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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CHERYL LYNN BRATLIEN MAYVILLE,
et al.,

Plaintiffs and Appellants,

v.

JAMES PROVENCHER,

Defendant and Respondent.

D068099

(Super. Ct. No. 37-2014-00083875-
CU-PN-CTL)

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

Annen Law Group and Richard J. Annen for Plaintiffs and Appellants.

Law Offices of Jerry D. Cluff and Timothy J. Galvin for Defendant and Respondent.

Cheryl Lynn Bratlien Mayville (Cheryl), Craig Bratlien (Craig) and Brian Bratlien (Brian) (collectively, Plaintiffs) appeal from the summary judgment entered in favor of James Provencher in their lawsuit alleging that Provencher committed legal malpractice

while representing their late mother, Charlotte Bratlien (Charlotte) in her estate planning.¹ Specifically, Plaintiffs contend that the trial court erred in concluding that the statute of limitations barred their claim against Provencher. We conclude that Plaintiffs' appeal lacks merit, and we accordingly affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

In 2002, Charlotte created the Holy Trinity Trust (the Trust), as the trustor and initial trustee, naming her six children as beneficiaries. At the same time, Charlotte executed a statutory short-form power of attorney, appointing her daughter Janice Sbicca (Janice) as her attorney-in-fact. The Trust stated that at Charlotte's death, the trust estate shall be distributed to Charlotte's children in equal shares.

In January 2004, Charlotte resigned as trustee and delegated the trustee duties to Janice (the First Delegation). According to Plaintiffs, the First Delegation was believed to be lost, and Charlotte therefore executed a second delegation document in October 2005, which again delegated trustee duties to Janice (the Second Delegation).² The complaint alleges that Charlotte was diagnosed with dementia in July 2004 and as of that date could not understand legal documents.

¹ As some of the parties share the same surname, we refer to the parties by their first names, and we intend no disrespect by doing so.

² The First Delegation was apparently not permanently misplaced, as it appears as an exhibit in the record.

In February 2006, a first amendment to the Trust was created (the First Amendment), which amended the Trust to provide that Charlotte's real property in Carlsbad (the Carlsbad property) would be distributed to Janice upon Charlotte's death. The First Amendment was not signed by Charlotte, and instead was signed solely by Janice in her capacity both as Charlotte's attorney-in-fact and as trustee of the Trust. Plaintiffs allege that Provencher prepared all of the estate planning documents for Charlotte, including the Trust, the First Delegation and Second Delegation, and the First Amendment. According to the complaint, Provencher did not meet or talk with Charlotte after her dementia diagnosis in January 2004, and did not personally attempt to assess Charlotte's mental condition when preparing the Second Delegation in 2005 or the First Amendment in 2006.

Charlotte died on November 15, 2010. Four days later, on November 19, 2010, Janice, acting as trustee of the Trust, recorded a quitclaim deed for the Carlsbad property, transferring the Carlsbad property to herself, as her sole and separate property.

On February 28, 2011, Richard Annen, as legal counsel for Cheryl, Brian and one of Janice's sisters Geralyn Jaramillo (Geraldyn), sent a letter to Janice. Annen challenged Janice's transfer of the Carlsbad property to herself on the ground that the First Amendment was not valid. Annen stated, "[A]s you may know, the Trust does not provide for amendment of the Trust by anyone except [Charlotte] as Trustor, including anyone attempting to act in her place pursuant to a power of attorney. Thus, the First Amendment to the [Trust] which you executed on February 1, 2006, as Charlotte's

purported attorney-in-fact, is of no force or effect. Consequently, the purported transfer of Charlotte's [Carlsbad property] to you upon her death is of no force or effect."

