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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

ALAIN V. BONAVIDA, Plaintiff and Appellant, v. JOSEPH M. FAHS, Defendant and Respondent.	B287053 (Los Angeles County Super. Ct. No. BC658879)

APPEAL from a judgment of the Superior Court for the County of Los Angeles. Elizabeth Allen White, Judge. Affirmed.

Yvonne M. Renfrew and Alain V. Bonavida, in pro. per., for Plaintiff and Appellant.

David C. Wheeler for Defendant and Respondent.

SUMMARY

This case involves the sham pleading doctrine, the statute governing the contents of contingency fee contracts, and $4 million in claimed legal fees. This opinion is our second in lawsuits involving plaintiff Alain Bonavida (the attorney), defendant Joseph Fahs (his former client) and another lawyer (Joshua Friedman, who is not involved in this case).

We began our first opinion by observing that the case included procedural misadventures that made it appear more complicated than it was. Further misadventures occurred in this case, and this time the result was a judgment dismissing Mr. Bonavida's claims, after the trial court sustained Mr. Fahs's demurrers without leave to amend.

We affirm the judgment. Our principal conclusions are these. The allegations of Mr. Bonavida's amended complaint, together with documents in earlier lawsuits which may be judicially noticed, establish that Mr. Bonavida failed to include in a contingency fee agreement a statutorily required statement about an hourly fee agreement in a related matter. (Bus. & Prof. Code, § 6147, subds. (a)(3) & (b) (section 6147).) This permitted Mr. Fahs to declare the contingency fee agreement void, which he did in pleadings in the earlier cases.

Then, in this case – which Mr. Bonavida filed after voluntarily dismissing an earlier lawsuit seeking recovery of the same legal fees (*Bonavida I*) – Mr. Bonavida omitted all mention of the hourly fee agreement, despite having declared under penalty of perjury in his earlier suit that both agreements existed contemporaneously. His explanation of this omission in his amended complaint was entirely unsatisfactory, resulting in the

trial court's proper application of the sham pleading doctrine and dismissal of the amended complaint.

In reaching these conclusions, we reject Mr. Bonavida's numerous arguments to the contrary. Prime among these is the claim that Mr. Fahs's voluntary dismissal of a declaratory relief count in a cross-complaint in another lawsuit that was the subject of our previous opinion operated as a retraxit or dismissal with prejudice on the section 6147 issue, precluding that defense in this case. As the trial court concluded, it did not.

The further procedural misadventure is that this case (*Bonavida II*) was not filed until after the statute of limitation governing quantum meruit claims had expired – thus relegating to the dust heap Mr. Bonavida's otherwise available right under section 6147 to collect a reasonable fee.

FACTS

1. The Background

The genesis of the claims before us lies in a $10 million judgment in favor of Mr. Fahs in litigation with his employer (the Marciano litigation).

In September 2007, Mr. Fahs engaged Mr. Bonavida to defend him when he (and several other employees) were sued by Mr. Marciano. The retainer agreement specified an hourly rate for Mr. Bonavida's services (the hourly fee agreement).

In March 2008, Mr. Bonavida recommended that Mr. Fahs, like other employee-defendants in the Marciano litigation, file a cross-complaint. Messrs. Fahs and Bonavida entered into a contingency fee agreement with respect to the Marciano cross-complaint, under which Mr. Bonavida would receive 40 percent of any recovery (and a reasonable fee if he were discharged). The

agreement covered Mr. Bonavida's representation of Mr. Fahs only on the cross-complaint against Mr. Marciano.

In April 2009, the court in the Marciano litigation ordered Mr. Marciano to pay Mr. Fahs $36,400 in sanctions.

In July 2009, after Mr. Marciano defaulted and after a jury trial on damages, Mr. Fahs obtained a judgment of $74 million (reduced in March 2013 to $10 million). (The other employees obtained similar judgments.)

In August 2009, at Mr. Bonavida's recommendation, Mr. Fahs engaged another lawyer, Joshua Friedman, to collect the judgment.

In October 2009, Mr. Fahs hired bankruptcy counsel and (along with others) forced Mr. Marciano into bankruptcy.

On January 12, 2012, Mr. Fahs terminated Mr. Friedman.

