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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

CARL M. PULLEN,
Plaintiff and Appellant,

v.

JON N. UNGER et al.,
Defendants and Respondents.

A132389

**(Solano County
Super. Ct. No. FCS036660)**

The trial court sustained defendants' demurrer to plaintiff Carl M. Pullen's legal malpractice complaint without leave to amend, concluding it was barred by the one-year statute of limitations for such actions (Code Civ. Proc., § 340.6).¹ Plaintiff appeals from the judgment of dismissal, contending the trial court improperly decided issues of fact in reaching this result.² We conclude that the trial court properly sustained the demurrer but erred in denying plaintiff leave to amend. The judgment is reversed.

FACTUAL AND PROCEDURAL BACKGROUND

On September 29, 2010, plaintiff filed a complaint in the Solano County superior court against Jon N. Unger, C. Richard Urquhart, and Hubbard, Unger & Urquhart (collectively, defendants). The complaint asserts causes of action for general negligence and negligent infliction of emotional distress, arising out of Unger's alleged acts and omissions in his legal representation of plaintiff. According to the complaint, Unger

¹ All undesignated statutory references are to the Code of Civil Procedure.

² Plaintiff acted in propria persona in the proceedings below, and does so on appeal.

represented plaintiff in a postdissolution family law matter brought by plaintiff's ex-wife, but "failed to perform discovery, make necessary pre-trial motions, research case law and make appropriate objections, supervise his employees, secure the services of a court reporter or file an income and expense declaration" and "breached his professional duties of care to [plaintiff] by failing to exercise the requisite competence, diligence, skill, knowledge and judgment required of him." Specifically, plaintiff alleged: that Unger's staff erroneously informed him that trial of the matter would be rescheduled, causing him to fail to appear for trial in January 2009; that Unger misrepresented to the court that he had not heard from plaintiff in months; and that Unger failed to provide adequate legal representation at trial, resulting in a court decision awarding plaintiff's ex-wife the relief she requested, plus attorney fees and sanctions. Plaintiff alleged further that Unger's subsequent conduct resulted in another attorney fee award to plaintiff's ex-wife's counsel, and that plaintiff was held in contempt of court because he could not afford to pay these attorney fee awards. Finally, plaintiff alleged that Unger filed motions to set aside and/or correct the trial court's decisions, but the documents he filed were "grossly inadequate."

Defendants filed a demurrer to the complaint, contending it was time-barred by the one-year statute of limitations applicable to legal malpractice claims (§ 340.6). Acknowledging that the limitations period is tolled during the continuation of the attorney-client relationship (§ 340.6, subd. (a)(2)),³ defendants maintained that the one-year period commenced on September 25, 2009, when their relationship with plaintiff ended, and that this period expired four days before plaintiff filed his complaint on September 29, 2010. In support of their demurrer, defendants requested judicial notice of

³ As relevant here, section 340.6 states: "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. . . . [T]he period shall be tolled during the time that . . . [t]he attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred." (§ 340.6, subds. (a), (a)(2).)

a substitution of attorney form signed by plaintiff and Unger. The signatures on this form are hand-dated September 25, 2009, and it was filed on September 29, 2009.

Plaintiff opposed the demurrer, contending the attorney-client relationship continued until September 29, 2009, when the substitution form was filed. In an attached declaration, he stated as follows: In June 2009, Unger filed a motion to vacate the January 2009 judgment against plaintiff, and this motion was scheduled to be heard on September 30, 2009. Plaintiff was reluctant to continue Unger's representation and took time to "mull things over." Unger sent him a substitution of attorney form and, as the hearing date approached, "became emphatic" that plaintiff decide whether to continue the representation. Plaintiff "finally decided that he did not want [Unger's firm] to continue to represent him" Sometime in mid to late September 2009, plaintiff signed the substitution of attorney form in counterpart and faxed it to Unger's office "for completion of the substitution."⁴ Plaintiff did not date his signature, so Unger or his staff must have added the date that appears by his signature on the form.