Around the same time, in February 2011, Geralyn filed a crime report with the police, alleging financial elder abuse by Janice. A police investigation found, among other things, that numerous credit accounts and a home equity line of credit had been opened in Charlotte's name between 2006 and 2010 when she already had dementia and was incapacitated. Janice was criminally charged with theft from an elder, grand theft of personal property and use of personal identifying information arising from her handling of Charlotte's financial affairs. On July 22, 2013, Janice entered a guilty plea to the crime of theft from an elder in an amount over \$65,000. (Pen. Code, §§ 368, subd. (d), 12022.6, subd. (a)(1).) In December 2013, Janice's five siblings filed a petition in the probate court to have Janice removed as trustee of the Trust and to compel Janice to provide an accounting.

The probate court issued an order on April 30, 2014, in which it (1) removed Janice as trustee of the Trust, replacing her with Cheryl; and (2) ordered Janice to provide an accounting. Plaintiffs explain that after the probate court issued the order, Janice filed a petition in the bankruptcy court in November 2014, which had the result of staying the proceedings in the probate court.

On January 16, 2014, Plaintiffs filed the complaint in this matter, which alleges a single cause of action for legal malpractice against Provencher.³ Specifically, the complaint alleges that Provencher acted below the standard of care by (1) not personally assessing Charlotte's mental capacity at the time of the Second Delegation in 2005 and the First Amendment in 2006; and (2) not requiring that each of the beneficiaries to the Trust were informed of and consented to the First Amendment before Janice signed it.⁴

Provencher filed a motion for summary judgment, contending that the lawsuit was barred by the statute of limitations. Provencher's main argument was that the limitations period for the legal malpractice claim against him began to run as of the date of Annen's February 28, 2011 letter, because that letter established the date that Plaintiffs knew they had been injured by the First Amendment. In opposition, Plaintiffs submitted evidence of Provencher's testimony during the preliminary hearing in Janice's criminal proceeding on January 22, 2013, during which Provencher stated that he would not have prepared the First Amendment unless he believed that all of the beneficiaries had consented to it, although there was no legal requirement for him to obtain their consent. Provencher

³ Geralyn was also identified as a plaintiff in the complaint, but she is not named as a party to the appeal, which is pursued only by Cheryl, Brian and Craig.

⁴ The complaint does repeat the allegation, made by Annen in his February 28, 2011 letter to Janice, that the Trust prohibits amendments by someone with a power of attorney to act on behalf of the trustor. Indeed, we note that paragraphs 11.4 and 11.5 of the Trust state that "[t]he power of the trustor to revoke or amend this instrument is personal to the trustor and shall not be exercisable on behalf of the trustor by any conservator or other person," but that "[t]his limitation shall not apply to a power to revoke or amend this trust granted by the trustor to any person or persons under the provisions of the Uniform Durable Power of Attorney Act." (Trust, ¶¶ 11.4, 11.5)

confirmed in his testimony that although he had no record of having obtained the consent of the beneficiaries, he had been told by Janice's husband that the beneficiaries had consented. In their opposition, Plaintiffs argued that Provencher's testimony was the first time that they were on notice of Provencher's legal malpractice in failing to obtain their consent for the First Amendment.

The trial court granted summary judgment in favor of Provencher, concluding that the legal malpractice claim was barred by the statute of limitations.

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 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. *Law Governing the Statute of Limitations Defense*

The statute of limitations provision that applies to Plaintiffs' legal malpractice action against Provencher is set forth in Code of Civil Procedure section 340.6. As applicable here, "(a) 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." (*Ibid.*)

By focusing on when the plaintiff discovers or should have discovered the facts constituting the wrongful act or omission, Code of Civil Procedure section 340.6 expressly incorporates the discovery rule, which, as our Supreme Court has explained,

"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*)). Under this rule, "the plaintiff 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, italics added.) "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.)

"While ignorance of the existence of an *injury* or *cause of action* may delay the running of the statute of limitations until the date of discovery, the general rule in California has been that ignorance of the *identity* of the defendant is not essential to a claim and therefore will not toll the statute. . . . Aggrieved parties generally need not know the *exact manner* in which their injuries were 'effected, nor the identities of all parties who may have played a role therein.' " (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 932, italics added.)