On January 18, 2012, the bankruptcy trustee distributed a portion of the sanctions Mr. Marciano had been ordered to pay Mr. Fahs in April 2009. The trustee's disbursement was "for [Mr. Fahs's] benefit directly to Bonavida." Mr. Bonavida applied these monies to an invoice he had sent Mr. Fahs on January 10, 2012 (the sanctions award invoice), that purported to show how the sanctions award should be allocated as between Mr. Fahs and Mr. Bonavida, and what amounts of the sanctions award were allocated to the hourly agreement and to the contingency fee agreement.

On February 6, 2012, Mr. Fahs terminated Mr. Bonavida's representation.

On April 2, 2012, both Mr. Bonavida and Mr. Friedman served notices of liens on Mr. Fahs's claims in the Marciano bankruptcy proceeding.

On July 2, 2014, the bankruptcy trustee made the first interim distribution to Mr. Fahs ($3.3 million plus), to be credited toward his $10 million judgment. Two more distributions were made to Mr. Fahs in August 2014 and January 2015. The bankruptcy trustee withheld $4 million-plus for Mr. Bonavida's lien claim, as well as monies for Mr. Friedman's lien claim.

On July 3, 2014, the day after Mr. Fahs received the first distribution on his $10 million judgment, Mr. Bonavida filed *Bonavida I*, and Mr. Friedman also filed a lawsuit (the Friedman lawsuit), both seeking legal fees.

On August 14, 2014, Mr. Fahs filed an answer in *Bonavida I*. One of his affirmative defenses was that "[t]he terms of the contingency fee agreement . . . are unconscionable and the purported agreement is void."

On August 15, 2014, Mr. Fahs filed a cross-complaint in the Friedman lawsuit. He named as cross-defendants both Mr. Friedman and Mr. Bonavida. The first count of his cross-complaint sought declaratory relief against both cross-defendants, alleging (as pertinent here) the Bonavida contingency fee agreement violated section 6147, entitling Mr. Fahs to declare it void, and was also void as unconscionable. (Section 6147 requires a contingency fee agreement to include a statement "as to what extent, if any, the client could be required to pay any compensation to the attorney for related matters that arise out of their relationship not covered by their contingency fee contract." (§ 6147, subd. (a)(3).) It also provides that "[f]ailure to comply with any provision of this section renders the agreement voidable at the option of the plaintiff, and the attorney shall thereupon be entitled to collect a reasonable fee." (§ 6147, subd. (b).))

Mr. Fahs's second count alleged (as pertinent here) breach of fiduciary duty against Mr. Bonavida in connection with the terms of the contingency fee agreement. This count similarly alleged that the contingency fee agreement "is and has been void at all relevant times [and] should not be enforceable against Fahs." (A third cause of action for breach of fiduciary duty is irrelevant here.)

On November 10, 2014, at a hearing on demurrers to his cross-complaint, Mr. Fahs voluntarily dismissed his declaratory relief claim. The trial court later summarily adjudicated Mr. Fahs's breach of fiduciary duty claims against him based on the statute of limitation, and entered judgment for Mr. Bonavida on Mr. Fahs's cross-complaint.

On March 7, 2017, we affirmed the judgment for Mr. Bonavida in the Friedman lawsuit. (*Fahs v. Bonavida* (Mar. 7, 2017, B268415) [nonpub. opn.].) We had no reason to and did not opine on whether the voluntary dismissal of Mr. Fahs's declaratory relief claim was with or without prejudice. We stated that "the declaratory relief claim was voluntarily dismissed at the hearing, *before* the court ruled on the demurrer to it. The legal effect of such a dismissal is to deprive the court of jurisdiction to rule on the claim." (*Fahs v. Bonavida, supra,* B268415.) We further stated: "The trial court in this case had no occasion to rule on the nature of the dismissal, which removed the declaratory relief claim from this case, and the ensuing judgment does not purport to embrace that point." (*Ibid.*)[1]

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[1] As we also observed, the trial court had told counsel it intended to grant Mr. Fahs leave to amend the declaratory relief claim, which had not been pled with particularity, but his counsel then told the court " 'that there was no need to argue the

During the appeal of the judgment on the cross-complaint, litigation of the complaint in *Bonavida I* had continued.

