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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ROBERT M. LUJAN,

Cross-complainant and Respondent,

v.

PROFESSIONAL COLLECTION
CONSULTANTS et al.,

Cross-defendant and Appellants.

A139438

(San Francisco County
Super. Ct. No. CGC-12-517685)

This matter arises from a credit card debt collection action brought against Robert M. Lujan, who filed a first amended cross-complaint (cross-complaint) against Professional Collection Consultants (PCC), Todd Allen Shields, Wireless Receivables Acquisition Group, LLC (Wireless), and Clark Garen (collectively cross-defendants), alleging violations of the federal Fair Debt Collection Practices Act and the California Rosenthal Fair Debt Collection Practices Act. The trial court overruled cross-defendants' demurrer and denied their motion to strike the cross-complaint, both brought, inter alia, pursuant to Civil Code section 1714.10, subdivision (a),¹ which prohibits a party from including any "cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client" in a complaint unless the party seeks and receives pre-filing approval and "the court determines that the party seeking to

¹ All further statutory references are to the Civil Code unless otherwise indicated.

file the pleading has established that there is a reasonable probability that the party will prevail in the action.”

Cross-defendants now appeal, contending the trial court erred in finding that Lujan’s claims against Garen, an attorney, did not trigger the prefiling requirements of section 1714.10, subdivision (a). Cross-defendants also request that we treat this appeal as a petition for writ of mandate and address underlying legal issues regarding which statute of limitations applies here, whether the applicable statute of limitations is tolled, and whether the litigation privilege bars the cross-complaint.² Because we conclude that the causes of action in Lujan’s first-amended cross-complaint are not within the scope of section 1714.10, subdivision (a), we shall affirm the trial court’s order overruling cross-defendants’ demurrer and denying their motion to strike. Moreover, because we find that cross-defendants have not demonstrated any unusual circumstances justifying review of the interlocutory order overruling the demurrer as to the non-1714.10 issues before final judgment, we shall dismiss that portion of the appeal.

PROCEDURAL BACKGROUND

On June 21, 2011, PCC, as an assignee of the original creditor, Chase, filed a complaint against Lujan for \$8,831.90 in unpaid credit card debt, plus interest and attorney’s fees.

On February 15, 2013, Lujan filed his cross-complaint against PCC; Shields, vice-president of PCC; Wireless; and Garen, alleging violations of the federal Fair Debt Collection Practices Act (FDCPA) (15 U.S.C. 1692 et seq.), and the California Rosenthal Fair Debt Collection Practices Act (RFDCPA) (§ 1788.2, subd. (f)). The cross-complaint alleged, with respect to cross-defendant Garen, that he “is or was an employee, agent, officer, and/or director of PCC and Wireless at all relevant times. . . . The principal

² We have granted the application of Chase Bank USA, N.A. (Chase) for permission to file an amicus curiae brief in this matter. In its brief, Chase does not express any opinion on the section 1714.10 issue. Instead, its argument is limited to the underlying statute of limitations question, regarding which it agrees with cross-defendants’ position.

purpose of Garen’s business [is] the collection [of] consumer debts due or alleged to be originally due another. Garen is regularly engaged in the business of collecting consumer debts by filing and maintaining numerous civil debt collection lawsuits and obtaining judgments in those lawsuits Garen is a ‘debt collector’ within the meaning of 15 U.S.C. § 1692a(6).”

On March 14, 2009, cross-defendants filed a demurrer and motion to strike the cross-complaint, alleging, inter alia, that it was filed in violation of section 1714.10, subdivision (a), and that it was barred by the applicable statute of limitations.

On August 2, 2013, the trial court entered its order, overruling the demurrer and denying the motion to strike, finding, as relevant here, that section “1714.10 does not apply to this case based on the allegations in paragraphs 23-29 in the amended cross complaint. See [§] 1714.10(c)(2).”³ The court further found that Lujan’s action was not time-barred because “Delaware law appears to apply to this action based on paragraph 18 of the contract”⁴ and “PCC fails to show that federal law or tolling applies.”

On August 7, 2013, cross-defendants filed a notice of appeal.

³ Paragraphs 23 to 29 of the cross-complaint alleged that Lujan’s debt was transferred to Wireless on August 11, 2010; that Garen “participated in and personally selected [Lujan’s] account for purchase by [Wireless,] with the intent to file this action to collect the alleged debt”; that Garen, “a licensed attorney in the state of California, is the sole owner and manager of [Wireless]”; that Garen “indirectly purchased the account which underlies this action through Wireless with the intent to bring suit thereon, in violation of Cal. Business and Professions Code § 6129”; that “the alleged debt was thereafter placed, consigned or otherwise transferred to [PCC], for the purpose of collection only”; and that Wireless and Garen “continue to have a beneficial interest in the alleged debt.”

