

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RICHARD EHMKE,

Plaintiff and Appellant,

v.

JEFFREY D. LARKIN et al.,

Defendants and Respondents.

D058908

(Super. Ct. No.
37-2009-00055178-CU-PN-NC)

APPEAL from a judgment of the Superior Court of San Diego County, Thomas P. Nugent, Judge. Affirmed.

I.

INTRODUCTION

Plaintiff Richard Ehmke appeals from a judgment entered against him in his legal malpractice action against defendants Jeffrey D. Larkin, Michael G. Doan, Doan Law

Firm, LLP (Doan Law), and The Larkin Law Firm (jointly Defendants).¹

Ehmke retained Doan Law to represent him in a Chapter 7 bankruptcy proceeding. After Ehmke was arrested on an outstanding warrant issued in Nevada as a result of Ehmke's having passed bad checks in a Las Vegas casino, he sued Defendants, claiming that they failed to adequately represent him with respect to the criminal matter in Nevada.

The trial court granted summary judgment in favor of Defendants on the ground that Ehmke failed to file his action within the one-year statute of limitations provided in Code of Civil Procedure² section 340.6, which applies to actions against an attorney for a wrongful act or omission arising in the performance of professional services. On appeal, Ehmke contends that the trial court erred in granting summary judgment in favor of Defendants. Specifically, Ehmke asserts that there remains a triable issue of fact as to whether the limitations period was tolled until May 27, 2008, based on Defendants' continuous representation of him. If the limitations period was tolled as Ehmke contends, his action, filed on May 26, 2009, would be timely under the one-year statute of limitations.

We conclude that there is no triable issue of material fact as to whether Defendants continued to represent Ekmke after May 8, 2008, when he discovered the alleged omissions that form the basis of his claims, so as to toll the limitations period in his

¹ The relationships among the defendants are not entirely clear from the record.

² Further statutory references are to the Code of Civil Procedure.

malpractice action. Rather, the evidence establishes as a matter of law that Ehmke could not have reasonably believed after May 8, 2008, that Defendants continued to represent him with respect to the criminal action filed against him in Nevada. We therefore affirm the judgment of the trial court.

II.

FACTUAL AND PROCEDURAL BACKGROUND

On February 1, 2008, Ehmke retained Doan Law to file a Chapter 7 bankruptcy case on his behalf. Among the debts that Ehmke listed was a \$16,100 debt to the district attorney's office in Clark County, Nevada, for "Bounced Checks."

On the day he retained Doan Law, Ehmke provided the firm with a letter, dated January 3, 2008, from the Clark County District Attorney's office, addressed to Ehmke. The letter stated that "[p]assing a bad check is a crime which is punishable by fine and/or imprisonment," and directed Ehmke to make full restitution of \$16,100 for passing bad checks totaling \$15,000 in Clark County. The letter also informed Ehmke that the district attorney would "proceed to take criminal action under Nevada law and a warrant for your arrest will be issued if we do not receive payment from you within ten (10) days."

On May 7, 2008, Larkin, an attorney at Doan Law, forwarded to Ehmke via e-mail a second letter from the Clark County District Attorney regarding Ehmke's criminal debt. This letter stated that a criminal complaint had been filed against Ehmke and that a warrant for his arrest had been issued. Also attached to the letter was a copy of the criminal complaint. The letter had been sent to Doan Law, rather than Ehmke,

presumably because the Clark County District Attorney had received notice that it had been identified as a creditor in Ehmke's bankruptcy case, and that Doan Law represented Ehmke in the bankruptcy matter.

Through multiple e-mail communications sent on May 7 and May 8, 2008, Larkin informed Ehmke that any criminal debt that Ehmke might have incurred as a result of having passed bad checks would not be dischargeable in a Chapter 7 bankruptcy proceeding. Larkin also recommended that Ehmke retain a criminal attorney to defend Ehmke in the criminal proceedings. In a May 8 e-mail, Larkin noted that Ehmke's bankruptcy case had concluded as of May 7, 2008.