On September 24, 2015, at a hearing on Mr. Bonavida's motion for summary adjudication of Mr. Fahs's affirmative defenses (including the defense based on section 6147), Mr. Bonavida stated: "There are two coexistent agreements through a certain period of time between myself and Mr. Fahs. There was certainly is [*sic*] no question in anybody's mind including Mr. Fahs' mind, that both existed at the same time . . . . So that's not a question, period." And, when Mr. Bonavida referred to the contingency agreement's provision that "there are no other agreements between the parties," the court said, "But there is another agreement between the parties," and Mr. Bonavida replied, "There is, absolutely." Mr. Bonavida later submitted a declaration to the same effect in his opposition to a motion by Mr. Fahs for summary adjudication.[2]

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demurrer to the [declaratory relief claim] because . . . I was voluntarily dismissing it. I pointed out that declaratory relief is not appropriate where one party has already filed a claim for breach of contract.' " (*Fahs v. Bonavida, supra,* B268415, pp. 15-16.)

[2] Mr. Bonavida's declaration stated that "[d]ue to Fahs' financial status, he could only afford to retain me for prosecution of the cross-complaint on contingency. Fahs also asked me if I could represent him as defense counsel against Marciano's lawsuit on contingency. I told him I would look into this and consider it. I subsequently contacted the California State Bar Ethics Hotline to discuss representation of Fahs as defense counsel on a contingency and I was informed that this was ethically problematic. Thus, I informed Fahs that I will not do so. On March 06, 2008, Fahs further retained me to represent

On June 28, 2016, the trial court overruled Mr. Bonavida's demurrer to Mr. Fahs's third amended answer to Mr. Bonavida's first amended complaint. Among other things, the court stated that Mr. Fahs's dismissal of the declaratory relief count in his cross-complaint in the Friedman lawsuit "did not operate as a . . . dismissal with prejudice which bars future action on the same subject matter . . . because the second and third causes of action [for breach of fiduciary duty were] based on the same primary right – whether the Contingency Fee Agreement was void or voidable on the grounds that [section 6147 was] violated and whether Bonavida was entitled to no more than a reasonable fee . . . ."

Trial in *Bonavida I* was set for April 24, 2017.

On March 24, 2017, Mr. Bonavida filed an ex parte application to file a second amended complaint.

On March 27, 2017, the trial court denied Mr. Bonavida's ex parte application. (The second amended complaint, among other things, would have removed factual allegations concerning the hourly fee agreement and would have added a cause of action for quantum meruit.)

Two days later, on March 29, 2017, Mr. Bonavida filed a request for dismissal of *Bonavida I* without prejudice.

2. This Lawsuit

On April 21, 2017, several weeks after dismissing *Bonavida I,* Mr. Bonavida filed *Bonavida II*, this lawsuit, seeking recovery under the contingency fee agreement and alleging causes of action for declaratory relief, breach of contract, and

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him as a Cross-Complainant in the Civil Action on a contingency basis."

quantum meruit. The complaint did not mention the hourly fee agreement.

Mr. Fahs demurred to the complaint, contending it was a sham pleading filed in bad faith; it sought enforcement of a contingency fee agreement that was void and had been voided under section 6147; and the quantum meruit claim was time-barred.

Mr. Bonavida's opposition asserted, among other things, that Mr. Fahs's voluntary dismissal of his declaratory relief claim in the Friedman lawsuit "operated *with* prejudice" and was "now *res judicata* in Bonavida's favor," precluding Mr. Fahs's arguments that the contingency fee agreement was void under section 6147.

On July 27, 2017, the trial court sustained Mr. Fahs's demurrer without leave to amend as to the causes of action for declaratory relief and quantum meruit. The court found declaratory relief was not available because Mr. Bonavida's claim pertained to past acts, and declaratory procedure operates prospectively, not merely to redress past wrongs. The cause of action for quantum meruit was time-barred by the two-year statute of limitation under Code of Civil Procedure section 339, subdivision 1, governing an action "upon a contract, obligation or liability not founded upon an instrument of writing." (A declaration from Mr. Bonavida in *Bonavida I* established that the final distribution to Mr. Fahs toward his $10 million judgment occurred on March 26, 2015, and *Bonavida II* was not filed until April 21, 2017.)