⁴ In paragraph 18 of his cross-complaint, Lujan alleged that the relevant provision regarding governing law in the cardmember agreement between him and Chase provided: “The terms and enforcement of this agreement and your account shall be governed and interpreted in accordance with federal law and, to the extent state law applies, the law of Delaware without regard to conflict-of-law principles. The law of Delaware, where we and your account are located, will apply no matter where you live or use the account.”

On November 8, 2013, Lujan filed a motion to dismiss the appeal for lack of jurisdiction. On December 23, 2013, we filed an order denying the motion to dismiss “as to those appellate claims regarding the trial court’s overruling of cross-defendants’ demurrer based on its conclusion that Civil Code section 1714.10 does not apply to the case,” and ordered that the remainder of the motion to dismiss be considered with the appeal.

DISCUSSION

I. Section 1714.10

Ordinarily, an order overruling a demurrer is not appealable until after final judgment. (*Evans v. Pillsbury, Madison & Sutro* (1998) 65 Cal.App.4th 599, 602 (*Evans*)). Appeal is permitted, however, when the demurrer is based on the alleged failure to comply with section 1714.10, which “was enacted to combat ‘the use of frivolous conspiracy claims that were brought as a tactical ploy against attorneys and their clients and that were designed to disrupt the attorney-client relationship. [Citations.]’ [Citation.] To achieve this goal, the statute performs a ‘gatekeeping’ function and requires a plaintiff to establish a reasonable probability of prevailing before he or she may pursue a ‘cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute.’ [Citation.]” (*Stueve v. Kahn* (2013) 222 Cal.App.4th 327, 329 (*Stueve*), quoting § 1714.10, subd. (a); *Evans*, at pp. 602-603.)

Section 1714.10 provides: “(a) No cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney’s representation of the client, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes the claim for civil conspiracy to be filed after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action. The court may allow the filing of a pleading claiming liability based upon such a civil conspiracy following the filing of a verified petition therefor accompanied by the proposed pleading and supporting affidavits

stating the facts upon which the liability is based. The court shall order service of the petition upon the party against whom the action is proposed to be filed and permit that party to submit opposing affidavits prior to making its determination. The filing of the petition, proposed pleading, and accompanying affidavits shall toll the running of any applicable statute of limitations until the final determination of the matter, which ruling, if favorable to the petitioning party, shall permit the proposed pleading to be filed.

“(b) Failure to obtain a court order where required by subdivision (a) shall be a defense to any action for civil conspiracy filed in violation thereof. The defense shall be raised by the attorney charged with civil conspiracy upon that attorney’s first appearance by demurrer, motion to strike, or such other motion or application as may be appropriate. Failure to timely raise the defense shall constitute a waiver thereof.

“(c) This section shall not apply to a cause of action against an attorney for a civil conspiracy with his or her client, where (1) the attorney has an independent legal duty to the plaintiff, or (2) the attorney’s acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney’s financial gain.

“(d) This section establishes a special proceeding of a civil nature. Any order made under subdivision (a), (b), or (c) which determines the rights of a petitioner or an attorney against whom a pleading has been or is proposed to be filed, shall be appealable as a final judgment in a civil action.

“(e) Subdivision (d) does not constitute a change in, but is declaratory of, the existing law.”

Here, as expressly permitted by subdivision (b), cross-defendants utilized a demurrer and motion to strike to challenge Lujan’s failure to comply with the prefiling requirements of subdivision (a) of section 1714.10. Lujan countered that he was not subject to the prefiling requirements because either the allegations of his cross-complaint did not come within the scope of section 1714.10, or the exception set forth in subdivision (c)(2) applied. The trial court’s order, overruling the demurrer and denying the motion to strike based on the exception found in subdivision (c)(2) of section

1714.10, determined the parties' rights pursuant to subdivisions (a) and (c) of that section. The order is therefore appealable pursuant to subdivision (d) "as a final judgment in a civil action." (§ 1714.10, subd. (d); see *Evans, supra*, 65 Cal.App.4th at pp. 603-604.)

" 'We review the trial court's interpretation of section 1714.10 de novo. [Citations.]' [Citation.]" (*Stueve, supra*, 222 Cal.App.4th at p. 330.)

