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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

DANE E. NIELSEN, Plaintiff and Appellant, v. ADAM STEWART et al., Defendants and Respondents.	C082925 (Super. Ct. No. STK-CV-UF-2016-0004040)

Plaintiff Dane Nielsen, representing himself in both the trial and appellate courts, appeals after the trial court sustained defendants' demurrer on statute of limitations grounds and dismissed his legal malpractice case. We find that all of Nielsen's claims are barred by the four-year statute of limitations of Code of Civil Procedure section

340.6, subdivision (a)[1] because none fall within the fraud exception and no tolling provisions apply. Accordingly, we affirm.

BACKGROUND

On April 26, 2016, Nielsen filed a complaint against defendants: law firm Moorad, Clark & Stewart (the law firm) and attorneys Adam Stewart and Albert Clark. The complaint alleged that on or about April 30, 2003, Nielsen retained the law firm to represent him in a workers' compensation claim and a Labor Code section 132, subdivision (a) discrimination claim against the Pine Mountain Lake Association (PMLA). Stewart and Clark were partners in the law firm. Unbeknownst to Nielsen, Clark was a member of PMLA.

The complaint was styled as three causes of action: malpractice, fraud, and representation of adverse interests in violation of rule 3-300 of the California Rules of Professional Conduct. The malpractice and fraud claims had identical allegations. The gist of these claims was that defendants "failed to exercise reasonable care and skill" in performing legal services for Nielsen and "failed to properly draft the appropriate pleadings concerning the Labor Code section 132a action resulting in dismissal of that action." The complaint further alleged that the workers' compensation appeals judge stated defendants had failed to exercise care in drafting the pleadings and had a conflict of interest. Based on these statements and those of counsel for both parties, Nielsen believed he had lost a meritorious claim for compensation.

The third cause of action had the same allegations, but added: "The relationship to PINE MOUNTAIN LAKE ASSOCIATION was not disclosed to plaintiff at the time of representation. This is a direct violation of Rule 3-300(B) and plaintiff suffered injuries directly and proximately as previously stated and stated subsequently herein."

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[1] Undesignated statutory references are to the Code of Civil Procedure.

Defendants demurred on the bases that the complaint failed to state a cause of action and that it was barred by the statute of limitations of section 340.6, subdivision (a). In support of the demurrer, defendants requested judicial notice of various documents filed in the workers' compensation case. These documents included the petition for the Labor Code section 132, subdivision (a) claim, filed by Clark on September 23, 2003, and two substitutions of attorney for plaintiff. In the first, filed June 30, 2006, Nielsen substituted himself in place of the law firm. A month and a half later he substituted in Stephen Mackey as counsel.

Nielsen did not file an opposition to the demurrer.

After the parties argued the matter, the trial court sustained the demurrer without leave to amend. Nielsen appeals.[2]

DISCUSSION

Both parties have moved to strike portions of the other party's brief, contending the briefs contain facts that are not in the record on appeal and are false. "A reviewing court must accept and is bound by the record before it [citations], cannot properly consider matters not in the record [citations], and will disregard statements of alleged facts in the briefs on appeal which are not contained in the record." (*Weller v. Chavarria* (1965) 233 Cal.App.2d 234, 246; see Cal. Rules of Court, rule 8.204(a)(1)(C).) We deny both motions to strike, but disregard any factual assertions based on information not properly in the record on appeal.

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[2] Although not included in the record on appeal, the trial court did enter a judgment of dismissal. We take judicial notice of the judgment and the notice of its entry. (Evid. Code, § 452, subd. (d).) Nielsen's notice of appeal, filed after entry of judgment, states the appeal is from the judgment of dismissal, but gives the date of the order sustaining the demurrer, which is a nonappealable order. We will liberally construe the notice of appeal to apply to the judgment of dismissal as Nielsen clearly intended to appeal from the judgment and defendants ask us to do so. (See *Gu v. BMW of North America, LLC* (2005) 132 Cal.App.4th 195, 202-203)

"When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied factual allegations. [Citation.] Courts must also consider judicially noticed matters. [Citation.] In addition, we give the complaint a reasonable interpretation, and read it in context. [Citation.] If the trial court has sustained the demurrer, we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.]" (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

"In order to prevail on appeal from an order sustaining a demurrer, the appellant must affirmatively demonstrate error. Specifically, the appellant must show that the facts pleaded are sufficient to establish every element of a cause of action and overcome all legal grounds on which the trial court sustained the demurrer. [Citation.] We will affirm the ruling if there is any ground on which the demurrer could have been properly sustained. [Citation.]" (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751-752.)