On Mr. Bonavida's breach of contract claim, the court described the sham pleading doctrine, and concluded: "It thus appears that [Mr. Bonavida] completely omitted mention of the

September 24, 2007 [hourly] fee agreement to avoid the application of [section 6147, subdivision (b)]."

The court granted leave to amend the breach of contract claim, stating Mr. Bonavida "must plead why the reference to the September 24, 2007 written fee agreement was omitted." (See *Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 344 (*Larson*) ["Plaintiffs . . . may avoid the effect of the sham pleading doctrine by alleging an explanation for the conflicts between the pleadings."].)

On August 28, 2017, Mr. Bonavida filed a first amended complaint for breach of contract. He added allegations that he was first engaged under the hourly fee agreement, but in contemplation of a "different legal strategy" (prosecuting a cross-complaint against Mr. Marciano), he and Mr. Fahs entered into the contingency fee agreement, under which Mr. Bonavida "was to be compensated for his future services in the *Marciano Litigation* on a contingent fee basis."[3] He characterized the contingency fee agreement as a "novation" that had "abrogated" the hourly fee agreement, and explained he had no reason to mention the hourly fee agreement because the integration clause in the contingency agreement said it was the entire agreement of the parties. This, he said, "extinguished all pre-existing agreements." Thus, he explained:

"In short, (i) by the time Bonavida filed his Complaint in the instant action [April 2017], he had become aware that he had been mistaken in previously claiming (at any time after March 6,

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[3] In fact, the contingency fee agreement did not cover all "future services." It covered Mr. Bonavida's representation of Mr. Fahs on the cross-complaint against Marciano.

2008) that amounts were owed to him under the Hourly Agreement, and (ii) Bonavida corrected that mistake by omitting such mistaken claims from his Complaint in the instant action."

The amended complaint also alleged that Mr. Fahs, after consulting with his counsel, "knowingly *paid* one or more invoices including charges under the Contingency Fee Agreement," thereby waiving any failure of that agreement to comply with section 6147. (This refers to the sanctions award invoice.) The amended complaint further alleged the facts surrounding the judgment in Mr. Bonavida's favor on the cross-complaint in the Friedman action and our affirmance of that judgment.
Mr. Bonavida alleged the trial court sustained his demurrer to Mr. Fahs's declaratory relief count (which had alleged the violation of section 6147 among other points) without leave to amend, and that all section 6147 issues were "now *res judicata* in favor of Bonavida, and are not subject to relitigation in this action." He omitted to tell the trial court we had concluded to the contrary in the appeal of that case that the trial court could not sustain a demurrer to the declaratory relief count because Mr. Fahs had already dismissed it, and the trial court had no occasion to rule on the nature of the dismissal. (*Fahs v. Bonavida, supra,* B268415.)

Mr. Fahs again demurred.

On November 16, 2017, the trial court sustained Mr. Fahs's demurrer to the breach of contract claim without leave to amend. The court stated:

"[Mr. Bonavida's] attempt to recharacterize the March 6, 2008 Contingency Fee Agreement as a novation which extinguished all preexisting agreements, including the Hourly

Agreement . . . constitutes a sham pleading to circumvent this Court's prior rulings in *Bonavida I*."

"The sham pleading doctrine applies to complaints filed in prior actions, such as *Bonavida I*, in which [Mr. Bonavida] consistently pled the existence of two separate retainer agreements – the Hourly Fee Agreement pertaining to Fahs' defense, and the Contingency Fee Agreement pertaining to Fahs' cross-complaint, in the underlying *Marciano* lawsuit." (Fn. omitted.) The court stated that Mr. Bonavida's "new position . . . would violate Business & Professions Code [section 6068] and Rules of Professional Conduct . . . ." (An attorney may not "seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." (§ 6068, subd. (d).)) And, the new position "directly contradicts [Mr. Fahs's] election to void the Contingency Fee Agreement under Business & Professions Code § 6147(b) because it did not comply with [section] 6147(a)(3)."

At the hearing, the court further explained that the facts about the two separate fee agreements, "which are affirmed by way of declaration under penalty of perjury, are facts that are historical facts. They are not going to change. This is not a change of legal theory. These are facts that Mr. Bonavida swore to in a declaration under penalty of perjury." The court read Mr. Bonavida's declaration (see fn. 2, *ante*) into the record. The court also observed that the argument there could be a "novation" based on the contingency fee agreement "runs so counter to [section] 6147, which is all about protection of the client."

