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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DUKE GERSTEL SHEARER, LLP,

Plaintiff and Appellant,

v.

DAVID T. PURSIANO et al.,

Defendants and Respondents.

D060374

(Super. Ct. No. 37-2010-00104285-
CU-BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Judith F. Hayes, Judge. Affirmed in part and reversed in part.

Plaintiff Duke Gerstel Shearer, LLP (Duke) appeals a judgment dismissing claims against David T. Pursiano and Laurel L. Barry (together Respondents) after the court sustained Respondents' demurrer to Duke's first amended complaint without leave to amend. Duke contends: (1) it has properly stated claims of civil conspiracies of interference with contractual relations and interference with prospective economic advantage and (2) under the facts alleged in the first amended complaint, it can state

causes of action for (a) constructive trust, (b) unjust enrichment, (c) conversion, and (d) money had and received, and should be allowed leave to amend its first amended complaint to state those causes of action. We affirm the judgment with respect to the dismissal of the interference claims, constructive trust, and unjust enrichment, but reverse as to the claims for conversion and money had and received.

FACTUAL AND PROCEDURAL BACKGROUND

The First Amended Complaint

Duke is a California limited liability partnership with its main office in San Diego, California and satellite offices in Las Vegas, Nevada and Phoenix, Arizona. Eric Sachrison was the Duke partner responsible for the Phoenix office. In March 2001, Sachrison, on behalf of Duke, entered into written attorney-client contingent fee agreements with several homeowners of the Canyon Ridge development in Surprise, Arizona for a class action lawsuit. Sachrison filed a complaint in the Canyon Ridge action in March 2001 and developed the case on behalf of Duke until his sudden death in May 2003. The Canyon Ridge action was then transferred to another Duke partner.

In June 2003, Pursiano, then a partner in Duke's Nevada office and Barry, then an associate attorney with Duke, gave notice that they would resign from Duke. Prior to Sachrison's death, Respondents had attempted to convince him to leave Duke also, and to bring with him several cases, including the Canyon Ridge matter. Because of their positions with Duke, Respondents were at that time fully aware of Sachrison's case load and client list, including the Canyon Ridge matter.

In the summer of 2003, after Sachrison's death, Respondents, Sachrison's widow, and Michael Poli, an Arizona lawyer friend of Pursiano, conspired to convince the Canyon Ridge clients to terminate their representation by Duke and retain Poli's firm as the new counsel of record. On July 9, 2003, the Canyon Ridge clients terminated their representation by Duke. Within a week, the Canyon Ridge clients substituted in Poli's firm as counsel of record. Respondents appeared *pro hac vice* in the matter because neither was licensed to practice law in Arizona. Sachrison's widow, also not licensed to practice law in Arizona, served as the client contact person and performed other functions related to the case.

This group litigated the Canyon Ridge matter until it was settled in September 2008 with the court approving the settlement in December 2008. Upon approval of the settlement, Respondents received approximately \$1.3 million as their contingency fee. Duke was never compensated for the legal services it provided the Canyon Ridge clients between March 2001 and July 8, 2003.

Duke filed its original complaint on November 17, 2010. In January 2011, Duke filed its first amended complaint, alleging claims for: (1) intentional interference with contractual relations, (2) intentional interference with prospective economic advantage, (3) breach of fiduciary duty, (4) trade secret misappropriation, (5) conversion, and (6) quantum meruit.

The Demurrer

Respondents demurred to the first through fourth causes of action based on the applicable statutes of limitation, to the sixth cause of action based on Duke's factual allegations precluding a claim as a matter of law, and to the fifth cause of action for both reasons.

In opposition to the demurrer, Duke argued: (1) claims 1 and 2 (the interference claims) were not barred by the statute of limitations because (a) Duke did not sustain actual damages until Respondents received a contingent fee, and (b) the interference claims were based on a civil conspiracy and the statute of limitations did not commence to run until the "last overt act" of the conspiracy, i.e., Respondents' "diversion" of the contingent fee; (2) claim 6 (quantum meruit) was not precluded as a matter of law because Duke had a written lien provision in its contingency fee agreement; and (3) Duke should be permitted to amend its first amended complaint to allege a constructive trust. Duke did not dispute Respondents' demurrer as related to claims 3, 4, or 5. At oral argument, Duke recognized that quantum meruit may only be a cause of action under contract, and pleaded unjust enrichment in the alternative.

