

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

SECOND APPELLATE DISTRICT

DIVISION FIVE

CHARL JANEKE,

Plaintiff and Appellant,

v.

LARRY L. NASH,

Defendant and Respondent.

B262684

(Los Angeles County
Super. Ct. No. BC531568)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rafael A. Ongkeko, Judge. Affirmed.

Law Offices of Abraham A. Labbad, Abraham A. Labbad, for Plaintiff and Appellant.

Nemecek & Cole, Jonathan B. Cole, Mark Schaeffer, for Defendant and Respondent.

INTRODUCTION

In a fourth amended complaint, plaintiff and appellant Charl Janeke brought an action against his former attorney, defendant and respondent Larry Nash, concerning defendant's representation of plaintiff in the first of two proceedings before the United States Bankruptcy Court. The trial court sustained defendant's demurrer to the fourth amended complaint without leave to amend and ordered plaintiff's action dismissed with prejudice. It ruled the doctrine of judicial estoppel barred all of plaintiff's causes of action and the statute of limitations for legal malpractice actions barred all of plaintiff's causes of action except for his fraud cause of action.

Plaintiff contends the trial court misapplied the doctrine of judicial estoppel. He further contends he pleaded facts supporting his fraud cause of action with sufficient specificity¹ and, if we determine otherwise, we should instruct the trial court to grant him leave to amend.

We affirm the court's order without the need to address the applicability of judicial estoppel for the following reasons. Given plaintiff's election not to challenge the trial court's ruling that the statute of limitations barred all but the fraud cause of action, we affirm, without further discussion, the order sustaining the demurrer on those causes of action based on the undisputed applicability of the statute of limitations. In addition, we affirm the order sustaining the demurrer on the fraud action as plaintiff did not plead fraud with the requisite degree of specificity and has not provided an adequate record demonstrating he should have been permitted to amend the complaint for the fifth time.

BACKGROUND

In his fourth amended complaint, plaintiff alleged causes of action against defendant for fraud, constructive fraud, negligent misrepresentation, negligence,

¹ This contention responds to defendant's argument in his respondent's brief that we may properly affirm the dismissal order as to plaintiff's fraud cause on the additional ground that it was not pleaded with the requisite degree of specificity—a ground the trial court did not rely on in its ruling.

negligent infliction of emotional distress, unjust enrichment, and breach of contract arising from defendant's representation of plaintiff in the first of two bankruptcy proceedings. As to each of his causes of action, plaintiff alleged that in March 2010, he filed a Chapter 11 bankruptcy petition in pro per. That same month, plaintiff hired defendant to provide legal counsel concerning civil matters outside the bankruptcy proceeding. Notwithstanding the intended scope of defendant's representation, defendant, who held himself out as a bankruptcy expert, worked primarily on plaintiff's bankruptcy case.

Between March 2010, and June 2011, defendant convinced plaintiff to give him over \$100,000 that defendant represented he would use to settle claims by creditors other than Fannie Mae. Defendant explained that, with Fannie Mae as plaintiff's sole creditor, a simple repayment plan could be prepared that the bankruptcy court would confirm. Rather than using the money to pay plaintiff's creditors, defendant kept the money for himself.

In July 2011, plaintiff filed a second Chapter 11 bankruptcy petition. In March 2012, plaintiff "brought an action" in his bankruptcy proceeding to cause defendant to disgorge the money plaintiff had given him. Defendant agreed to settle the dispute by paying plaintiff \$60,000. The settlement agreement concerned money plaintiff paid to defendant for "unused fees and other expenses." Thereafter, defendant breached the settlement agreement by tendering to plaintiff checks that were ultimately returned due to insufficient funds. Plaintiff took three months and incurred bank fees and costs in collecting on those checks. Plaintiff suffered unspecified damages as a consequence of defendant's delayed payments.

Plaintiff alleged, "Due to the delay and the dismissal of Plaintiff's first chapter 11 bankruptcy, Plaintiff's creditor Fanny Mae was awarded \$720,000 in cost[s] and fees on December 27, 2012 when Plaintiff's second Bankruptcy was confirmed." Plaintiff alleged defendant was responsible for that award by his failure to present the bankruptcy court with a confirmable plan and other "misconduct." He appeared to allege the court in the second bankruptcy proceeding granted Fanny Mae's motion for \$285,000 in attorney

fees and costs. But for defendant's "incompetence" in plaintiff's first bankruptcy proceeding, plaintiff claimed, the bankruptcy court would not have dismissed plaintiff's petition and plaintiff would have incurred "about \$285,000 exactly or approximately what was claimed by Fannie Mae and awarded by the court in the second chapter 11 Bankruptcy."

In his first cause of action, for fraud, plaintiff alleged defendant, in connection with plaintiff's first bankruptcy proceeding, falsely represented he was a Chapter 11 bankruptcy expert. He further alleged defendant obtained money from him by claiming defendant would use the money to pay off creditors other than Fannie May "so that the plan would be simple and confirmable." Instead, defendant kept the money for himself. Defendant's misrepresentations caused delays that resulted in a long, drawn out bankruptcy proceeding and cost plaintiff over \$720,000.