The trial court further stated that it had found, in *Bonavida I*, that Mr. Fahs's dismissal of the declaratory relief claim "did not operate as a retraxit because the second and third causes of action were based on the same primary right – whether

the contingency fee agreement was void or voidable and whether Bonavida was entitled to no more than a reasonable fee for work for which he had not been previously paid." The court observed that Mr. Bonavida "is estopped from asserting the same arguments that the court previously rejected."

Judgment was entered on November 29, 2017, and Mr. Bonavida filed a timely appeal.[4]

DISCUSSION

1. The Standard of Review and Preliminary Points

A demurrer tests the legal sufficiency of the complaint. We review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action. For purposes of review, we accept as true all material facts alleged in the complaint, but not contentions, deductions or conclusions of fact or law. We also consider matters that may be judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "[C]ourts may—and, indeed, must—disregard allegations that are contrary to judicially noticed facts and documents." (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1338.)

When a demurrer is sustained without leave to amend, "we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm." (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.) Plaintiff has the burden to show a reasonable possibility the complaint can be amended to state a cause of action. (*Ibid.*)

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[4] We grant Mr. Bonavida's unopposed request for judicial notice of documents from court records in proceedings related to this case.

When an amended pleading has been filed, courts generally disregard the original pleading. (*Larson, supra,* 230 Cal.App.4th at p. 343.) There is an exception to this rule – the sham pleading doctrine – when an amended complaint tries to avoid defects in an earlier complaint by ignoring them. (*Ibid.*) A plaintiff may not amend a complaint " ' "to omit harmful allegations, without explanation, from previous complaints to avoid attacks raised in demurrers." ' " (*Id.* at p. 344.) Likewise, the plaintiff " 'may not plead facts that contradict the facts or positions that the plaintiff pleaded in earlier actions or suppress facts that prove the pleaded facts false.' " (*Ibid.*, italics omitted.)

" 'The sham pleading doctrine is not " 'intended to prevent honest complainants from correcting erroneous allegations . . . or to prevent correction of ambiguous facts.' " [Citation.] Instead, it is intended to enable courts " 'to prevent an abuse of process.' " ' " (*Larson, supra,* 230 Cal.App.4th at p. 344.) "Plaintiffs therefore may avoid the effect of the sham pleading doctrine by alleging an explanation for the conflicts between the pleadings." (*Ibid.*)

Mr. Bonavida offers eight separately headed arguments, many of them with multiple sub-arguments, challenging the court's rulings sustaining Mr. Fahs's demurrers to his three causes of action. We need not delve into many of them. For one thing, Mr. Bonavida's opening brief does not present a full and fair recital of the trial court proceedings, thereby arguably forfeiting several of his convoluted contentions of error. He also repeatedly asserts as fact that Mr. Fahs's declaratory relief claim was dismissed with prejudice, despite our explicit statement in *Fahs v. Bonavida* that the trial court had no occasion to rule on the nature of that dismissal. A few fundamental principles of law

are sufficient to demonstrate the absence of any merit in Mr. Bonavida's appeal.

2. The Breach of Contract Claim

a. The sham pleading rule

There was no error in the trial court's conclusion that the sham pleading doctrine applied to Mr. Bonavida's first amended complaint for breach of contract. Mr. Bonavida omitted from his initial complaint in *Bonavida II* significant factual allegations he made in *Bonavida I*: that Mr. Fahs retained him under the hourly agreement for defense of the *Marciano* complaint, and that he "successfully defeated" that lawsuit. Indeed, his *Bonavida I* complaint attached an invoice (the sanctions award invoice) showing that in 2012, he billed Mr. Fahs for hourly work under the "fee agreement covering defense" of the *Marciano* complaint.

The complaint in *Bonavida II* omitted these factual allegations. They did not disappear because they were " 'inadvertent misstatements of facts.' " (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945 (*Berman*).) They disappeared because they would put the lie to Mr. Bonavida's allegations in *Bonavida II* that he is entitled to be compensated under the contingency fee agreement.