Ehmke left a voice-mail for Larkin on May 8, apparently in response to Larkin's May 7 e-mail. Ehmke also sent Larkin an e-mail on May 8. In that e-mail, Ehmke stated that he had "expect[ed] a little more help from my attorney with this [i.e., the matter of the restitution owed to the Clark County District Attorney], unless I should go to the Bar Association and see what they say concerning this matter—you have a fiduciary responsibility to protect me and my best interests and I do not feel this has taken place when you failed to be proactive, as you said you would. I have no criminal record and would have taken care of this myself had you communicated to [me] that I needed to do this when it was originally provided to you, before there was any warrant for my arrest!" Larkin responded that Ehmke had hired Doan Law to represent him in his bankruptcy matter, and that this limited retainer did not make Doan Law his counsel for other

matters. Larkin explained that his fiduciary duty to protect Ehmke's interests was with respect to "bankruptcy related matters only, nothing more."

Ehmke did not immediately hire a criminal attorney. On May 10, 2008, Ehmke sent a check to the Clark County District Attorney in the amount of \$335.42, and in a letter sent with the check, requested that they agree to an arrangement that would allow Ehmke to make installment payments to pay off the \$16,100 that he owed.

Ehmke was apparently arrested on the outstanding warrant on May 23, 2008.³

On May 26, 2009, Ehmke filed a lawsuit alleging professional negligence and breach of contract against Defendants.

On May 6, 2010, Defendants filed a motion for summary judgment, or, in the alternative, a motion for summary adjudication, asserting that Ehmke's causes of action were barred by the one-year statute of limitations.

The trial court granted Defendants' motion for summary judgment in full, determining that Ehmke's claims were barred by the statute of limitations. The court found that Ehmke's claims accrued on May 8, 2008, when Ehmke discovered facts that constituted the alleged wrongful acts and became aware that the criminal complaint had been filed. The court concluded that Ehmke's complaint, filed May 26, 2009, was thus untimely, and entered judgment in favor of Defendants on November 30, 2010.

³ Ehmke failed to include his separate statement of material facts in the record on appeal, and the only references to Ehmke's arrest in the appellate record are in the complaint and in Ehmke's memorandum of points and authorities in opposition to Defendants' motion for summary judgment.

Ehmke filed a timely notice of appeal.

III.

DISCUSSION

Ehmke contends that the trial court erred in granting summary judgment in favor of Defendants because, he maintains, the limitations period was tolled at least until May 27, 2008. Ehmke asserts that Defendants were his attorneys of record and continued to represent him at least until May 27, 2008, the date on which he claims (without citation to the record) the bankruptcy court finally discharged his bankruptcy debts.

A. *Standard of review*

A motion for summary judgment is properly granted only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (§ 437c, subd. (c).) An appellate court reviews a grant of summary judgment de novo and decides independently whether the undisputed facts warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) We therefore must independently review the trial court's order granting summary judgment and determine whether the undisputed facts establish that Defendants are entitled to judgment as a matter of law on their statute of limitations defense. (See *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849, 860.)

B. *The undisputed facts demonstrate that Ehmke did not file his claim within the one-year statute of limitations*

Ehmke does not challenge the trial court's application of section 340.6's one-year limitation period to his claims, thereby conceding that section 340.6 applies to his claims. Rather, Ehmke contends that the one-year period did not begin to run until May 27, 2008, because Defendants continued to represent him until that date.

Section 340.6, subdivision (a) 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. . . . [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:

"(1) The plaintiff has not sustained actual injury.

"(2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred.

"(3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation.

"(4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action."

Under section 340.6, unless one of the tolling provisions applies, the limitations period for actions such as Ehmke's is one year from the actual or imputed discovery of the wrongful act or omission, or four years from the date of the wrongful act or omission,

whichever is sooner. "The test [for actual or imputed discovery] is whether the plaintiff has information of circumstances sufficient to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his or her investigation."

