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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ROCHELLE T. BASTIEN,

Plaintiff and Appellant,

v.

DENNY KERSHEK,

Defendant and Respondent.

D058424

(Super. Ct. No. 37-2009-00084767-  
CU-BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Jay M. Bloom, Judge. Affirmed.

Rochelle T. Bastien appeals the summary judgment against her in the lawsuit she filed against Denny Kershek, alleging fraud, breach of contract, breach of fiduciary duty and professional malpractice arising from Kershek's participation as a mediator in Bastien's 2002 divorce. We conclude, as did the trial court, that Bastien's fraud cause of action is barred by the statute of limitations, and accordingly we affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

During Bastien's marriage to her ex-husband, Dennis Dominguez, the couple was friends with Kershek, who is an attorney and certified family law specialist. Kershek acted as an unpaid mediator in the divorce of Bastien and Dominguez, resulting in an executed marital settlement agreement in August 2002 (the MSA).

In 2005, Bastien came to believe that certain community property assets had been omitted from the MSA or had been undervalued. She wrote several letters to Kershek, accusing him of colluding with Dominguez during the mediation. In a May 23, 2005 letter, Bastien stated among other things: "[I]t looks as if you and my Ex-husband have been conspiring to achieve a deal that was best for [Dominguez], and that was unfair for me. I always knew that [Dominguez] would try to hide money, but I have confidence that you, Denny, would ensure a fair process." Bastien referred to consulting with a "malpractice attorney" and stated, ". . . I believe that you have violated the ethical and legal mandate th[at] you behave in a fair and impartial manner, in your role as a 'mediator.'" She complained that Kershek and Dominguez "both intimidated me into signing that agreement without any representation," and that Kershek "seriously lobbied me on [Dominguez's] behalf." She stated that "[p]erhaps I overvalued the extent to which your license would keep you honest . . . ," and that "[t]he process was marked all along with flagrant, outrageous, and conspicuously unethical behaviors on your part, Denny."

Similarly, Bastien's deposition testimony establishes that in 2005 she had come to believe that Kershek "had only been pretending to be a mediator," and "in fact, he was

really working for my ex." She testified that she believed in 2005 that Dominguez and Kershek had been "partners," and that Kershek used his law license to "deceive" her into believing he was acting as a mediator.

Bastien filed a lawsuit against Kershek on March 9, 2009. The trial court sustained a demurrer to her first amended complaint, with leave to amend, and she then filed the operative second amended complaint.

The second amended complaint alleges causes of action for (1) fraud and concealment; (2) breach of contract; (3) breach of fiduciary duty; and (4) mediator malpractice. Each of these causes of action are based on the allegation that Dominguez and Kershek had a preexisting attorney-client relationship at the time of the mediation in 2002, which Kershek concealed from Bastien, falsely giving the appearance that he was acting as a neutral mediator, when he was actually working on behalf of Dominguez. Bastien alleges that had she known Dominguez and Kershek had an attorney-client relationship, she would have consulted with counsel, insisted on a different mediator or proceeded to litigate the marital dissolution in court. Bastien claims that she was damaged by Kershek's alleged misconduct because she did not receive a full and fair division of the marital estate and has spent resources attempting to rectify that inequity.

For the purposes of pleading that the lawsuit was filed within the applicable statute of limitations, the second amended complaint alleges that Bastien did not discover an attorney-client relationship between Dominguez and Kershek until December 2009 "during a review of decade-old checks" which revealed a check from Dominguez to Kershek for legal services. During discovery, further details emerged about the check

and Bastien's discovery of it. The check was written in April 2000 from Dominguez to Kershek from a checking account maintained by Bastien in her name for her personal and professional use, but for which Dominguez also had signing privileges. The check was in the amount of \$180 and bore the notation "legal fees." According to Bastien, a carbon copy of the check, as well as the original negotiated check returned to her from her bank, had continuously been in her possession in a closet in her residence since 2000, but she did not notice them until she was looking through personal papers in December 2009.<sup>1</sup>

Kershek filed a motion for summary judgment, contending that each of the causes of action were barred by the applicable statute of limitations. The trial court granted the motion and entered judgment in favor of Kershek.