Here, the omitted allegations about the hourly agreement "were clearly material to the issue of whether [Mr. Bonavida] had a viable claim" (*Berman, supra*, 56 Cal.App.4th at p. 949) for breach of the contingency fee agreement. As mentioned earlier, under section 6147, a contingency fee agreement must include a "statement as to what extent, if any, the client could be required to pay any compensation to the attorney for related matters that arise out of their relationship not covered by their contingency fee

contract." (§ 6147, subd. (a)(3).) Failure to include such a statement "renders the agreement voidable at the option of the plaintiff, and the attorney shall thereupon be entitled to collect a reasonable fee." (§ 6147, subd. (b).)

The Bonavida-Fahs contingency fee agreement contained no statement concerning Mr. Fahs's obligation to pay compensation to Mr. Bonavida for the related matter of the defense of the *Marciano* litigation. That means the agreement was voidable at the option of Mr. Fahs. It does not matter that Mr. Fahs knew about the hourly agreement – the information still must be in the contingency fee agreement. (*Fergus v. Songer* (2007) 150 Cal.App.4th 552, 572 ["Irrespective of whether the client has knowledge of the information required to be in the contingency fee agreement, the agreement is voidable if it fails to set forth that information in writing."].) By initially omitting his allegations about the hourly fee agreement, Mr. Bonavida removed historical facts to which he swore under penalty of perjury in *Bonavida I*, in an attempt to state a cause of action in *Bonavida II*. That is exactly what the sham pleading doctrine prohibits.

Mr. Bonavida protests, pointing out that he provided an explanation of the omission when he amended the *Bonavida II* complaint. (*Larson, supra,* 230 Cal.App.4th at p. 344.) He explained that he changed his legal theory and legal conclusions, and this rendered the earlier-pleaded facts – that there were two fee agreements – immaterial. The existence of the hourly fee agreement is immaterial, he says, because under his new legal theory (novation), the hourly agreement was extinguished by the contingency fee agreement (which stated it was the "entire

agreement" of the parties and no agreement made before it would be binding on the parties).

Mr. Bonavida is wrong on the facts and the law.

First, the two retainer agreements covered different subject matters – the first concerning defense of the Marciano lawsuit, and the second concerning prosecution of a cross-complaint. Absent an explicit statement to the contrary, we necessarily infer that the integration clause covers only the subject matter of the agreement in which it appears, not some other subject matter in some other agreement. That subject matter is prosecution of a cross-complaint, not defense of a complaint.

Second, as Mr. Bonavida himself established, he was advised it would be unethical to defend a complaint based on a contingency fee arrangement, and he expressly refused to do so ("I informed Fahs that I will not do so"). (See fn. 2, *ante*.) It is clear both parties were well aware two different agreements existed contemporaneously.

Third, there cannot be a novation – "the substitution of a new obligation for an existing one" (Civ. Code, § 1530) – unless the parties intended to extinguish the earlier obligation. (§ 1531 ["Novation is made: [¶] 1. By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation."].) They did not so intend, as is plain from the scope of each agreement, and from Mr. Bonavida's own prior statements under penalty of perjury, and from Mr. Bonavida's allegation he did not "become aware" he was "mistaken" in billing Mr. Fahs under the first retainer agreement until nine years after the fact. The absence of the intent necessary for a novation, at the time of the novation, is clear.

In other words, even Mr. Bonavida's legal theory is a sham. We can see no error in the trial court's ruling that the sham pleading doctrine applies.

b. Section 6147

Mr. Bonavida proffers a second "major pillar" of error in the trial court's dismissal of *Bonavida II*. Observing that section 6147 "is key to this appeal," Mr. Bonavida contends Mr. Fahs is precluded from relying on section 6147 as voiding the contingency fee agreement, because Mr. Fahs's voluntary dismissal of the declaratory relief count of his cross-complaint in the Friedman case was a " 'final judgment on the merits' " of that claim. The trial court concluded otherwise, and we agree.

To review, in a ruling in *Bonavida I,* the trial court found Mr. Fahs's dismissal "did not operate as a . . . dismissal with prejudice which bars future action on the same subject matter . . . because the second and third causes of action [for breach of fiduciary duty were] based on the same primary right – whether the Contingency Fee Agreement was void or voidable on the grounds that [section 6147 was] violated . . . ." The court recited that ruling in its order dismissing this case.

