2016 timely. (*T.H. v. Novartis Pharmaceuticals Corp.*, *supra*, 4 Cal.5th at p. 162 [plaintiff bears the burden to demonstrate a reasonable possibility that the complaint’s defects can be cured by amendment].)

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allegations of altering a settlement agreement—occurred during the scope of Wagner’s official duties.

### **DISPOSITION**

We deem the order dismissing the complaint a judgment of dismissal and affirm the judgment. Respondents are entitled to their costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.