

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

JEE SOO KIM,

Plaintiff and Appellant,

v.

MALCOLM LEADER-PICONE et al.,

Defendants and Respondents.

A144148

(Alameda County
Super. Ct. No. RG14735547)

Jee Soo Kim sued his former attorney Malcolm Leader-Picone and the law firm of Bartlett, Leader-Picone & Young, LLP (hereafter referred to, as the context requires, collectively or severally as Leader-Picone) for legal malpractice. Kim appeals from the judgment dismissing his case after Leader-Picone's demurrer to his first amended complaint was sustained without leave to amend. The court correctly determined that Kim's allegations of negligence failed to state facts sufficient to constitute a cause of action, and that his causes of action for constructive fraud and breach of fiduciary duty were barred by the statute of limitations. We affirm.

II. BACKGROUND

The lawsuit underlying the malpractice claim was filed by Mike and Ana Yoo against Kim and the sellers of a business purchased by the Yoos. Kim was the escrow holder in the transaction. In June 2012, Kim retained Leader-Picone to defend him. In a letter to the Yoos' attorney accompanied by a proposed motion for sanctions, Leader-Picone demanded that the case against Kim be dismissed. On December 3 the Yoos moved for leave to file a first amended complaint (Yoos' FAC). On December 14,

Leader-Picone filed motions against the Yoos for judgment on the pleadings and for sanctions. The next day, the Yoos proposed a settlement dismissing Kim from the case in exchange for a release of liability. On December 20, Kim and Leader-Picone signed a substitution of attorneys replacing Leader-Picone with Kim as counsel in pro per. On December 27, Kim was dismissed with prejudice from the case on the Yoos' request.

In his complaint in this case Kim alleges that in January 2013, he received an email from counsel for the Yoos asking his permission to file the Yoos' FAC "which still contained all the fraudulent allegations against [Kim] and [the sellers] to save his client some attorneys' fees. [I] firmly indicated that would not be acceptable and [the] complaint should be rewritten." In an order dated January 23, 2013, the court allowed the Yoos to file the FAC, which included the original allegations against Kim. However, the order directed that Kim "shall be and hereby is stricken from the first amended complaint as a named party, and that all causes of action and allegations against Kim shall be and hereby are stricken. Specifically, Plaintiffs have settled with [Kim], but Plaintiffs drafted the first amended complaint before settlement occurred. As such, Kim is no longer a party to the instant action."

Kim alleges that the Yoos' FAC contained "defamatory" allegations that enabled the Yoos "to continue to falsely support their accusations about [him] to members of [the] Korean community where [his] professional reputation is of utmost importance." Kim contacted Leader-Picone about the problem, and Leader-Picone "agreed to continue to represent [him] in the same matter to require [the Yoos' attorney] to amend the [Yoos' FAC] by bringing a motion to enforce the settlement agreement pursuant to Code of Civil Procedure section 664.6."

On April 30, 2013, Kim sent Leader-Picone an email stating: "I just found out Mike Yoo and his attorneys filed the first amended complaint which still has the causes of actions against me and as such I am still in the litigation. I am considering reporting this matter to the State Bar." Leader-Picone replied that same day: "Do you want to send me a copy of the amended complaint, and I'll send a demand that they amend it to remove any mention of you, citing CCP section 128.7? [¶] . . . [¶] . . . [I]f you would like

me to threaten them with sanctions for their amended complaint, I would be pleased to do so, at no charge to you.” The next emails in the thread were a May 9 message from Kim requesting copies of emails between Leader-Picone and Yoos’ counsel, and a May 10 reply from Leader-Picone that Kim had been copied on all such emails. Leader-Picone billed Kim a total of \$680 for work on May 15, 23, and 30 involving emails with Kim and Yoo’s counsel, and “breach of settlement agreement and amended complaint.” On June 3, Leader-Picone sent the Yoos’ FAC to Yoos’ counsel with the allegations against Kim redacted, and asked Yoos’ counsel to prepare a second amended complaint reflecting the redacted allegations. Leader-Picone stated, “If I do not receive back your affirmative response by the end of the day on Wednesday, June 5th, I will prepare a motion under CCP section 664.6 for an order from the Court requiring you to do this.” On June 14, Leader-Picone, who by this time was representing the sellers of the business as well as Kim, sent Yoos’ counsel a proposed stipulation to permit filing of a second amended complaint that deleted the references to Kim.