Mr. Bonavida contends the trial court was mistaken in concluding Mr. Fahs's declaratory relief count was based on the same primary right as the breach of fiduciary duty counts, but fails to cite any authority that supports his claim of error. Instead, he characterizes the dismissal of that count as a " 'final judgment on the merits,' " and simply states – over and over – that the declaratory relief claim is "distinct" and "different" from the breach of fiduciary duty claims, without explaining why that is so. It is not so.

Each count in the Fahs cross-complaint incorporated the factual allegations in the first 63 paragraphs. Those included, for example, paragraph 22: "The Contingency Fee Agreement does not provide the means by which Bonavida would allocate the time that he would spend defending Fahs against Marciano's complaint, for which Bonavida would be paid hourly; and the time Bonavida would spend prosecuting the cross-complaint, which was subject to the Contingency Fee Agreement." The first count (declaratory relief) alleged in paragraph 66 that the contingency fee agreement was "void or voidable" on the ground that section 6147 was violated "and makes such Agreement voidable at the option of Fahs who hereby does declare it to be void." The declaratory relief count also alleged (paragraph 67) the contingency fee agreement was void or voidable on the basis of unconscionability.

The second count (breach of fiduciary duty) similarly alleged (paragraph 75) that the contingency fee agreement "is and has been void at all relevant times [and] should not be enforceable against Fahs. To the extent it is enforceable, Bonavida should be permitted only to obtain a reasonable recovery . . . based upon the facts of this case and under the terms for such a fee as expressed in the Contingency Agreement and California law." (As Mr. Fahs points out, section 6147 entitles the attorney to a "reasonable fee" when a contingency agreement is voidable.) Further, the prayer for relief in the cross-complaint demanded judgment on *each* count "[f]or cancellation/voiding of the Contingency Fee Agreement."

In short, it is plain the cross-complaint alleged a single "primary right" – to be free of any obligation to pay legal fees under a contingency fee agreement that is void. (See *Crowley v.*

Katleman (1994) 8 Cal.4th 666, 681 [a "primary right" is "simply the plaintiff's right to be free from the particular injury suffered"; "[i]t must therefore be distinguished from the *legal theory* on which liability for that injury is premised: 'Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief.' " (*Id*. at pp. 681-682.)

Thus, we see no error in the trial court's conclusion that the voluntary dismissal of the declaratory relief count in Mr. Fahs's cross-complaint did not operate as a dismissal with prejudice barring future action on the same subject matter. Plainly, "action on the same subject matter" – the same primary right – continued in that very lawsuit, until the trial court entered summary judgment against Mr. Fahs on the breach of fiduciary duty counts of his cross-complaint. Only then was a final judgment entered on Mr. Fahs's cross-complaint. And, as Mr. Bonavida himself observed in his brief, that final judgment was *not* on the merits; it was based on the statute of limitation. (*Finnie v. District No. 1 – Pacific Coast Dist. etc. Assn.* (1992) 9 Cal.App.4th 1311, 1319 [dismissal on statute of limitation ground "is not on the merits and does not have res judicata effect"].)

Accordingly, we can think of no reason why the final judgment against Mr. Fahs on his cross-complaint should or could operate to prevent him from defending against Mr. Bonavida's action on the ground the contingency fee agreement was void, under section 6147 or for any other reason. There was no error in the trial court's analysis.

c. Other contentions

Mr. Bonavida makes numerous other arguments about why he thinks he has stated a claim for breach of contract despite the sham pleading rule. For example:

Mr. Bonavida says Mr. Fahs cannot rely on section 6147 to defeat enforcement of the contingency fee agreement because Mr. Fahs did not file a cross-complaint on the basis of section 6147 in *Bonavida I* or in this case. This contention is forfeited as it was not raised in the trial court. In any event, we see no legal basis for requiring a cross-complaint. Mr. Fahs asserted the contingency fee agreement was void as an affirmative defense in *Bonavida I,* and his demurrer in this case raised the same issue. That was enough.