The court found that Duke's claims were barred by the applicable statutes of limitation and its claim of quantum meruit failed as a matter of law because it properly could apply only to the Canyon Ridge clients, not Respondents. Thus, the court sustained Respondents' demurrer without leave to amend and entered a judgment of dismissal from which Duke now appeals.

DISCUSSION

In its appeal, Duke requests leave to file a second amended complaint which would allege: (1) interference with contract, (2) interference with prospective economic advantage, (3) constructive trust, (4) unjust enrichment, (5) conversion, and (6) money had and received. We conclude the statutes of limitation bar Duke from stating causes of action for interference with contract, interference with prospective economic advantage, constructive trust, and unjust enrichment. However, Duke can plead sufficient facts to allege causes of action for conversion and money had and received. Thus, Duke should be permitted leave to amend its complaint on those grounds only.

I

STANDARD OF REVIEW

We review a judgment of dismissal based on an order sustaining a demurrer de novo, i.e., "we exercise our independent judgment about whether the complaint states a cause of action as a matter of law." (*Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 650.) In reviewing the complaint, "we must assume the truth of all facts properly pleaded by the plaintiffs, as well as those that are judicially noticeable." (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814.) That judgment "will be affirmed if proper on any grounds stated in the demurrer, whether or not the court acted on that ground." (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324.) Alternatively, if a complaint alleges facts sufficient to constitute a cause of action,

or if the plaintiff shows a reasonable probability that it could be amended to do so, we will reverse the dismissal. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

II

INTERFERENCE CLAIMS

Duke maintains two interference claims, one for interference with contract and the other for interference with prospective economic advantage. The statute of limitations for both interference claims is two years. (Code Civ. Proc., § 339, subd. (1); *Tu-Vu Drive-In Corp. v. Davies* (1967) 66 Cal.2d 435, 437; *Knoell v. Petrovich* (1999) 76 Cal.App.4th 164, 168.) Generally, the statutory period for a claim of wrongfully induced breach of contract begins to run on the date of the allegedly wrongful conduct. (*Trembath v. Digardi* (1974) 43 Cal.App.3d 834, 836 (*Trembath*)). Because breach of contract is the culmination of the alleged wrong, "the accrual date could not be later than the actual breach of the contract by the party who was wrongfully induced to breach." (*Ibid.*) Here, Duke accuses Respondents of "taking the wrongful actions to conspire as a group to induce [Duke's] clients in the Canyon Ridge matter to terminate their representation by [Duke] on July 9, 2003," but Duke did not file its original complaint until November 2010, over five years after the statutory period for its interference claims had expired.

Duke relies on two separate theories to argue the statutes of limitation do not bar the interference claims. First, Duke contends that it did not have a cause of action under the claims until Respondents received a contingency fee because Duke did not suffer

damage until it did not receive its portion of the contingency fee. Second, Duke asserts that the statute of limitations should have been tolled for the interference claims because Duke properly alleged a civil conspiracy, and the "last overt act" of that conspiracy was Respondents' receipt of their contingency fee. The trial court found both theories to be without merit and determined that the statute of limitations barred the interference claims as a matter of law. We agree.

A

Duke correctly asserts that a prima facie element of both interference claims is that the plaintiff sustained damages as a result of the breach. (E.g., *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 600-601 (*Weiss*).)¹ To determine when those damages were suffered, Duke relies on *Fracasse v. Brent* (1972) 6 Cal.3d 784, which held that a discharged attorney working for a fee contingent on the client's recovery does not have a cause of action *against his former client* until that contingency occurs. (*Id.* at p. 792.) Duke's reliance on *Fracasse* is misplaced. The *Fracasse* court reasoned that a client who obtains an attorney for a contingent fee may be of limited means, and "it would be improper to burden the client with an absolute obligation to pay his former attorney regardless of the outcome of the litigation." (*Ibid.*) Further, requiring such a client to compensate his former attorney immediately upon discharge would run counter to "the

¹ Elements of interference are: (1) valid contract between plaintiff and another, (2) defendant had knowledge of the contract and intended to induce breach thereof, (3) party other than plaintiff breached the contract, (4) breach was caused by defendant's wrongful conduct, and (5) plaintiff suffered damages as a result of the breach. (*Weiss, supra*, 51 Cal.3d at pp. 600-601.)

strong policy, expressed both judicially and legislatively, in favor of the client's absolute right to discharge his attorney at any time." (*Id.* at p. 786.)