In July, Leader-Picone obtained judgment against the Yoos on all of their causes of action against the sellers. On October 13, Kim emailed a request to Leader-Picone for copies of his communications with Yoos’ counsel “after this email,” apparently referring to Leader-Picone’s message of June 3 attaching the redacted complaint. On October 15, Leader-Picone replied, “I will . . . see what I can find.” On December 13, Kim sent Leader-Picone an email asking, “Can you just confirm that the last email you cced was the last communication between you and [Yoo’s counsel].” Leader-Picone replied that day, “Yes, that appears to be the last communication with [Yoos’ counsel] about you. Immediately after that, you referred [one of the sellers] to me to have me take over as his counsel.” On December 21, Kim responded, “So is it the end of your involvement? Why does it take more than 6 months and the conclusion of the main case for me to find this out?” On December 24, Leader-Picone answered, “Does it not seem that the matter is moot now. The plaintiff lost on all aspects of his complaint and there is a dismissal for you and judgment for the other defendants. I don’t think the judge would consider any motions that you might want to bring about the failure to delete allegations in the first

amended complaint. [¶] Keep in mind that the allegations that you wanted removed will always exist in the original complaint. [¶] Is there something that you want me to do?” Kim and Leader-Picone exchanged further emails after the December 24 message, but none involved any additional work on Kim’s behalf.

On August 4, 2014, Kim filed his complaint against Leader-Picone. The first cause of action for “Legal Malpractice based on Negligence” referred to Kim’s retention of Leader-Picone “[i]n or about June 2013,” to enforce his settlement with the Yoos. Kim alleged that he did not learn of Leader-Picone’s failure to enforce the settlement until Leader-Picone’s email of December 13. Paragraph 15 of the complaint states: “Plaintiff did not receive any responses to his October 15, 2013 email. Instead, on December 13, 2013, Plaintiff received an email from defendant that the matter seemed to be moot and the false allegations were in the original complaint anyway.¹ Plaintiff was never made aware of the fact that he did nothing in this matter until December 2013.”

The second cause of action for “Constructive Fraud” and the third cause of action for “Breach of Fiduciary Duty” referred to retention of Leader-Picone “[i]n or about June, 2012,” and apparently complained of Leader-Picone’s delay in filing the motion for sanctions before the Yoos dismissed Kim from the underlying case. Both causes of action (paragraphs 26 and 36) stated that “defendants abused the trust and confidence of plaintiff by pretending to file a bogus motion and not revealing the whole truth as to their true intention of not filing the motion and continuing the litigation unnecessarily.” Paragraphs 27 and 37 stated: “Plaintiff in fact placed confidence and reliance in defendants until on or about December 13, 2013, when through plaintiff’s research and emails with defendants, plaintiff discovered the true facts concerning defendants’ false representation about the filing of the sanction motion and the motion to enforce the settlement terms, as alleged above.”

Leader-Picone demurred on the grounds that the complaint failed to state facts sufficient to constitute a cause of action, and was barred by the one-year statute of

¹ This email was the one sent on December 24, not December 13.

limitations for attorney malpractice cases set forth in Code of Civil Procedure section 340.6. This statute provides: “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.” (Code Civ. Proc., § 340.6, subd. (a).) The statute further provides: “[I]n no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist: [¶] . . . [¶] (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred.” (Code Civ. Proc., § 340.6, subd. (a)(2).)

The court requested supplemental briefing on the running and possible tolling of the statute of limitations on the second and third causes of action, “[s]pecifically . . . the question of whether, assuming (1) Defendants’ representation of Plaintiff ended for the first time on December 20, 2012, (2) Defendants began representing Plaintiff for a second time on May 15, 2013, and (3) Defendants’ representation of Plaintiff ended for the second time on December 13, 2013, the one-year statute of limitations resumes on December 13, 2013 from the point at which it was tolled on May 15, 2013 or a new one-year statute of limitations begins on December 13, 2013.”

