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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CRISTINE FOXEN,

Plaintiff and Appellant,

v.

JOHN CARPENTER et al.,

Defendants and Respondents.

B342633

(Los Angeles County  
Super. Ct. No.  
23SMCV00414)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alison MacKenzie, Judge. Affirmed.

The Business Legal Group and Russell M. Frandsen for Plaintiff and Appellant.

Nemecek & Cole, Jon D. Robinson, Mark Schaeffer, and Marshall R. Cole for Defendants and Respondents.

In 2015, plaintiff and appellant Cristine Foxen (Foxen) sued the attorneys who represented her in a personal injury case after the matter settled: defendants and respondents Carpenter, Zuckerman & Rowley LLP (Carpenter Zuckerman), John Carpenter (Carpenter), and Paul Zuckerman (collectively, defendants).<sup>1</sup> She alleged an initial proposed disbursement of settlement funds revealed defendants improperly and fraudulently paid themselves and other litigation support providers money that should have been paid to her. Foxen lost because her claims were barred by the statute of limitations. In November 2021, defendants furnished a final accounting to Foxen detailing the disposition of all settlement funds. Foxen then sued again, and the bulk of the lawsuit restated the same claims advanced in her earlier 2015 lawsuit. The only salient difference was Foxen's attachment of the final accounting to the complaint and the addition of nonspecific complaints (on information and belief) about "some or all of the other fees" in the initial proposed disbursement and the 2021 final accounting. The trial court found, in granting defendants' demurrer, that this second lawsuit was time-barred too. We now consider whether this was error.

## I. BACKGROUND

### A. *Defendants' Representation of Foxen, As Alleged*

Foxen was injured in a car accident in 2009. She retained defendants to represent her in a personal injury action. Defendants also represented her husband Michael in a separate case alleging loss of consortium from the accident.

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<sup>1</sup> Nicholas Rowley was also named as a defendant, but he is not a party to this appeal.

Under the terms of defendants' contingent fee representation agreement, defendants would receive 40% of the gross recovery if Foxen received damages after the filing of a lawsuit. The fee agreement further provided that "[c]osts and expenses" for certain items would be advanced by defendants at their discretion, and that defendants would be reimbursed for "[c]osts . . . upon recovery and in addition to attorney fees."

During the course of the litigation, defendants advised Foxen to sign a personal injury lien authorizing defendants to advance fees to Excel Diagnostic Services, Inc. (Excel Diagnostic) that Foxen would later be obliged to pay. Foxen signed the agreement.

Before trial on the personal injury matter, Foxen received a \$5 million settlement offer. On defendants' advice, Foxen rejected the offer in order to pursue a larger verdict at trial. The trial jury, however, awarded her only \$2,300,000. The parties then settled Foxen's case and Michael's case for a total of \$3 million, which Foxen and Michael understood, based on Carpenter's statements to them during negotiations, was comprised of \$2,300,000 for Foxen's verdict and \$700,000 for Michael's loss of consortium claim. The settlement agreement itself, however, referenced only the total \$3 million amount without apportioning it in any way.

Defendants received settlement checks in February 2011. They paid themselves a total of \$1,200,000 in attorney fees. Foxen did not learn about this deduction from the settlement until "after April 1, 2011." Defendants prepared an "Initial Proposed Disbursement," which listed "Cristine Foxen" as the client. In addition to listing the amount of attorney fees defendants paid to themselves, the proposed disbursement

identified sums to be paid to a variety of third parties, including focus groups, experts, and medical professionals.

Michael initiated non-binding arbitration proceedings against defendants regarding the fee dispute and received a decision in his favor. In February 2014, Carpenter Zuckerman filed suit against Michael for declaratory relief, seeking a declaration that Michael was not owed any additional money from the settlement. Michael cross-complained, alleging defendants unilaterally paid themselves \$1,200,000 in attorney fees, \$280,000 of which were fees for representing Michael. Michael also alleged various charges listed on the initial disbursement were fraudulent and intended to mislead Michael and Foxen. He specifically alleged charges related to “Finlay Boag, [Excel Diagnostic,] and Meridian Resource Company” were fraudulent and improper. Michael eventually dismissed his cross-complaint after settling with defendants.