Duke's argument that there was no injury until Respondents received the contingent fee is misguided because Duke's cause of action is based on Respondents interfering with Duke's contract, not on Respondents receiving a fee based on their subsequent contract with the same clients. The policies the *Fracasse* court discussed do not apply to a discharged attorney's claims against the former client's subsequent attorneys for interference with the attorney-client relationship. (*Fracasse, supra*, 6 Cal.3d 784.) This distinction was discussed in *Trembath, supra*, 43 Cal.App.3d 834 which stated "the tort action against the third party [for interference with contract] is distinct from the contract right against the client," and the cause of action for interference accrues "no later than the date of the breach which has been tortiously induced." (*Id.* at p. 837.) To hold otherwise would imply that if Respondents here did not settle the case and lost at trial, they would not have harmed Duke by convincing the Canyon Ridge clients to discharge Duke as their legal representative. Because the injury, correctly articulated in Duke's first amended complaint, was "the diversion of the case from [Duke's] inventory of cases" and the resulting loss of a *potential* contingency fee, we conclude that the injury occurred, at the latest, on July 9, 2003 when Duke was discharged. Duke, however, did not file suit until November 2010. We therefore affirm the court's ruling that Duke's interference claims, if not saved by its allegation of a civil conspiracy, are barred by the two-year statute of limitations and fail as a matter of law.

B

We turn now to Duke's argument that its allegation of a civil conspiracy saves its interference causes of action. In a civil conspiracy, the statute of limitations does not begin to run until the "last overt act" of that conspiracy has been completed. (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 786 (*Wyatt*)). The "last overt act" of a conspiracy is identifiable as the "*substantive offense* which is the primary object of the conspiracy." (*People v. Zamora* (1976) 18 Cal.3d 538, 560, italics added.)² Thus, even if acts in furtherance of a conspiracy continue after completion of the substantive offense, those acts will not have the effect of delaying the start of the statute of limitations for the substantive offense. (*Ibid.*) Assuming the facts as pleaded by Duke, we must determine which act constitutes the "last overt act" of the conspiracy. (See *Livett v. F.C. Financial Associates* (1981) 124 Cal.App.3d 413, 419.)

Here, the alleged "substantive offenses" are based on Respondents' interference with Duke's contracts in July 2003. Even if the objective of the alleged conspiracy was to eventually earn a contingency fee, working under Respondents' own attorney-client contract and earning a fee based on that contract is not itself a "substantive offense" towards Duke. Because the interference with Duke's contract and the subsequent retention of Respondents as counsel of record both occurred in July 2003, regardless of

² For the purpose of determining the commencement of the statute of limitations, the differences between criminal and civil conspiracies are inconsequential. (See *Wyatt, supra*, 24 Cal.3d at p. 787.)

which of those two events was the "last overt act" of the conspiracy, the statute of limitations bars Duke's claim.

Duke insists the "last overt act" of the conspiracy was the receipt of the contingency fee, and points to *Wyatt* to show receipt of payment can restart the statutory period for past violations conducted for the purpose of receiving that payment. *Wyatt*, however, involved a conspiracy of a continuing fraud, wherein each act in furtherance of the fraudulent scheme restarted the statutory period. (*Wyatt, supra*, 24 Cal.3d 773.) Thus, the receipt of a victim's payment on a fraudulently induced loan that was part of a lending scheme designed to lock the victim onto a "financial treadmill" of refinancing, brokerage fees, and late charges was an act in furtherance of the original wrong of committing the fraud. (*Id.* at p. 788.) The *Wyatt* court emphasized that where a person's wrongful conduct towards another is continuing and serves to "hold the victim in place," the statute of limitations should not serve to bar the victim from bringing a claim that the fraudulent acts effectively prevented him from bringing earlier. (*Ibid.*) The court's reasoning was clear; since the purpose of statutes of limitation is to protect persons from defending against stale claims, as long as a person continues to commit wrongful acts against another in furtherance of a civil conspiracy, a claim of a conspiracy to commit those acts does not become stale. (*Id.* at p. 787.)