The court sustained with leave to amend the demurrer as to the first cause of action based on Leader-Picone’s failure to file a motion to enforce Kim’s settlement, finding that Kim had not stated facts sufficient to constitute a cause of action. The court took judicial notice that the Yoos “complied with the settlement agreement by filing a dismissal of their claims against Plaintiff, and that the Contra Costa County Superior Court issued an order stating specifically that the claims against Plaintiff were deemed stricken. Plaintiff does not allege what benefit would have been achieved by a motion to enforce a settlement agreement that had already been performed, or how he was damaged by the presence of the irrelevant allegations against him in the First Amended Complaint in the Yoo case.”

The court sustained the demurrer to the second and third causes of action on the ground that they were time-barred. The court rejected Kim’s argument that he had one year from December 13, 2013, when Leader-Picone “gave notice that they would not perform,” within which to file suit.² The court concluded that the one-year statute was tolled during the time Leader-Picone resumed representing Kim, but that the second period of representation “did not revive the statute, but merely prevented it from continuing to run.” Leave to amend was granted to enable Kim “to allege, if possible facts that support the conclusion that Defendants continuously represented [him] during the period from December 20, 2012 to May 15, 2013.”

Kim filed a first amended complaint asserting the same three causes of action. The amended complaint deleted the references in paragraphs 15, 27, and 37 to Leader-Picone’s December 13 email. The original and amended complaint alleged that Kim requested all of his case files from Leader-Picone in March 2014. The amended complaint alleged that Kim relied on Leader-Picone “until in or about March 2014,” rather than “until on or about December 13, 2013,” as stated in the original complaint. The amended complaint stated that Kim asked for his files in March 2014 “realizing there is no reasonable hope that [Leader-Picone] can be expected to continue to represent [him]”

Leader-Picone again demurred and the demurrer was sustained without leave to amend. The court concluded that the first cause of action in the amended complaint for negligent failure to move for enforcement of Kim’s settlement with the Yoos “still failed to allege wrongful conduct by Defendants coupled with actionable harm.” The court further concluded that the “face of the pleadings continues to show that the Second and Third Causes of Action are time-barred.” The court considered the unauthenticated emails Kim lodged in opposition to the demurrer to determine whether they justified leave to amend the second and third causes of action and concluded that they did not.

² Kim does not renew this argument on appeal.

II. DISCUSSION

A. Scope of Review

We review an order sustaining a demurrer de novo to determine whether the complaint states facts sufficient to constitute a cause of action. (*Bower v. AT & T Mobility, LLC* (2011) 196 Cal.App.4th 1545, 1552; *Stanton Road Associates v. Pacific Employers Ins. Co.* (1995) 36 Cal.App.4th 333, 341 (*Stanton Road*).) We construe the complaint “liberally . . . with a view to substantial justice between the parties” (Code Civ. Proc., § 452) and treat it “ ‘ ‘as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.’ ” [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.’ ” (*Stanton Road, supra*, 36 Cal.App.4th at p. 340; *Jager v. County of Alameda* (1992) 8 Cal.App.4th 294, 296–297.) When the court sustains a demurrer 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. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.’ [Citations.]” (*Stanton Road, supra*, at p. 341.)

B. Negligence Cause of Action

The trial court concluded that Kim could not plead a cause of action for damages against Leader-Picone based on failure to successfully challenge the Yoos’ FAC that continued to name Kim as a defendant. The trial court reasoned: “The court order striking the claims against Plaintiff in the First Amended Complaint necessarily mooted the need to file an action to ‘enforce the terms of the Settlement’ [between Kim and the Yoos]. [¶] . . . Plaintiff does not allege any damages he would have recovered if a section 664.6 motion, seeking to force the Yoos to file a dismissal, had been filed and granted, or that he would have been entitled to recover attorney’s fees as a result of such a motion. [¶] . . . [¶] Plaintiff appears to allege that [he] was damaged by the fact that the Yoos filed the First Amended Complaint after he entered into a settlement agreement with the Yoos, and that Defendant Malcolm Leader-Picone was aware that the Yoos

would use the mere existence of the allegations in the First Amended Complaint as a basis to continue to defame Plaintiff to members of the Korean community, where Plaintiff's professional reputation was important. However, the allegations do not show that Defendants were responsible for the conduct of the Yoos, that they could have prevented it, or that Defendants' failure to file a section 664.6 motion proximately caused the alleged defamatory statements by the Yoos."