Defendant demurred to plaintiff's fourth amended complaint, arguing, among other things, that the entire complaint was barred by judicial estoppel, the statute of limitations for legal malpractice actions in Code of Civil Procedure section 340.6 barred all of the causes of action in the complaint except the fraud cause of action, and plaintiff failed to plead his fraud cause of action with the requisite degree of specificity. In support of his demurrer, defendant filed a request for judicial notice, asking the court to judicially notice certain documents and a reporter's transcript from plaintiff's first and second Chapter 11 bankruptcy proceedings. The trial court granted the request.

Among the judicially noticed documents from plaintiff's second bankruptcy proceeding was plaintiff's "Third Amended Disclosure Statement Describing Third Amended Chapter 11 Plan of Reorganization" (Disclosure Statement). In the Disclosure Statement, plaintiff told the bankruptcy court and the creditors, "There were various developments which occurred in the First Bankruptcy which continue to have an impact on the Instant Bankruptcy. Readily apparent is the fact that the First Bankruptcy was pending for near[ly] a year and a half with little meaningful progress. The handling of the First Bankruptcy by [defendant], both substantively, and as it relates the fees

[defendant] procured from [plaintiff] in connection with the First Bankruptcy, in violation of the Local Bankruptcy Rules, was subpar and did not result in a confirmed plan.”

With respect to his dispute with defendant, plaintiff said, in the Disclosure Statement, “In an attempt to compel [defendant] to right the wrongs committed against [plaintiff] in the First Bankruptcy, to the detriment of [plaintiff] and [plaintiff’s] estate, on March 15, 2012, [plaintiff] filed a Motion to reopen Chapter 11 Case to allow for Disgorgement of [defendant]’s fees (the ‘Disgorgement Motion’). [¶] The filing of the Disgorgement Motion led to, as of March 22, 2012, [plaintiff] and [defendant] reaching a settlement agreement (the ‘Defendant Settlement’) wherein [defendant] agreed to pay to [plaintiff] a total of \$60,000.00. [Plaintiff] anticipates collecting completely from [defendant] by the end of the 2012 calendar year.”

The trial court ruled plaintiff was judicially estopped from pursuing his causes of action based on his conduct in the bankruptcy court. Relying on plaintiff’s Disclosure Statement, the trial court stated, “Defendant’s continued reliance on judicial estoppel as a bar to plaintiff’s now proceeding against [defendant] has merit and, in the court’s view, is fatal to plaintiff’s complaint, even at the demurrer stage, given plaintiff’s conduct in the bankruptcy proceedings. Defendant’s demurrer, and matters of which the court has taken judicial notice, effectively outlines plaintiff’s manipulation of the bankruptcy system by his representation to the court and his creditors that he and [defendant] had reached a settlement, leaving nothing more to declare.”

The trial court also ruled the statute of limitations for legal malpractice barred all of plaintiff’s causes except for his fraud cause of action. It stated, “The original complaint in this case having been filed on 12/26/13, the second through seventh causes of action fail to state a cause of action and are barred by the one-year statute of limitations for legal malpractice (CCP 340.6), based on an accrual date in June, 2011, the dismissal and closure of the first bankruptcy case in which [defendant] represented plaintiff. Were it not for the dispositive ruling above based on judicial estoppel, the only surviving claim against [defendant] that is sufficiently pled within an applicable limitation period is plaintiff’s first cause of action for fraud, which has a three-year

statute.” The trial court did not rule on defendant’s argument that plaintiff failed to plead his fraud cause of action with the requisite degree of specificity.

DISCUSSION

I. Standard of Review

“On appeal from a judgment after an order sustaining a demurrer, our standard of review is de novo. We exercise our independent judgment about whether, as a matter of law, the complaint states facts sufficient to state a cause of action. [Citations.] We view a demurrer as admitting all material facts properly pleaded but not contentions, deductions, or conclusions of fact or law. [Citation.]” (*Lin v. Coronado* (2014) 232 Cal.App.4th 696, 700.) ““We also consider matters which may be judicially noticed.” [Citation.]” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; Code Civ. Proc., § 430.30.) We affirm a judgment of dismissal following a demurrer on any proper ground stated in a demurrer, regardless of the ground on which the trial court based its ruling. (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324; *Total Call Internat., Inc. v. Peerless Ins. Co.* (2010) 181 Cal.App.4th 161, 169.) We review a trial court’s decision to not grant leave to amend a complaint for an abuse of discretion. (*Los Angeles Memorial Coliseum Com. v. Insomniac, Inc.* (2015) 233 Cal.App.4th 803, 819.)

II. Plaintiff’s Fraud Cause of Action

““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.]” (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) “In California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] “Thus ““the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect.”” [Citation.] [¶] This particularity requirement necessitates pleading *facts* which “show

how, when, where, to whom, and by what means the representations were tendered.” [Citation.]” (*Id.* at p. 645.)