Respondents' receipt of a contingency fee, however, was not part of a continuing wrong toward Duke, but rather was much more similar to the divvying up of larcenous proceeds, which does not serve to restart the underlying conspiracy to commit grand

larceny. (See e.g. *People v. Zamora, supra*, 18 Cal.3d at p. 560.) Therefore, even under a civil conspiracy rationale, the statute of limitations for the interference claims began to run, at the latest, in July 2003 when the clients discharged Duke and retained Respondents as their counsel. Accordingly, we determine the claims of interference with contractual relations and interference with prospective economic advantage were barred by the statute of limitations and thus failed as a matter of law.

III

CONSTRUCTIVE TRUST

A constructive trust may be imposed when a person gains something through a wrongful act or wrongfully detains the property of another. (Civ. Code, §§ 2223, 2224; *Weiss, supra*, 51 Cal.App.3d at p. 600.) That said, a constructive trust is a remedy, not an independent cause of action, and thus must arise out of some underlying wrongdoing. (*Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 82.) Thus, a claim for a constructive trust is not based on the establishment of the trust itself, but must arise out of the fraud, breach of fiduciary duty, or other act entitling the plaintiff to relief at the expense of the defendant. (*Weiss, supra*, at p. 600.) When applicable, a constructive trust will "compel a person who has property to which he is not justly entitled to transfer it to the person entitled thereto." (*Burger v. Superior Court* (1984) 151 Cal.App.3d 1013, 1018.) In the case where there is no concealment of the acts, the statute of limitations for an involuntary trust runs from either the time of the wrongful act of the trustee (*Truesdail v. Lewis* (1941) 45 Cal.App.2d 718, 723) or from the time of the acquisition of the

property in violation of the trustee's duty. (*Bell v. Bayly Bros., Inc.* (1942) 53 Cal.App.2d 149, 159 (*Bell*.)

Here, Duke alleges that a constructive trust should be imposed on some portion of the fee paid to Respondents through their contract with the Canyon Ridge clients. Duke's claim is based on the theory that Respondents took over the case after Duke had spent two years working on it, thus Duke should have a constructive trust for a proportionate or otherwise equitable share of Respondents' contingency fee. Duke contends, if it is allowed leave to amend its first amended complaint, it will base this claim on a written lien agreement with the Canyon Ridge clients that allegedly entitled Duke to a share of any proceeds from that case.

Duke's argument is fatally flawed. The fee Respondents received was the product of Respondents' own contract with the Canyon Ridge clients. If the Respondents received anything through a wrongful act, it was the benefit of Duke's two years of work on the case that Respondents "acquired" when they began to represent the Canyon Ridge clients. Accepting the full contingency fee without sharing some portion of that fee with Duke for any benefit Respondents derived from Duke's two years of work on the case was merely an act in line with the original "wrong" of taking the case. Duke "cannot evade the bar of the statute [of limitations] by skipping lightly over the first [wrongdoing] and claiming to found [its] action on some subsequent conduct in line with it." (*Bell, supra*, 53 Cal.App.2d at p. 159.) Whether the statute of limitations is two years under Code of Civil Procedure section 339, subdivision (1), based on a claim of quasi-contract

or torts toward Duke's contract, or four years under Code of Civil Procedure section 343, it commenced when Respondents contracted with the Canyon Ridge clients in July 2003 and bars Duke's claim for a constructive trust as a matter of law. Therefore, we affirm the court's denial of Duke's request to amend its first amended complaint to state a cause of action for a constructive trust.

IV

UNJUST ENRICHMENT

Unjust enrichment is not itself a cause of action, but is " 'a general principle, underlying various legal doctrines and remedies.' " (*Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793 quoting *Dinosaur Development, Inc. v. White* (1989) 216 Cal.App.3d 1310, 1315.) A claim for unjust enrichment, therefore, cannot stand on its own, but may arise under an unenforceable contract or a quasi-contract where a defendant receives a benefit from a plaintiff under circumstances that make it inequitable for the defendant to retain that benefit without paying for it. (*Dunkin v. Boskey* (2000) 82 Cal.App.4th 171, 195-196; *Hernandez v. Lopez* (2009) 180 Cal.App.4th 932, 938.) It is necessary not only that the receiving party unjustly receive a benefit, but that it receives and retains it at the expense of another. (*Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1593.) The statute of limitations for unjust enrichment is based on the underlying wrong. (See *Federal Deposit Insurance Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 348.) Here, Duke claims Respondents were unjustly enriched at its expense because they received payment for work partially

completed by Duke, so the statute of limitations would be two years based on the quasi-contractual conferral of a benefit. (Code Civ. Proc., § 339, subd. (1).)