We likewise fail to see how Kim was damaged by the contents of the Yoos' FAC containing allegations against him stricken by court order, or by Leader-Picone's failure to obtain a redundant second amended complaint with those allegations deleted or a redundant second dismissal of Kim from the case. Although Leader-Picone undertook limited efforts to obtain the superfluous relief Kim wanted, his grievance, as Leader-Picone pointed out, was moot following his dismissal from the case with prejudice and particularly after the underlying suit was resolved against the Yoos.

Kim has no persuasive arguments against these conclusions. He contends that Leader-Picone "abandoned the agreed upon task without notifying [him]," but identifies no plausible theory supporting resulting damage. Accordingly, the demurrer to the first cause of action for negligence was properly sustained without leave to amend.

C. Constructive Fraud and Breach of Fiduciary Duty Causes of Action

The constructive fraud and breach of fiduciary duty causes of action were based on Leader-Picone's representation of Kim before December 20, 2012, when they signed the substitution of Kim as counsel. The one-year statute of limitations thereafter ran for 146 days, until May 15, 2013, when Leader-Picone resumed work for Kim in the underlying case. The statute was tolled from May 15 to December 13, 2013, when Kim learned that Leader-Picone was doing no work for him against the Yoos. Kim had 219 (365 minus 146) days or until Monday, July 21, 2014, to file suit within the one-year statute of limitations. However, his complaint was not filed until August 4, 2014.

Kim argues that the tolling began before May 15, 2013, but he attached an invoice to his original and amended complaints showing that Leader-Picone began working for him the second time on that date. Kim also contends that the tolling ended after

December 13, 2013, but his original complaint repeatedly identified that date, when Leader-Picone sent him the email stating that he had not contacted Yoos' counsel since June, as the date when his reliance on Leader-Picone ended.³ Moreover, Kim wrote in opposition to the first demurrer: "Plaintiff's Complaint alleges that Plaintiff did not know Defendants abandoned their representation until Defendants sent plaintiff an email, a belated response to Plaintiff's October 15, 2013 email, on December 13, 2013 The date the statute of limitation[s] should start to run should be this December 2013 date when Plaintiff discovered his cause of action against Defendants"

Kim omitted references to the December 13 date from the allegations in his amended complaint, and instead alleged his reliance on Leader-Picone ended in March 2014, but those amendments did not effectively negate his earlier admissions. "If a party files an amended complaint and attempts to avoid the defects of the original complaint by either omitting facts which make the previous complaint defective or by adding facts inconsistent with those of previous pleadings, the court may take judicial notice of prior pleadings and may disregard any inconsistent allegations." (*Colapinto v. County of Riverside* (1991) 230 Cal.App.3d 147, 151; see also *Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 343–344 [explaining the sham pleading doctrine].)

None of the emails between Kim and Leader-Picone after December 13 could have given Kim the impression that Leader-Picone's work for him was ongoing. On December 21, after learning that Leader-Picone had taken no action since June, Kim asked whether Leader-Picone's involvement in the case had ended. On December 24, Leader-Picone replied that the matter was moot and asked Kim whether he wanted anything else done. In January and March 2014, Leader-Picone responded to Kim's questions about his handling of the sanctions motion against the Yoos before they

³ Even if Kim meant to allege that he relied on Leader-Picone until he received the December 24 email stating that his concerns were moot (see fn. 1, *ante*), it should have been apparent from the email of December 13 that Leader-Picone was not pursuing any further relief against the Yoos. In any event, Kim's complaint was untimely even if the tolling continued until December 24 rather than December 13.

dismissed him from the underlying case. In March 2014, Kim asked Leader-Picone for his case files, and in June 2014 Leader-Picone asked where the files should be delivered. As the trial court correctly concluded, the “confrontational emails” exchanged by Kim and Leader-Picone after December 13 provided no support for a finding that their attorney-client relationship continued after that date. The demurrer to the second and third causes of action was properly sustained without leave to amend based on the statute of limitations.

III. DISPOSITION

The judgment is affirmed.

Siggins, J.

We concur:

Pollak, Acting P.J.

Jenkins, J.