#### *B. Foxen’s First Lawsuit*

Less than two weeks after Michael dismissed his cross-complaint, on March 25, 2015, Foxen sued defendants and similarly alleged they unilaterally and improperly paid themselves \$1,200,000 in attorney fees. Defendants demurred, and Foxen filed an amended complaint.

The amended complaint alleged causes of action for declaratory relief, breach of fiduciary duty, breach of contract based on the fee agreement, breach of contract based on the personal injury lien, unfair competition and unfair and deceptive acts and practices, fraud, conversion, breach of the implied covenant of good faith and fair dealing, money had and received, and a claim for an accounting. The amended complaint alleged

defendants improperly paid themselves \$1,195,500 in attorney fees and (like Michael's earlier cross-complaint) alleged the initial proposed distribution included fraudulent charges defendant paid to co-conspirators including "at a minimum Excel Diagnostic . . . , Meridian Resources, and Finlay Boag."

The complaint specifically identified the fees listed for two expert witnesses as problematic, alleging they were higher than the fees the experts actually charged. The complaint also alleged defendants wrongfully induced Foxen to sign a personal injury lien agreement with Excel Diagnostic and defendants, which defendants used to charge her excessive amounts for services. And the amended complaint alleged defendants attempted to charge Foxen a legal fee for services that a different law firm, Finlay Boag, performed for defendants.

The amended complaint alleged Foxen did not discover facts suggesting the fraudulent nature of defendants' conduct until certain dates in 2011. The complaint attached the initial proposed distribution and alleged it revealed other fraudulent charges that were not specified in the complaint.

Defendants demurred to the amended complaint, arguing all of Foxen's causes of action were barred by the statute of limitations. The trial court agreed and sustained the demurrer. Foxen appealed and a different division of this court affirmed, concluding the statute of limitations governing legal malpractice suits applied to Foxen's claims for breach of contract, declaratory relief, money had and received, breach of the implied covenant of good faith and fair dealing, for an accounting, and for unfair business practices. (*Foxen v. Carpenter* (2016) 6 Cal.App.5th 284, 287, 291-293, 296.) As to the fraud and conversion claims, the court found that even assuming the standard three-year statute

of limitations applied, Foxen's claims were still time barred because the operative complaint expressly alleged she discovered the wrongful charges and fraudulent withholding no later than December 2011. (*Id.* at 293-294.)

*C. The Current Lawsuit*

Defendants provided Foxen with a final accounting regarding her personal injury settlement in November 2021. The final accounting asserted it was regarding the personal injury settlement of both "Christine [sic] and Michael Foxen." It listed a variety of payments to "vendors." Many, but not all, of the vendors listed on the final accounting were identified on the initial proposed distribution, though the amounts they were paid did not always match the amounts in the initial proposed distribution. Additionally, most of the line items reflected they were paid prior to the filing of Foxen's prior complaint in 2015.<sup>2</sup> The final accounting also listed a number of reimbursements to defendants for advanced costs and expenses, including some dated 2017 and 2020, that did not have direct correlates in the proposed distribution.

Foxen filed a petition for arbitration with the Los Angeles County Bar Association Client Mediation and Arbitration Services in November 2022, which was denied the following month. She filed the complaint in this action in January 2023.

The general allegations in the operative complaint are almost entirely cut and pasted from Foxen's earlier 2015

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<sup>2</sup> An exception was a 2017 payment of \$53,260.39 to "Bucky Boy Group," that did not have an identifiable corresponding entry on the proposed distribution.

amended complaint. There are factual allegations in the operative complaint concerning allegedly wrongful payments defendants made to themselves in 2011 that are repeated word-for-word from the earlier complaint. There are complaints about costs and expenses paid to Excel Diagnostic, Meridian Resources, and Finlay Boag that are (other than a paragraph number) lifted word-for-word from the earlier complaint. There are complaints about other “fraudulent” charges in the initial proposed disbursement that are lifted from the 2015 pleading too.