The statute of limitations for legal malpractice is set forth in section 340.6, subdivision (a), which provides in 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*." (Italics added.)

The time bar of section 340.6, subdivision (a) "applies to claims whose merits necessarily depend on proof that an attorney violated a professional obligation in the

course of providing professional services. In this context, a 'professional obligation' is an obligation that an attorney has by virtue of being an attorney, such as fiduciary obligations, the obligation to perform competently, the obligation to perform the services contemplated in a legal services contract into which an attorney has entered, and the obligations embodied in the State Bar Rules of Professional Conduct." (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1236-1237.)

Here, the alleged wrongful acts or omissions were defendants' lack of care in performing legal services, specifically in drafting the pleadings for the Labor Code section 132, subdivision (a) claim, and failing to disclose Clark's membership in PMLA "at the time of representation." All of these acts or omissions involve violation of a professional obligation and thus are subject to the limitations period of section 340.6, subdivision (a). Defendants ceased representing Nielsen by June of 2006, so all the alleged wrongful acts or omissions occurred more than four years before the complaint was filed in 2016.

Nielsen's second cause of action is titled "Fraud." Section 340.6, subdivision (a) by its express terms does not apply to actual fraud. However, the second cause of action does not properly allege actual fraud, and is therefore not exempt from that section's application. In determining the applicable statute of limitations, we look to the principal purpose or "gravamen" of the action, rather than the form of action or the relief demanded. (*Vafi v. McCloskey* (2011) 193 Cal.App.4th 874, 880.) The allegations of the second cause of action are identical to those in the cause of action for malpractice, and, as discussed, their gravamen is legal malpractice--the failure to "exercise reasonable skill and care" and "properly draft the appropriate pleadings." Further, fraud must be pled specifically in California. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) " 'The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e)

resulting damage.' [Citations.]" (*Id*. at p. 638.) The second cause of action does not include specific allegations of fraud, so it is not actual fraud and is not exempt from the limitations period of section 340.6, subdivision (a).

Section 340.6, subdivision (a) provides for tolling of the statute of limitations in four instances: "(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."

None of these tolling provisions apply here.

The first, second, and fourth are easily dispatched. For purposes of the "actual injury" tolling provision of section 340.6, subdivision (a), "[t]he loss or diminution of a right or remedy constitutes injury or damage." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 744.) Nielsen alleged defendants' lack of care in drafting the Labor Code section 132, subdivision (a) claim caused him to lose a meritorious claim for compensation, so he had an actual injury. There was no continuous representation; defendants' representation of Nielsen ended in June 2006. Nielsen did not allege any legal or physical disability that restricted his ability to file suit.

Therefore, Nielsen relies on the third tolling provision: "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." (§ 340.6, subd. (a).) He contends Clark and Stewart failed to disclose Clark's conflict of interest, his membership in PMLA. Further, Nielsen contends Clark and Stewart willfully omitted material facts in the Labor Code section 132, subdivision (a) claim,

such as Nielson's wrongful termination, PMLA defrauding him by cashing his union dues checks and failing to pay the union, and the loss of his retirement benefits.

Nielsen misunderstands the active concealment tolling provision. First, it requires more than a failure to disclose. As a leading treatise explains, "the statute of limitations will remain tolled if the existence of a cause of action for malpractice was fraudulently concealed by affirmative misrepresentations." (3 Mallen & Smith, *Legal Malpractice* (2017 ed.) § 23.53, p. 584, fn. omitted.) Mere nondisclosure of alleged wrongful conduct even in the context of a fiduciary relationship does not constitute active "concealment." (See *Trantafello v. Medical Center of Tarzana* (1986) 182 Cal.App.3d 315, 321 [discussing tolling the statute of limitations for medical malpractice].) Second, defendant must conceal facts *from the client*. The alleged omission of material facts from the Labor Code section 132, subdivision (a) claim is not active concealment; rather, it is alleged legal malpractice. Nielsen knew of the facts related to the Labor Code section 132, subdivision (a) claim; presumably he related these same facts to defendants in the first place.

Because Nielsen has failed to show he properly alleged actual fraud or tolling of the four-year statute of limitations of section 340.6, subdivision (a), the trial court did not err in sustaining the demurrer without leave to amend.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

/s/
Duarte, J.

We concur:

/s/
Hull, Acting P. J.

/s/
Mauro, J.