(*McGee v. Weinberg* (1979) 97 Cal.App.3d 798, 803.)

The evidence in the record demonstrates that Ehmke was aware of the facts underlying his professional negligence and breach of contract claims by at least May 8, 2008. Larkin sent an e-mail to Ehmke on May 7, 2008, to which he attached the criminal complaint that had been filed in Nevada. In the e-mail, Larkin said, "As an aside, we just received the attached from the Clark County District Attorney['s] Office regarding the checks written to Caesar[']s Palace. Since this is a criminal matter at this point, I would suggest contact[ing] a criminal attorney as this is beyond the realm of what we do as bankruptcy attorneys." There is evidence in the record that Ehmke received this e-mail, and that he was thus aware of the criminal complaint and the warrant for his arrest as of May 8, 2008. In an e-mail sent on May 8, 2008, Ehmke acknowledges having received the May 7 e-mail from Larkin, and discusses the fact that a warrant for his arrest had been issued.

Ehmke offered no evidence to rebut this evidence of his knowledge of the criminal complaint against him and the fact that a warrant for his arrest had been issued, as of May 8, 2008. The e-mail exchange between Ehmke and Larkin clearly shows that Ehmke suspected as of that date that Defendants had not adequately represented him in the

manner that he apparently had expected. Thus, absent a statutory basis for tolling the time period, the statute of limitations expired a year later, on May 8, 2009.

Ehmke asserts on appeal that the commencement of the limitations period should be tolled until at least May 27, 2008, when, he asserts, his "debts were listed and legally discharged in the Federal Bankruptcy Court." Based on Ehmke's briefing, it appears that he is suggesting that Defendants continued to represent him at least until May 27, 2008, and therefore, under section 340.6, subdivision (a)(2), the accrual of the statute of limitations was tolled until that date. However, the record demonstrates that Ehmke could not have reasonably believed that Defendants represented him in the criminal action in Nevada after May 8, 2008.

The Legislature's purposes in adopting the continuing representation tolling provision contained in section 340.6, as set forth in the legislative history, were: (1) to avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error; and (2) to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired. (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618.)

Section 340.6 "does not expressly state a standard to determine when an attorney's representation of a client regarding a specific subject matter continues or when the representation ends, and the legislative history does not explicitly address this question. An attorney's representation of a client ordinarily ends when the client discharges the attorney or consents to a withdrawal, the court consents to the attorney's withdrawal, or

upon completion of the tasks for which the client retained the attorney. [Citations.]" (*Gonzalez v. Kalu* (2006) 140 Cal.App.4th 21, 28 (*Gonzalez*)). "Some authorities [further conclude] that the representation also ends if the attorney withdraws unilaterally without the consent of either the client or a court, despite any breach of duty, if the client actually has or reasonably should have no expectation of further services. [Citations.]" (*Id.* at pp. 28-29.)

"Absent a statutory standard to determine when an attorney's representation of a client regarding a specific subject matter ends, and consistent with the purposes of the continuing representation rule, . . . for purposes of . . . section 340.6, subdivision (a)(2), in the event of an attorney's unilateral withdrawal or abandonment of the client, the representation ends when the client actually has or reasonably should have no expectation that the attorney will provide further legal services. [Citations.] *That may occur upon the attorney's express notification to the client that the attorney will perform no further services, or, if the attorney remains silent, may be inferred from the circumstances.* Absent actual notice to the client that the attorney will perform no further legal services or circumstances that reasonably should cause the client to so conclude, a client should be entitled to rely on an attorney to perform the agreed services and should not be required to interrupt the attorney-client relationship by filing a malpractice complaint. *After a client has no reasonable expectation that the attorney will provide further legal services, however, the client is no longer hindered by a potential disruption of the attorney-client relationship and no longer relies on the attorney's continuing representation, so the*

tolling should end." (*Gonzalez, supra*, 140 Cal.App.4th at pp. 30-31, italics added, fns. omitted.) The *Gonzalez* court thus concluded that the question of when representation ends "should be viewed objectively from the client's perspective." (*Id.* at p. 31.)