The operative complaint’s first cause of action for declaratory relief is mostly more of the same. In terms substantively identical to the 2015 complaint, the operative complaint seeks to void the attorney fee agreement based on Foxen’s understanding of the amount of the gross recovery she would receive; in the alternative, Foxen claims she is entitled to \$1,380,000 that has not been paid to her under the agreement and Foxen alleges defendants “wrongfully paid themselves” \$1,195,000. The only pertinent difference between the first cause of action as alleged in both complaints comes in two paragraphs. Foxen alleges the following in paragraph 31: “On November 17, 2021, [defendants] rendered yet another fraudulent accounting to [Foxen] (‘2021 Accounting’) (attached as Exhibit D). [Foxen] has demanded from [defendants] a full accounting for such alleged fees, costs and bills, but [defendants] have refused to render such accounting. Accordingly, [Foxen] believes and on information and belief alleges that some or all of the other fees, costs and bills set forth in the ‘Initial Proposed Disbursement’ and in the 2021 Accounting are similarly false, fraudulent, improper, wrong, and deceitful.” In the following paragraph, alleging Foxen’s completion of fee arbitration, she explains the arbitrator ruled

against her because her 2015 complaint had been found time-barred and she alleges: “However, with the present complaint, the statute of limitations is no bar because [defendants] rendered their ‘final’ accounting to [Foxen] on November 17, 2021, and [Foxen] filed [her] application for mandatory arbitration on November 15, 2022, within one year of the date that [defendants] rendered their ‘final’ accounting.”

The other nine causes of action either make no reference to defendants’ 2021 final accounting or include similar non-specific allegations of impropriety regarding “some or all” of the other fees and costs.<sup>3</sup> In some instances, these are combined with allegations that the final accounting, like the initial disbursement, contains “falsehoods, misstatements, lies, obfuscations, half-truths and omissions,” and “improper, non-existent, illegal, hidden, secret, [and] bogus” charges. The complaint, however, alleges no facts in connection with these allegations other than the asserted facts concerning Excel Diagnostic, Meridian Resources, and Finlay Boag that were identified in Foxen’s 2015 complaint.

*D. The Trial Court Sustains Defendants’ Demurrer*

*1. The demurrer and opposition*

Defendants demurred to the complaint, arguing in part that all of Foxen’s causes of action were barred by the statute of

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<sup>3</sup> Some of the operative complaint’s other causes of action don’t even acknowledge the existence of the 2021 accounting that defendants provided. The second cause of action for breach of fiduciary duty, for instance, alleges defendants “refus[ed] to render an accounting to [Foxen] even after repeated demands by [Foxen] for an accounting.”



limitations. Defendants argued the complaint could not be deemed timely because she alleged she learned of the purportedly improper payments in 2011, did not file her first action until March 2015, and did not file this action until 2023. They also argued their attorney-client relationship with Foxen broke down and effectively terminated for purposes of the statute of limitations no later than 2011. Defendants further asserted the forwarding of an accounting of funds paid out years earlier, which reiterated defendants' position, was no more than a ministerial act that could not toll the statute of limitations. Defendants additionally argued that the doctrine of issue preclusion barred all the claims in Foxen's lawsuit.<sup>4</sup>

Foxen opposed the demurrer, arguing the complaint was not time-barred because timeliness was to be measured from the date defendants transmitted the final accounting and because the statute of limitations was extended by Foxen's attempt to have the dispute arbitrated. Foxen further argued the preparation and submission of the 2021 final accounting was an act done in performance of professional services and as part of its attorney-client relationship with Foxen. Foxen contended her complaint did not suggest the 2021 final accounting was simply a repeat or regurgitation of the proposed initial disbursement, and she argued defendants did not describe how or why the final accounting simply affirmed or restated any earlier information.

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<sup>4</sup> In connection with the demurrer, defendants asked the court to take judicial notice of various documents from prior legal proceedings including Michael's cross-complaint against defendants and documents from Foxen's first action against defendants.