Plaintiff maintained he "had every expectation that the defendants[] would continue to represent him (i.e. accepting service of documents, settlement offers, etc.) until the substitution was formalized by filing with the clerk and notification to the opposing counsel." Relying on *Nielsen v. Beck* (2007) 157 Cal.App.4th 1041 (*Nielsen*), he contended a trier of fact must decide whether the relationship ended when the form was signed or when it was filed.

In its tentative ruling, the trial court sustained the demurrer without leave to amend, distinguishing *Nielsen* because the attorney in that case continued to perform work for the plaintiff after the substitution of attorney form was filed. The tentative ruling concludes: "[I]t is clear from plaintiff's argument opposing defendants' demurrer that plaintiff has no additional facts to plead that could remedy the clear statute of limitations bar."

⁴ A printed notation appears at the top of the faxed form: "Sep 25 09 11:07a Carl & Denise," with a fax number plaintiff later identified as his own.

At the April 15, 2011 hearing, plaintiff contended, in response to the trial court's tentative ruling, that he could plead additional facts. Specifically, he maintained that he was unwilling to risk having no representation so he did not date the substitution form, believing Unger would continue to represent him in court until the form was filed and he was allowed to represent himself; and that "Unger met with [him] and advised [him] about the case in the courthouse on September 30th, 2009, just before the hearing."

Because defendants served their reply brief late and plaintiff asserted additional facts for the first time at the hearing, the trial court allowed the parties to file supplemental briefs and set the matter for further hearing.⁵

In his supplemental opposition and an attached declaration, plaintiff said he "did not agree to terminate Unger's representation before the substitution of attorney process was completed including notice to . . . all the parties and filing with [the] court. [He] would never have agreed to unnecessarily put his underlying case at risk." (See *McMunn v. Lehrke* (1915) 29 Cal.App. 298 [exclusive right of attorney to appear in court for his client]; *Sherman v. Panno* (1954) 129 Cal.App.2d 375 [a party's opponents are bound to recognize his attorney of record until receipt of written notice of substitution].) Plaintiff stated that he reasonably believed the representation continued until he was notified by the court at the September 30, 2009 hearing that he could represent himself. According to plaintiff, he met with Unger before the September 30, 2009 hearing and expressed concern that the court would refuse to allow him to speak, as it had done previously because he was represented by counsel. Unger "agreed to be on standby during the September 30, 2009 hearing until it was determined if the court would acknowledge [plaintiff] in pro per" and "assured [plaintiff] he would be in the courtroom to address

⁵ Plaintiff contends the trial court denied him equal protection and gave defendants an unfair advantage by failing to make them comply with the Code of Civil Procedure and the rules of court and allowing their attorney to choose the remedy for filing their reply brief late. The record does not support these contentions, as it shows the trial court allowed further briefing to give plaintiff additional time to respond to defendants' reply brief and to give defendants an opportunity to respond to additional facts plaintiff asserted for the first time at the hearing.

any problems” “The court acknowledged the substitution was effective on September 29, 2009 and allowed [plaintiff] to speak. Unger left before the hearing ended.” Plaintiff noted that defendants had not served him with the executed substitution form or told him they dated his signature, so he did not know if the substitution form had been signed by Unger and filed with the court until the September 30, 2009 hearing.

Plaintiff also submitted a declaration from Janet Denise Phelps, who stated that she witnessed a meeting between plaintiff and Unger outside the courtroom before the September 30, 2009 hearing, in which they discussed plaintiff’s case. She indicated that she heard Unger say he did not know if the substitution form had been filed early enough for plaintiff to represent himself at the hearing and that Unger remained in the courtroom until the judge said the substitution form was on file.

Defendants argued that in plaintiff’s earlier statement that he “finally decided that he did not want [Unger’s firm] to continue to represent him” conflicted with his claim that he reasonably believed Unger continued to represent him until September 30, 2009. They maintained, in any event, that the additional facts plaintiff asserted were insufficient to toll the statute.

At a May 11, 2011, hearing on the demurrer, plaintiff noted that, on September 29, 2009, Unger “filed the transcript with the court on my case. There was activity on the 29th.”