Section 1714.10's requirement that a party obtain court approval before filing an action applies solely to causes of action brought "against an attorney for *a civil conspiracy* with his or her client arising from any attempt to contest or compromise a claim or dispute, and *which is based upon the attorney's representation of the client.*" (§ 1714.10, subd. (a), italics added.)

In *Berg & Berg Enterprises LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802 (*Berg*), the appellate court addressed the scope of section 1714.10 and, in particular, discussed the requirement that the action be one for civil conspiracy between an attorney and his or her client. The court first described what a plaintiff must allege to maintain an action for civil conspiracy, i.e., "that the defendant had knowledge of and agreed to both the objective and the course of action that resulted in the injury, that there was a wrongful act committed pursuant to that agreement, and that there was resulting damage. [Citation.] Civil conspiracy is not an independent tort. [Citation.] Rather, it is a "legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." [Citation.] . . . The essence of the claim is that it is merely a mechanism for imposing vicarious liability; it is not itself a substantive basis for liability. Each member of the conspiracy becomes liable for all acts done by others pursuant to the conspiracy, and for all damages caused thereby. [Citations.]" (*Berg*, at p. 823.)

In *Berg, supra*, 131 Cal.App.4th at page 824, the appellate court found that section 1714.10 was applicable to the entirety of the plaintiff's complaint, "without regard to the labels attached to the causes of action or whether the word 'conspiracy'—having no

talismanic significance—appears in them. The particular allegations throughout [the plaintiff’s] entire complaint of the union of conduct between attorney and client arising out of the legal representation, the absence of other allegations of independent conduct by [the defendant’s attorney], and the incorporation of conspiracy allegations into every cause of action, more than suffice to subject all the claims against [the attorney] to the initial coverage of section 1714.10, as provided in subdivision (a).” The court ultimately found that the plaintiff’s allegations against the attorney fell “within the coverage of, rather than the exceptions to, the statute.” (*Berg*, at p. 836.)

In the present case, in contrast to *Berg*, Lujan neither expressly alleged civil conspiracy in any of the causes of action set forth in his cross-complaint, nor did he incorporate conspiracy allegations into his claims. (Compare *Berg*, *supra*, 131 Cal.App.4th at p. 824.) In addition, and more importantly, unlike the plaintiff in *Berg*, Lujan did not allege vicarious participation on the part of Garen in wrongs committed by Garen’s clients, arising out of his legal representation of them. (See *Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1110 [in order for section 1714.10 to apply, “the alleged conspiracy must arise in some fashion out of the attorney-client relationship”]; compare *Berg*, at p. 824.) Instead, he sued Garen in his individual capacity, alleging that Garen *directly* participated with the other cross-defendants in violating the FDCPA and the RFDCPA, in his role as managing member and owner of Wireless and as an employee of PCC.⁵ (See, e.g., *Alden v. Hindin* (2003) 110 Cal.App.4th 1502, 1506 [plaintiff’s action was not subject to section 1714.10 requirements because, although malicious prosecution

⁵ Specifically, Lujan alleged in his cross-complaint that Garen, as an owner and managing member of Wireless, purchased defaulted consumer credit accounts for his own personal profit and that he engaged his employer, PCC, to collect on those accounts. That the allegations of the cross-complaint centered on cross-defendants’ improper attempts to collect the debt from Lujan does not, as cross-defendants claim, transform the allegations into causes of action for conspiracy, with Garen vicariously liable in his role as counsel for PCC. Rather, the causes of actions alleged that all cross-defendants, including Garen, acted directly, in their individual capacities, to collect the debt. Section 1714.10 simply does not apply. (See *Pierce v. Lyman*, *supra*, 1 Cal.App.4th at p. 1110.)

cause of action was directed at both defendant and her attorneys, it did not charge attorneys with liability for conspiring with their client but, instead, alleged that attorneys themselves had acted without probable cause and with malice in bringing suit against plaintiff].)

Because Lujan’s allegations neither alleged nor implied the existence of a civil conspiracy between Garen and the other cross-defendants based on his legal representation of them and because, by its terms, the requirements—and exceptions—of section 1714.10 apply only to causes of action for civil conspiracy arising out of an attorney’s legal representation, the causes of action in question simply do not come within the scope of that section. (See *Stueve, supra*, 222 Cal.App.4th at p. 333 [“Inasmuch as we have determined that section 1714.10 is inapplicable, given the plain wording of subdivision (a) thereof, we need not also address whether any of the exceptions of subdivision (c) apply”].)