"Whether [a] client actually and reasonably believed that [an] attorney would provide further legal services regarding a specific subject matter is predominantly a question of fact for the trier of fact, but can be decided as a question of law if the undisputed facts can support only one conclusion." (*Gonzalez, supra*, 140 Cal.App.4th at p. 31.)

On this record, the undisputed facts can support only one conclusion—that Ehmke could not have reasonably believed that Defendants would provide him any legal services pertaining to the criminal complaint and warrant for his arrest after May 8, 2008. The e-mail exchange between Larkin and Ehmke on May 7 and 8, 2008, demonstrates, as a matter of law, that Ehmke could have had no reasonable belief that Defendants would be representing him with respect to the criminal matter in Nevada after May 8, 2008. Specifically, on May 7, 2008, when Larkin forwarded the criminal complaint to Ehmke, Larkin said in his e-mail, "Since this is criminal matter . . . , I would suggest contact[ing] a criminal attorney as this is beyond the realm of what we do as bankruptcy attorneys." Ehmke wrote an e-mail the following morning, May 8, informing Larkin that he, Ehmke, had left Larkin a voice-mail message. In response to Ehmke's e-mail, also on May 8, Larkin sent Ehmke an e-mail in which he said the following:

"We have not dropped the ball on anything and did include this debt in your bankruptcy which is why we received the letter I sent you yesterday. You need to understand that although the debt may be wiped out when you receive your discharge, they are claiming you commit[t]ed a crime when you w[r]ote the checks. Bankruptcy does not pro[t]ect you from alleged criminal activity which is why I recommended you seek a criminal attorney. They can still arrest you and prosecute you for the crime they are claiming you commit[t]ed even though the debt is discharged in your BK. Whether or not you are found guilty depends on your specific intent as to whether you intended to defraud Caesars when you wrote the checks. This is not an issue of bankruptcy law but one of criminal law. Hope this helps clarify things for you."

After Ehmke responded by e-mail that day, less than an hour later, Larkin sent Ehmke the following e-mail communication:

"Yes, you did provide me with this information from Clark County when you retained us and I informed you that they would be included as a creditor in your bankruptcy (which they were). When the bankruptcy was filed on February 21, they received notice of the filing, just as every other creditor did. I was not retained to handle bounced check issues with the district attorney of Clark County, or to negotiate resolution of the same. Our firm was retained for the limited purpose of filing your chapter 7 bankruptcy which we did. This does not automatically make our firm your attorney for every possible issue that comes up or for something that may indirectly be related to the bankruptcy. . . . *My fiduciary duty and responsibility to protect your best interests is confined to bankruptcy related matters only, nothing more. . . . Again, this is a criminal issue at this point, not a bankruptcy one.* Your case was significantly more complex than most, *was concluded yesterday*, and will ultimately discharge over a million dollars in unsecured debt so I would say we have fulfilled our fiduciary duty to you." (Italics added.)

Larkin attested to sending these e-mail communications, and there is no evidence in the record to suggest that Ehmke did not receive them or that he received other communications that could have given him an impression different from what was

conveyed by these e-mail communications. Once Ehmke received these e-mails from Larkin, he could have had no *reasonable* belief that Defendants would provide him with continued legal services with respect to the criminal matter in Nevada. In addition, Ehmke could no longer have been hindered by a potential disruption of the attorney-client relationship with Defendants after May 8, 2008. Thus, any tolling based on continuous representation ceased as of that date.

The undisputed facts establish that Defendants are entitled to judgment as a matter of law on their statute of limitations defense, since those facts can support only one conclusion—i.e., that Ehmke's causes of action accrued, at the latest, as of May 8, 2008, and that he could not have reasonably believed that Defendants continued to represent him regarding the specific subject matter in which the alleged wrongful conduct occurred at any point after May 8, 2008.

IV.

DISPOSITION

The judgment of the trial court is affirmed.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.