The Trial Court’s Decision

The trial court adopted its tentative ruling sustaining the demurrer without leave to amend, on the ground that the complaint was barred by the statute of limitations (§ 340.6) and that plaintiff had not shown he could allege additional facts to avoid the statutory bar. The trial court distinguished *Nielsen, supra*, 157 Cal.App.4th 1041, concluding case-related telephone conversations between the plaintiff and the attorney after the parties had executed a substitution of attorney form raised a triable issue of fact in that case as to when the relationship ended. Noting that plaintiff’s supplemental brief “tells a slightly different story from the one presented by defendants’ motion and conceded in plaintiff’s initial opposition,” the trial court found the additional facts presented by plaintiff did not

create a factual issue as to defendants' continued representation of plaintiff: "It is clear from the supplemental opposition that both sides agreed to end the attorney-client relationship when the substitution was executed on September 25, and that defendant Unger's appearance in court on September 30 was only to verify the court's receipt of that substitution. There is no evidence that any case-related exchanges took place between the parties after the substitution was signed. Although plaintiff asserts that it was defendants who filled in the date on the substitution form, he does not dispute that the date entered, September 25, is accurate."

Plaintiff filed a timely appeal from the order of dismissal.

DISCUSSION

We begin our analysis with the principles that govern our review of a trial court's decision sustaining a demurrer. A demurrer presents an issue of law regarding the sufficiency of the allegations set forth in the complaint. (*James v. Superior Court of San Francisco* (1968) 261 Cal.App.2d 415, 416-417.) It "tests the pleadings alone and not the evidence or other extrinsic matters. Therefore, it lies only where the defects appear on the face of the pleading or are judicially noticed [citations]." (*Afuso v. United States Fid. & Guar. Co.* (1985) 169 Cal.App.3d 859, 862, overruled in part on other grounds by *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 310-311; *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994 [court cannot consider "the substance of declarations [and] matter not subject to judicial notice"].) We decide this question independently, applying the following standard: "'A demurrer on the ground of the bar of the statute of limitations will not lie where the action may be, but is not necessarily barred.' [Citations.] It must appear clearly and affirmatively that, upon the face of the complaint [and matters of which the court may properly take judicial notice], the right of action is necessarily barred. [Citations.] This will not be the case unless the complaint alleges [or matters subject to judicial notice show] every fact which the defendant would be required to prove if he were to plead the bar of the applicable statute of limitation as an affirmative defense. [Citation.]" (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 881 (*Lockley*);

Trinity Park, L.P. v. City of Sunnyvale (2011) 193 Cal.App.4th 1014, 1028.)

Accordingly, the primary question before us is whether the allegations on the face of the complaint and matters subject to judicial notice necessarily establish that the attorney-client relationship between plaintiff and defendants ended more than one year before plaintiff filed his complaint on September 29, 2010.

The following principles govern the determination of when an attorney-client relationship ends: “ ‘Ordinarily, an attorney’s representation is not completed until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for withdrawal.’ [Citation.] ‘The rule is that, for purposes of the statute of limitations, the attorney’s representation is concluded when the parties so agree, and that result does not depend upon formal termination, such as withdrawing as counsel of record.’ [Citations.]” (*Worthington v. Rusconi* (1994) 29 Cal.App.4th 1488, 1497.) “ ‘Continuity of representation ultimately depends, not on the client’s subjective beliefs, but rather on evidence of an ongoing mutual relationship and of activities in furtherance of the relationship.’ [Citation.]” (*Lockley, supra*, 91 Cal.App.4th at p. 887 (italics omitted).)

Applying these principles, we conclude that the substitution form, which is subject to judicial notice, establishes that plaintiff agreed to terminate the attorney-client relationship on September 25, 2009, and that his complaint, filed more than one year later, was untimely. (See Evid. Code, § 452, subd. (d) [judicial notice may be taken of: “[r]ecords of . . . any court of this state”].) By signing this form, plaintiff indicated: “I consent to this substitution,” namely, to representing himself in lieu of having Unger act as his legal representative. He conceded below that he signed this form in counterpart and faxed it to Unger in mid-to-late September 2009, and a printed notation at the top of the form indicates that he faxed the form to Unger on September 25, 2009. Additionally, Unger’s signature on the form is dated September 25, 2009, indicating that he received it from plaintiff at least by this date. The substitution form therefore shows that the one-year statute of limitations commenced on September 25, 2009, and bars plaintiff’s

complaint, which was filed more than a year later on September 29, 2010. We conclude that the trial court properly sustained the demurrer.