Moreover, even were we to find that the causes of action in the cross-complaint implicitly alleged, at least in part, a civil conspiracy between Garen, in his role as an attorney, and the other cross-defendants, as his clients, as the trial court apparently concluded, we still would conclude that the court properly overruled the demurrer and denied the motion to strike. That is because the causes of action in Lujan’s cross-complaint would nevertheless fall within the exception to the prefiling requirements set forth in subdivision (c)(2), which makes section 1714.10 inapplicable “to a cause of action against an attorney for a civil conspiracy with his or her client, where . . . the attorney’s acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney’s financial gain.”

Under subdivision (c)(2) of section 1714.10, the prefiling requirements of subdivision (a) do not apply if the lawyer acted “in excess of his or her official representative capacity in service to his or her client” and “violated a legal duty running to the plaintiff . . . in furtherance of the lawyer’s own financial advantage.” (*Berg, supra*, 131 Cal.App.4th at p. 833.) An improper financial advantage is “a personal advantage or

gain that is over and above ordinary professional fees earned as compensation for performance” of the legal representation. (*Id.* at p. 834.)

Here, it is plain that the causes of action in the cross-complaint allege that Garen violated a legal duty to Lujan in furtherance of his own financial advantage. (See § 1714.10, subd. (c)(2).) As Lujan states, the cross-complaint alleges that Garen “went beyond a professional duty as an attorney for a party, and instead participated in the subject transactions in his individual capacity and as an owner and manager of Wireless, purchasing defaulted consumer credit accounts and assigning those accounts to his employer, PCC, for collection. Thus, Garen financially benefited on both sides of the transaction. On one side, Garen benefited as owner of Wireless with a financial interest in the collection of Lujan’s account. On the other side of the transaction, Garen benefited as a salaried employee of PCC by being paid for his labor in collecting Lujan’s account.” Accordingly, even if the causes of action in the cross-complaint could be described as alleging a conspiracy arising out of Garen’s legal representation, because they allege that Garen acted in excess of his representative capacity in service to his client and violated a legal duty running to Lujan in order to receive a financial advantage over and above the professional fees he earned as compensation for performance of the legal representation, those causes of action come within the subdivision (c)(2) exception to the prefiling requirements set forth in subdivision (a) of section 1714.10. (See Berg, *supra*, 131 Cal.App.4th at p. 833; Evans, *supra*, 65 Cal.App.4th at pp. 606-607; cf. *Burtscher v. Burtscher* (1994) 26 Cal.App.4th 720, 727 [attorney’s extreme conduct in directly participating in self-help eviction of client’s ex-wife from home went far beyond role of legal representative].)

In conclusion, whether Lujan’s causes of action are viewed as being completely outside the scope of section 1714.10 or as coming within the exception found in subdivision (c)(2) of that section, we conclude the prefiling requirements of section

1714.10, subdivision (a), are not applicable here. The trial court properly overruled the demurrer and denied the motion to strike Lujan’s cross-complaint.⁶

II. Additional Issues Raised on Appeal

In addition to the contentions related to section 1714.10, cross-defendants have raised other issues regarding whether the Delaware or California statute of limitations applies in this case, whether the applicable statute of limitations is tolled, and whether the litigation privilege bars the cross-complaint. They acknowledge that these matters are not presently appealable. (See *Evans, supra*, 65 Cal.App.4th at p. 604, fn. 4 [declining to address other portions of trial court’s order since “subdivision (d) does not authorize review of matters apart from issues related to section 1714.10”]; accord, *Rickley v. Goodfriend* (2013) 212 Cal.App.4th 1136, 1148, fn. 1.) Cross-defendants nonetheless ask that we treat this portion of the appeal as a petition for writ of mandate, so that the additional issues can be resolved now.

Cross-defendants make unsubstantiated claims that an immediate resolution of this issue is necessary because most credit card companies use written agreements similar to the agreement in dispute here and “[t]here are thousands of similar cases pending in the trial courts of California with no binding California precedent to guide the trial judges the proper determination [*sic*] of this issue. Thousands of individual defendants are being sued throughout the State of California because there is no binding precedent in

⁶ Cross-defendants assert in their reply brief that the trial court should have taken judicial notice of certain facts that they claim would have demonstrated that subdivision (a) of section 1714.10 applied to this case. According to cross-defendants, if Lujan had properly followed the prefiling procedure mandated by that subdivision, the trial court would have been aware of those facts and Lujan never would have been permitted to file the cross-complaint. We have found, however, that Lujan is not subject to the prefiling requirements of section 1714.10, subdivision (a). Therefore, the general rule—that the court treats a demurrer as admitting all material facts that are properly pleaded—applies to this case. (See *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; cf. *Evans, supra*, 65 Cal.App.4th at pp. 606-607 [because cross-complaint supported reasonable inferences that (1) defendant attorney was active in how defendant limited partnership he represented was run and (2) his conduct would cost partnership money, those inferences would be assumed in plaintiffs’ favor on demurrer].)