Although the trial court did not address defendant’s argument that plaintiff failed to plead his fraud cause of action with the requisite degree of specificity,² we may affirm based on any proper ground asserted in the demurrer. (*Carman v. Alvord, supra*, 31 Cal.3d at p. 324; *Total Call Internat., Inc. v. Peerless Ins. Co., supra*, 181 Cal.App.4th at p. 169.)

As set forth above, plaintiff alleged in his fraud cause of action that defendant falsely represented he was a Chapter 11 bankruptcy expert. He further alleged defendant obtained money from him by claiming defendant would use the money to pay off creditors other than Fannie May “so that the plan would be simple and confirmable.” Instead, defendant kept the money for himself. Defendant’s misrepresentations caused delays that resulted in a long, drawn out bankruptcy proceeding and cost plaintiff over \$720,000.

These general allegations fail to meet the “particularity requirement” for pleading a fraud cause of action. (*Lazar v. Superior Court, supra*, 12 Cal.4th at p. 645.) That is, plaintiff does not allege the specific statements defendant made about his bankruptcy expertise or the specific statements defendant made to obtain money from plaintiff to pay off the creditors or allege any facts concerning the timing of the statements or the manner in which the statements were made. Thus, plaintiff failed to plead specific “*facts* which ‘show how, when, where, to whom, and by what means the representations were tendered.’” (*Ibid.*) Plaintiff also fails to allege the identity of the creditors defendant said

² Plaintiff contends that the trial court did rule on the sufficiency of the allegations in his fraud cause of action. For this contention, plaintiff relies on the trial court’s statute of limitations ruling on the fraud cause of action that “[w]ere it not for the dispositive ruling above based on judicial estoppel, the only surviving claim against [defendant] that is sufficiently pled within an applicable limitation period is plaintiff’s first cause of action for fraud, which has a three-year statute.” Contrary to plaintiff’s assertion, that ruling concerned whether the allegations in the fourth amended complaint were sufficient to show that the statute of limitations for fraud had not run and not whether the allegations in the fraud cause of action were pleaded with sufficient specificity.

he was going to pay off, the amounts defendant said he would pay to each of those creditors, or which creditors were not paid and the amounts they were not paid. Further, although plaintiff alleges defendant's misrepresentations caused him to incur over \$720,000 in unnecessary costs in the second bankruptcy proceeding, he fails to explain how defendant's misrepresentations resulted in those costs, alleging only that the "damages would not have been incur[r]ed absent Defendant[']s misconduct including the delays discussed above and . . . all the cost of the second Bankruptcy." Accordingly, because plaintiff did not plead specifically the elements of a fraud cause of action, the trial court's order sustaining defendant's demurrer to plaintiff's fraud cause of action is affirmed. (*Id.* at pp. 638, 645.)

III. Leave to Amend

On September 24, 2015, we requested the parties to brief the issue of whether plaintiff's failure to designate a reporter's transcript or a suitable substitute warrants affirmance based on the inadequacy of the record.³ Plaintiff contends a reporter's transcript was not necessary because the issues on appeal do not require consideration of the oral proceedings in the trial court—presumably because we review *de novo* an appeal from a judgment after an order sustaining a demurrer (*Lin v. Coronado*, *supra*, 232 Cal.App.4th at p. 700). Leave to amend, however, is reviewed for an abuse of discretion (*Los Angeles Memorial Coliseum Com. v. Insomniac, Inc.*, *supra*, 233 Cal.App.4th at p. 819) and a plaintiff forfeits a challenge to the denial of leave to amend by failing to provide a record of the oral proceedings corresponding to the demurrer hearing (*McAllister v. Los Angeles Unified School Dist.* (2013) 216 Cal.App.4th 1198, 1210-

³ In his reply brief, filed on November 20, 2015, plaintiff states, "[Plaintiff] while *in pro per* requested that the Superior Court provide a reporter's transcript which it did. The *in pro per* [Plaintiff] was not aware that the reporter's transcript was required to [be] hand lodged with the Court of Appeal. An attempt to do so is to be made before this matter is considered." A reporter's transcript of the demurrer hearing has not been filed with this court.

1211). Accordingly, by failing to provide an adequate record of the oral proceedings at the demurrer hearing, plaintiff has forfeited his claim that he should be granted leave to amend.

Moreover, even if plaintiff has not forfeited this issue, he has failed to meet his burden to establish how he can amend his fourth amended complaint to state a valid cause of action for fraud. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) Plaintiff contends any insufficiency in his fraud cause of action can be cured by amendment, but does not say how he would amend the cause of action. Instead, plaintiff only states that he “can provide additional specificity as to all elements” if we grant him leave to amend. Thus, plaintiff has failed to meet his burden of showing how he can amend the fourth amended complaint to state a valid fraud cause of action. (*Ibid.*)

DISPOSITION

The order sustaining the demurrer and the judgment are affirmed. Defendant is awarded his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KUMAR, J.*

We concur:

TURNER, P. J.

KRIEGLER, J.

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