## II

### DISCUSSION

#### A. *Standards Applicable to Review of Summary Judgment Rulings*

Code of Civil Procedure section 437c, subdivision (c) provides that summary judgment is to be granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. A defendant "moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*)). A defendant may meet this burden either by

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<sup>1</sup> Kershek submitted a declaration stating that he did not remember the check and did not recall providing any legal services to Dominguez or Bastien prior to mediating their divorce.

showing that one or more elements of a cause of action cannot be established or by showing that there is a complete defense. (*Ibid.*)

If the defendant's prima facie case is met, the burden shifts to the plaintiff to show the existence of a triable issue of material fact with respect to that cause of action or defense. (*Aguilar, supra*, 25 Cal.4th at p. 849; *Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261.) Ultimately, the moving party "bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar*, at p. 850.)

We review a summary judgment ruling de novo to determine whether there is a triable issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. (*Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 972.) "In practical effect, we assume the role of a trial court and apply the same rules and standards which govern a trial court's determination of a motion for summary judgment." (*Lenane v. Continental Maritime of San Diego, Inc.* (1998) 61 Cal.App.4th 1073, 1079.) "[W]e are not bound by the trial court's stated reasons for its ruling on the motion; we review only the trial court's ruling and not its rationale." (*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1402.)

B. *The Statute of Limitations Bars Bastien's Fraud Claim*

The issue before us is whether Bastien's cause of action for fraud is barred by the applicable statute of limitations.<sup>2</sup>

A cause of action for fraud is governed by a three-year statute of limitations, and under the discovery rule it is "not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." (Code Civ. Proc., § 338, subd. (d).)<sup>3</sup>

As our Supreme Court has explained, the discovery rule "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397 (*Norgart*)). "[T]he plaintiff

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<sup>2</sup> Although the trial court granted summary judgment on all four of Bastien's causes of action based on the statute of limitations, Bastien's opening appellate brief challenges only the ruling on the fraud cause of action, presenting no argument for reversal as to the causes of action for breach of contract, breach of fiduciary duty and mediator malpractice. In response to Kershek's argument that Bastien has limited her appeal to the summary judgment on the fraud cause of action, Bastien states, without extensive elaboration, that a reversal of the judgment on the causes of action for breach of contract, breach of fiduciary duty and mediator malpractice is also warranted. Based on ""obvious considerations of fairness,"" we will refuse to consider the issues that Bastien raises for the first time in her reply brief. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.) We thus limit our discussion to the cause of action for fraud.

<sup>3</sup> Much of Bastien's briefing is devoted to establishing that because of a purported fiduciary relationship between her and Kershek, the discovery rule applies and the statute of limitations did not begin to run until she discovered her cause of action. (See, e.g., *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 194 [holding that "a cause of action for legal malpractice does not accrue until the client discovers, or should discover, the facts establishing the elements of his cause of action"].) Bastien's discussion on that point is unnecessary in the context of a cause of action for fraud because the statute of limitations for fraud expressly incorporates the discovery rule. (Code Civ. Proc., § 338, subd. (d).)

discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof — when, simply put, he at least 'suspects . . . that someone has done something wrong' to him . . . ." (*Ibid.*, citations omitted.) "A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1111.) Because accrual of a cause of action is delayed under the discovery rule until the plaintiff discovers, or *has reason to discover*, the cause of action, "the limitations period begins once the plaintiff "'has notice or information of circumstances to put a reasonable person *on inquiry*.'" ( *Id.* at pp. 1110-1111.)

Bastien's cause of action for fraud is based on the allegation that although Kershek represented that he was acting as a neutral mediator, he was actually biased in favor of Dominguez due to a preexisting attorney-client relationship. The undisputed facts presented by Kershek's summary judgment motion establish that Bastien *actually discovered* that cause of action no later than 2005. As we have explained, a plaintiff discovers a cause of action when he or she "at least suspects a factual basis . . . for its elements." (*Norgart, supra*, 21 Cal.4th at p. 397.) It is undisputed that in 2005 Bastien believed that Kershek "had only been pretending to be a mediator," "was really working for" Dominguez, had been "partners" with Dominguez, and "deceive[d]" her into

believing that he was acting as a neutral mediator. Her letters in 2005 accused him of "flagrant, outrageous, and conspicuously unethical behaviors" and "conspiring" with Dominguez. These facts establish that by 2005, she suspected a factual basis for a fraud cause of action against Kershek for misrepresenting his status as a neutral mediator.