Duke contends Respondents were unjustly enriched at its expense when Respondents received the full value of the contingency fee without compensating Duke for its two years of work. However, the benefit Respondents unjustly received from Duke, if any, was not payment from the clients, but was the two years of work Duke put into the case before the clients discharged Duke and retained Respondents as counsel.³ As Duke did not file the original complaint until over seven years after Respondents took over the case, its claim for unjust enrichment is barred by the two-year statute of limitations.

V

CONVERSION

A cause of action for conversion requires: (1) plaintiff's ownership or right to personal property, (2) defendant's wrongful act toward or disposition of that property and (3) resulting damages to plaintiff. (*Baldwin v. Marina City Properties, Inc.* (1978) 79 Cal.App.3d 393, 410.) Where money is the property subject to an alleged conversion, a specific sum must be pleaded, but it is not necessary to identify specific coins or bills.

³ It is unclear whether an attorney can be unjustly enriched at the expense of a client's discharged attorney by taking advantage of the discharged attorney's efforts or work product. (See *Weiss, supra*, 51 Cal.App.3d at p. 599 [holding that exploitation of the work product of a client's former attorney did not state a cause of action because " 'work product' of an attorney belongs to the client, whether or not the attorney has been paid for his services"].) Because the statute of limitations bars the claim, that issue is not before the court and we express no opinion on the matter.

(*Haigler v. Donnelly* (1941) 18 Cal.2d 674, 681.) The statute of limitations for conversion is three years. (Code Civ. Proc., § 338, subd. (c)(1).) Generally, the statute of limitations runs from the time of conversion of the property at issue. (*Eistrat v. Cekada* (1958) 50 Cal.2d 289, 291.)

Duke claims it has an attorney lien giving it a right to a share of the contingency fee received by Respondents. Thus, Duke alleges that Respondents' dominion over the entire contingency fee is a wrongful act towards Duke's property resulting in damages to Duke in the amount of its share of the fee. If allowed leave to amend its first amended complaint, Duke claims it could allege a specific dollar amount of the fee to which it is entitled. Because the subject matter of Duke's claim of conversion is the fee itself, the statute of limitations on the claim would not begin to run until Respondents received the fee in December 2008 and Duke's claim would therefore fall within the statutory period. Thus, we conclude that Duke can state a cause of action for conversion and should be allowed leave to amend its first amended complaint to do so.

VI

MONEY HAD AND RECEIVED

A cause of action for money had and received arises when one person receives money belonging to another and " 'in equity and good conscience' " should return it. (*Mains v. City Title Insurance Co.* (1949) 34 Cal.2d 580, 586.) An action for money had and received must state a specific sum of money received by the defendant which properly belongs to the plaintiff. (*Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1623.)

The action accrues upon the receipt of the money. (*Whittle v. Whittle* (1907) 5 Cal.App. 696, 699.) The statute of limitations for money had and received is two years. (See *Franck v. J. J. Sugarman-Rudolph Co.* (1952) 40 Cal.2d 81, 90.)

Duke contends that it has a lien on a portion of the contingency fee received by Respondents. If allowed leave to amend its first amended complaint, Duke claims it could allege a specific amount of that fee to which it is entitled. Because the cause of action did not accrue until Respondents received the fee in December 2008 and Duke's original complaint was filed less than two years later in November 2010, Duke's claim is not barred by the statute of limitations.⁴ Therefore, we determine that Duke can state a cause of action for money had and received and should be allowed leave to amend its first amended complaint to do so.

DISPOSITION

The judgment of dismissal is reversed. This matter is remanded to the trial court with instructions to enter a new order sustaining the demurrer with leave to amend to state causes of action for conversion and money had and received. We affirm the court's

⁴ Even though money had and received was not pleaded in the original complaint, it arises out of the same general set of facts as were alleged in the original complaint, and we therefore use that complaint for the purpose of determining whether the claim was brought within the statutory time period. (See, e.g., *Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048.)

dismissal of the causes of action for interference with contractual relations, interference with prospective economic advantage, constructive trust, and unjust enrichment. The parties are to bear their own costs on appeal.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.