## 2. *The trial court's ruling*

The trial court sustained the demurrer without leave to amend.<sup>5</sup> The court recognized the operative complaint was “nearly identical in substance to the First Amended Complaint filed in the 2015 malpractice action” and found the operative complaint has no allegations of wrongdoing related to the 2021 final accounting other than alleged wrongdoing that Foxen knew of at the time of the 2015 malpractice case. The court found the only allegation regarding the final accounting was a general allegation on information and belief that some or all of the fees, costs, and bills set forth in both the initial proposed disbursement and the final accounting were fraudulent or improper. As a result, the court concluded Foxen was alleging the final accounting was improper merely for the same reasons asserted in her prior complaint. The court rejected Foxen’s claim that the similarities between the two accountings was a factual question because both documents were attached to the complaint. The court also concluded Foxen failed to carry her burden of showing she could cure the operative complaint’s defects by further amendment.

## II. DISCUSSION

The trial court’s ruling was correct, and it does not take long to explain why. Foxen’s 2015 lawsuit was dismissed on

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<sup>5</sup> In ruling on the demurrer, the trial court largely granted defendants’ request for judicial notice. The court also later granted defendants’ motion for Code of Civil Procedure section 128.7 sanctions for filing this lawsuit, which Foxen separately appealed, in case number B332334. That appeal was dismissed when Foxen failed to perfect it.

statute of limitations grounds and that dismissal was affirmed on appeal. When defendants subsequently provided Foxen with the final accounting in 2021, Foxen filed nearly the same complaint that had been dismissed earlier as time-barred. Naturally, if Foxen's 2015 complaint was barred by the statute of limitations, the same complaint filed eight years later would be time-barred too. Thus, the only question is whether the operative complaint adequately presents claims concerning the 2021 final accounting that are different from the claims raised in her earlier suit and thereby avoid the statute of limitations bar.

It does not. The only salient differences between the two pleadings are the deletion of some paragraphs (some reciting Foxen became aware of, or suspected, defendants' wrongdoing in 2011) and the addition of conclusory assertions, often on "information and belief," that "some or all of" the fees and charges outlined in the final accounting are improper. There are no facts pleaded concerning the 2021 final accounting, just strings of adjectives and nouns that are contentions and conclusions of law we disregard (e.g., "some or all of the other fees, costs and bills set forth in the 'Initial Proposed Disbursement' and in the 2021 Accounting are similarly false, fraudulent, improper, wrong, and deceitful"). (*County of Santa Clara v. Superior Court* (2023) 14 Cal.5th 1034, 1041 ["we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law"]; *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1100 [same]; see also *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 808 ["In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to 'show diligence'; 'conclusory allegations will not

withstand demurrer”].) Moreover, even if these conclusory assertions were sufficient to merit consideration, they are coupled only with facts that reveal the predicate for the claims is the same predicate that was advanced—and failed—in Foxen’s earlier lawsuit.<sup>6</sup> In this way, the operative complaint reveals on its face that Foxen knew of the challenged improper charges and fees detailed on the final accounting long ago and any causes of action contesting those charges and fees is well beyond the statute of limitations.

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<sup>6</sup> This is a representative example: “Th[e] ‘Initial Proposed Disbursement’ and the 2021 Accounting contained falsehoods, misstatements, lies, obfuscations, deceits, half-truths and omissions that [defendants] intentionally, willfully, fraudulently, wrongfully and deceitfully intended to mislead [Foxen] . . . as to the amount of legitimate costs and expenses incurred in the lawsuit and as to the amount to be disbursed to [Foxen] from the \$2,300,000 Settlement. In particular, [defendants] knew that the charges related to Finlay Boag, [Excel Diagnostic] and Meridian Resource Company were false, fraudulent, improper, wrong, and deceitful. [Foxen] has demanded from [defendants] a full accounting for such alleged fees, costs and bills, but [defendants] have refused to render such accounting. Accordingly, [Foxen] believes and on information and belief alleges that some or all of the other fees, costs and bills set forth in the ‘Initial Proposed Disbursement’ and the 2021 Accounting are similarly false, fraudulent, improper, wrong, and deceitful.”

DISPOSITION

The judgment is affirmed. Defendants are awarded costs on appeal.

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BAKER, J.

We concur:

HOFFSTADT, P. J.

KUMAR, J.\*

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\* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.