Bastien makes much of the fact that she did not discover the check for legal fees from Dominguez to Kershek until 2009. She contends that a cause of action for fraud based on the existence of the check is a "fundamentally different cause of action" than the allegations of Kershek's misconduct that she made in 2005. According to Bastien, in 2005 she "suspected that the mediation had not been fairly conducted," but she "had no inkling that there was an actual attorney/client relationship," and therefore the discovery of the check "established an entirely new cause of action." We reject this argument. The law is clear that a plaintiff "need not know the 'specific "facts" necessary to establish' the cause of action" to have discovered the cause of action within the meaning of the discovery rule. (*Norgart, supra*, 21 Cal.4th at p. 398.) Under the discovery rule, "[a]ggrieved parties generally need not know the exact manner in which their injuries were 'effected . . .'" (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 932.) In this instance, the check is nothing more than a *specific fact* that provides evidentiary support for Bastien's consistent allegation, first made in 2005, that Kershek had deceived her into believing he was acting as neutral mediator. She discovered the cause of action no later than 2005.

Our Supreme Court has acknowledged that "if a plaintiff's reasonable and diligent investigation discloses *only one kind* of wrongdoing when the injury was actually caused

by tortious conduct of a *wholly different sort*, the discovery rule postpones accrual of the statute of limitations on the newly discovered claim." (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 813, italics added.) For example, "a diligent plaintiff's investigation may only disclose an action for one type of tort (e.g., medical malpractice) and facts supporting an entirely different type of tort action (e.g., products liability) may, through no fault of the plaintiff, only come to light at a later date." (*Id.* at p. 814.) That is not the case here because the wrongdoing that Bastien accused Kershek of in 2005 is not tortious conduct of a wholly different sort from the wrongdoing that Bastien identified after she discovered the check in 2009. Instead, Bastien has consistently alleged that Kershek's misconduct consisted of misleading her into believing that he was acting as a neutral mediator.<sup>4</sup>

We therefore conclude that the undisputed facts establish that Bastien discovered her cause of action for fraud against Kershek in 2005. As 2005 is more than three years

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<sup>4</sup> Because Bastien assumes that the wrongdoing described in the second amended complaint arising from the undisclosed attorney-client relationship is fundamentally *different* from wrongdoing she asserted against Kershek in 2005, she contends that our legal analysis under the discovery rule should focus on whether a reasonable person would have been *put on inquiry*, more than three years prior to the filing of the lawsuit, of a claim that Kershek failed to disclose an attorney-client relationship. Accordingly, Bastien discusses at length whether, under the circumstances, a reasonable person would have looked through financial records for evidence of a payment for legal fees from Dominguez to Kershek. However, because — as we have explained — the fraud cause of action alleged in the second amended complaint is based on the *same* wrongdoing that Bastien identified in 2005, the limitations period began to run in 2005 *regardless* of whether the circumstances would have caused a reasonable person to search for evidence of an attorney-client relationship between Kershek and Dominguez. Put simply, because the undisputed facts establish that Bastien *did* discover her fraud cause of action in 2005, we need not consider whether a reasonable person *should have* made such a discovery.

prior to the date that Bastien filed this action in 2009, the fraud cause of action is barred by the three-year statute of limitations for fraud. (Code Civ. Proc., § 338, subd. (d).)

DISPOSITION

The judgment is affirmed. Kershek is to recover his costs on appeal.<sup>5</sup>

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IRION, J.

WE CONCUR:

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HUFFMAN, Acting P. J.

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HALLER, J.

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<sup>5</sup> We note that Kershek's respondent's brief makes a cursory request for "attorneys' fees . . . related to this appeal" without providing a legal or factual basis for the request. We will not consider the request as it is not properly supported. (See *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700 [an issue that is "unsupported by pertinent or cognizable legal argument . . . may be deemed abandoned and discussion by the reviewing court is unnecessary"].) If a legal basis exists for Kershek's request, he may present it to the trial court in the first instance.