Our analysis does not end here, however, as we must also determine whether the trial court properly denied plaintiff leave to amend his complaint. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We review the trial court's decision for abuse of discretion, determining whether there is a reasonable possibility that the defect in the complaint can be cured by amendment. (*Ibid.*) In this case, we conclude that plaintiff has demonstrated a reasonable possibility he can amend his complaint to survive a demurrer on statute of limitations grounds, as he has shown he can allege facts that would reasonably support a finding the attorney-client relationship did not end until at least September 29, 2009. These facts indicate that by signing the substitution form, he did not agree to terminate his attorney-client relationship with Unger immediately and contemplated, rather, that the representation would continue until the form was filed with the court and he was allowed to represent himself. In addition, these facts indicate that Unger continued the representation after the substitution form was signed by filing a transcript in the case on September 29, 2009, discussing the case with plaintiff and preparing for hearing on September 30, 2009, and agreeing to represent plaintiff at the hearing if the substitution form had not been filed and the court would not allow him to represent himself. Indeed, plaintiff's proposed allegations suggest that neither he nor Unger knew whether the representation would continue at the September 30, 2009 hearing, until the court confirmed that the substitution form had been filed.

Notwithstanding plaintiff's proposed allegations, the trial court concluded there was no factual issue and that "[i]t is clear . . . both sides agreed to end the attorney-client relationship when the substitution was executed on September 25" We disagree. In *Nielsen*, the court concluded on similar facts that "there is evidence from which a trier of fact could conclude that there was an ongoing mutual relationship and activities in furtherance of that relationship" (*Nielsen, supra*, 157 Cal.App.4th at p. 1051.) In that case, the court explained: "A strong argument can be made that the statute of limitations could not extend any later than August 26, 2004, when the substitution of

attorney form was executed because it demonstrated that the ongoing relationship between Beck and the Niensens had ended and Beck would no longer be rendering legal advice. However, there is contrary evidence from which a trier of fact could conclude that the relationship between Beck and the Niensens had not been severed at the time the substitution of attorney form was signed, but rather, the statute was tolled through September 18, 2004. [¶] On September 9, 14, and 18, 2004, Robert Nielsen placed telephone calls to Beck asking for advice. There is evidence that during these three telephone calls, Beck rendered professional services [including] ‘negotiations, options and strategy.’ Beck testified in his deposition that during these telephone calls, Robert Nielsen asked for advice as to procedure, negotiations, and tactics to resolve the . . . case, and Beck was responsive to those requests.” (*Ibid.*) The court rejected the attorney’s contention “he was simply being cordial when he discussed the pending litigation with Robert Nielsen and that the three conversations do not evidence a continuing relationship,” stating: “This may be the conclusion that a trier of fact reaches. However, the fact that Robert Nielsen continued to ask Beck for advice even after the substitution of attorney form was signed, and Beck apparently provided advice, creates sufficient evidence that may convince a trier of fact to the contrary.” (*Id.* at pp. 1051-1052, fn. omitted.) Although *Nielsen* addressed the propriety of a grant of summary judgment based on the evidence before the court, and this case comes before us in the context of a demurrer based on plaintiff’s proposed allegations, the same result applies here.

The record indicates that the trial court improperly considered the evidence and decided factual questions raised by plaintiff’s proposed allegations in denying leave to amend.⁶

⁶ At the May 11, 2011 hearing, the trial court told plaintiff: “[E]ven given your version of the facts on this issue, the law is against you because of the simple proposition that you and the attorney agreed, prior to September 29th, that your relationship was over.” The trial court said Unger “didn’t continue to represent you. He just did you a favor to be there to make it clear to the Judge that you are on your own now in case there was a question of that.”

DISPOSITION

The judgment of dismissal is reversed, with directions to the trial court to sustain defendants' demurrer to plaintiff's complaint, with leave to amend.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BRUINIERS, J.