California to guide the parties and the trial courts on which statute of limitations applies and which tolling statute applies.”⁷ Lujan opposes our treating this portion of the appeal as a petition for writ of mandate, arguing that the appeal “is in reality a sham, contrived as a vehicle to get this court’s immediate review of an unappealable order.”

Mandamus relief is typically available only “where there is not a plain, speedy, and adequate remedy, in the ordinary course of law.” (Code Civ. Proc., § 1086; *San Joaquin County Dept. of Child Support Services v. Winn* (2008) 163 Cal.App.4th 296, 301.) Although we have discretion to treat an imperfect appeal as a petition for writ of mandate, we are mindful of “the mandate of our Supreme Court to reserve the exercise of that discretionary power for cases involving compelling evidence of ‘unusual circumstances.’ [Citation.] Strong policy reasons underpin the one final judgment rule, and the guidelines for ‘saving’ appeals from nonappealable orders. . . . To treat the instant appeal as a writ application would obliterate that bright line rule and encourage parties to knowingly appeal from nonappealable orders, safe in the knowledge that their appeal will be ‘saved by the appellate courts.’ We cannot condone or encourage such practice.” (*Mid-Wilshire Associates v. O’Leary* (1992) 7 Cal.App.4th 1450, 1455-1456, quoting *Olson v. Cory* (1983) 35 Cal.3d 390, 401, fn. omitted; accord, *In re Marriage of Lafkas* (2007) 153 Cal.App.4th 1429, 1434 [“ ‘The interests of clients, counsel, and the

⁷ Cross-defendants also mistakenly describe opposing decisions from a superior court appellate division and a federal district court as constituting “a split of authority in California on this issue.” He cites *Resurgence Financial LLC v. Chambers* (2009) 173 Cal.App.4th Supp. 1, in which the Santa Clara County Superior Court Appellate Division held that the Delaware statute of limitations applied in a similar debt collection lawsuit and that the Delaware statute did not toll the limitations period, and *Boon v. Professional Collection Consultants* (S.D. Cal. 2013) 958 F.Supp.2d 1129 (*Boon*), an action filed by a Chase credit card holder in which the District Court granted PCC’s motion to dismiss the first amended complaint, with leave to amend, after finding that the debtor failed to state a claim under the FDCPA and that the litigation privilege applied. (See also *Boon* (S.D. Cal. 2014) 978 F.Supp.2d 1163 [granting summary judgment after filing of third amended complaint]; *Boon* (S.D. Cal. 2013) 978 F.Supp.2d 1157 [granting motion to dismiss second amended complaint, with leave to amend].)

courts are best served by maintaining, to the extent possible, bright-line rules which distinguish between appealable and nonappealable orders' ”].)

Here, cross-defendants have demonstrated no extraordinary circumstances warranting review of the interlocutory order overruling the demurrer as to the non-1714.10 issues before a final judgment in this matter. Although an appeal after a final judgment will not provide as speedy a resolution as cross-defendants may wish, we believe that process will provide them with an adequate remedy. (See Code Civ. Proc., § 1086.)

Because cross-defendants have not shown that this case involves “compelling evidence of ‘unusual circumstances’ ” that would justify treating the unappealable portion of the trial court’s order as a petition for writ of mandate (*Mid-Wilshire Associates v. O’Leary, supra*, 7 Cal.App.4th at p. 1456), we shall dismiss the portion of the appeal that does not concern the applicability of section 1714.10. (See Code Civ. Proc., § 1086; *San Joaquin County Dept. of Child Support Services v. Winn, supra*, 163 Cal.App.4th at p. 301.)

DISPOSITION

The order overruling the demurrer and denying the motion to strike the complaint as to the section 1714.10-related issues is affirmed. The remainder of the appeal is dismissed. Costs on appeal are awarded to respondent Robert M. Lujan.

Kline, P.J.

We concur:

Richman, J.

Stewart, J.

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