Mr. Bonavida next contends the contingency fee agreement was only voidable, not void, and Mr. Fahs could only void it by an action for rescission, including restoring everything of value he received. Mr. Bonavida cites no authority for any such requirements in the context of section 6147, and we reject the notion. There is authority directly to the contrary in the context of Business and Professions Code section 6148. (Section 6148 governs fee agreements not coming within section 6147, and has a similar provision making a noncompliant agreement voidable at the client's option. (§ 6148, subd. (c).)) See *Leighton v. Forster* (2017) 8 Cal.App.5th 467, 487 ("Appellant cites no authority for grafting rescission requirements onto section 6148."); *id.* at p. 488 (client "implicitly voided the [unsigned engagement letter] by refusing to pay the [invoice]"). Here, Mr. Fahs plainly opted to void the agreement in multiple court filings, including his cross-complaint in the Friedman lawsuit, his answer in *Bonavida I*, and his opposition to Mr. Bonavida's motion for summary

judgment on Mr. Fahs's affirmative defenses in *Bonavida I*. Nothing more was required.

Mr. Bonavida also argues at length that, as he alleged in his amended complaint, Mr. Fahs waived his right to void the contingency fee agreement by paying an invoice (the sanctions award invoice) that included charges ($3,164) for work under the contingency fee agreement. This is so, he says, because Mr. Fahs consulted his counsel before paying the invoice, and so it may be inferred that counsel informed him of section 6147.
Mr. Bonavida cites no authority to support that proposition, and does not bother to cite to the record either. The trial court rejected the notion, stating that "I haven't heard [of] a case that allows for an implied waiver of [section] 6147. To say that because a lawyer said 'pay your bill' means that there's a waiver, I just – I won't go there."

Neither will we. (See *In re Campbell* (2017) 11 Cal.App.5th 742, 756, italics omitted ["An 'implied waiver' is '[a] waiver evidenced by a party's decisive, unequivocal conduct reasonably inferring the intent to waive.' "].) Mr. Bonavida offers no facts he could plead to meet that standard.

3. The Declaratory Relief and Quantum Meruit Claims

As mentioned earlier, in its ruling on Mr. Fahs's demurrer to the initial complaint in *Bonavida II,* the trial court sustained, without leave to amend, Mr. Bonavida's claims for declaratory relief and quantum meruit, the former because declaratory relief is not available merely to redress past wrongs, and the latter on statute of limitation grounds. (See pt. 2 of the Facts, *ante,* at p. 9.) Mr. Bonavida's opening brief says nothing about the declaratory relief claim. As to his quantum meruit claim, he asserts that the statute of limitation has not yet begun to run

(based on his erroneous claims about the necessity of rescission and his own unsupported interpretation of section 6147). He cites no authority, and the claim has no merit. The statute (Code Civ. Proc., § 339, subd. 1) began to run, as the trial court found based on Mr. Bonavida's own declaration, on March 26, 2015, and *Bonavida II* was filed more than two years later, on April 21, 2017.

CONCLUSION

" 'It would unduly lengthen this opinion' to say more than [Mr. Bonavida's] other contentions are insubstantial and do not alter our analysis." (*Baker-Smith v. Skolnick* (2019) 37 Cal.App.5th 340, 348.) Nothing operates to change the two determinative points: The trial court properly applied the sham pleading doctrine, and properly found that section 6147 applies to this case. The result is a contingency fee agreement that is void at Mr. Fahs's option, because it failed to contain the necessary statement concerning the client's obligation to pay compensation under the hourly agreement. (§ 6147, subd. (a)(3).) Mr. Fahs long ago made clear his exercise of the right to void the agreement, leaving Mr. Bonavida with the right "to collect a reasonable fee." (§ 6147, subd. (b).) For some unknown reason, Mr. Bonavida dismissed *Bonavida I* and did not file *Bonavida II* until after the statute of limitation for his quantum meruit claim had expired. That is the end of the matter. As the trial court observed, "the remedy should have been quantum meruit," but "the court's hands are tied," and "[i]t's really unfortunate."

Mr. Bonavida has failed to demonstrate any legal error in the trial court's orders sustaining Mr. Fahs's demurrers to his complaint. Nor has he demonstrated how he could cure the

defects. The court properly sustained the demurrers without leave to amend.

DISPOSITION

The judgment is affirmed. Mr. Fahs shall recover his costs on appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

STRATTON, J.