With respect to the circumstances that will trigger the limitations period for legal malpractice, "[i]t is well settled that the one-year limitations period of [Code of Civil Procedure] section 340.6 ' "is triggered by the client's discovery of 'the facts constituting the wrongful act or omission,' *not by his discovery that such facts constitute professional negligence*, i.e., by discovery that a particular legal theory is applicable based on the known facts. 'It is irrelevant that the plaintiff is ignorant of his legal remedy or the *legal theories* underlying his cause of action.' " ' ' " (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 685, italics added (*Peregrine*)).

C. *Provencher Established the Legal Malpractice Claim Was Barred by the Statute of Limitations*

Here, it is undisputed that Plaintiffs knew by February 2011 that Janice had executed the First Amendment, that they had not consented to the First Amendment, that there was some sort of wrongdoing involved in the creation of the First Amendment, and that the creation of the First Amendment had caused injury to them by allowing the transfer of the Carlsbad property to Janice. Under these circumstances, although Plaintiffs did not necessarily know of Provencher's *identity* or know specifically the *exact manner* in which he caused them harm, Annen's February 28, 2011 letter shows that Plaintiffs had sufficient information to know that they had been damaged by the creation of the First Amendment, which was executed by Janice without their consent, and to put them on notice that they should investigate who was at fault for causing that injury to them.

Plaintiffs argue that the limitations period did not start to run until Provencher testified at the preliminary hearing in 2013, because that is purportedly the first time that they realized legal malpractice was the cause of their injury. However, this argument lacks merit in light of the applicable law. As we have explained, the running of the limitations period " 'is triggered by the client's discovery of 'the facts constituting the wrongful act or omission,' *not by his discovery that such facts constitute professional negligence.*" ' ' (Peregrine, supra, 133 Cal.App.4th at p. 685.) To trigger the limitations period, Plaintiffs were not required to know that it was Charlotte's attorney who allegedly caused the harm associated with the First Amendment; instead it was enough they that " 'suspect[ed] . . . that *someone* ha[d] done something wrong' to [them]." (Norgart, supra, 21 Cal.4th at p. 397, italics added.) Here, it is undisputed that Plaintiffs suspected as of February 2011 that the creation of the First Amendment was a wrongful act or omission that had harmed them, and that they had not consented to the First Amendment. Therefore, even if Plaintiffs did not specifically suspect that legal malpractice by Provencher was the cause of that injury, they knew that someone had done something wrong to them in connection with the creation of the First Amendment, and that knowledge caused the limitations period for the legal malpractice claim against Provencher to begin running.

We note that a large portion of Plaintiffs' opening brief focuses on the fact that in the order granting summary judgment the trial court referred to a document that was included in Provencher's exhibits in support of his summary judgment motion, but which was not specifically identified in his separate statement of facts. Specifically, in May

2011 Janice's husband wrote a letter to Plaintiffs' attorney, Annen, which Annen forwarded to Cheryl (the May 2011 letter). Janice's husband stated in the letter that "the attorney who drafted all the documents advised upon, prepared and notarized the correct amendments . . . and said that this was the way to do what was agreed to. . . . [¶] . . . We just did what the attorney advised us to do and did not give it a second thought. . . . So if the advice we received and the resulting actions were unlawful in your opinion[,] then you may need to pursue Jim for damages and some sort of malpractice suit" As the trial court explained, that letter provided evidence that Plaintiffs were on notice in 2011 that an attorney referred to as "Jim" was involved in the drafting of the First Amendment and advised that Janice should sign it as Charlotte's attorney-in-fact.

Plaintiffs argue that the trial court violated their due process rights by considering the May 2011 letter in ruling on the summary judgment motion, as the letter was not identified in Provencher's separate statement. "In ruling on a motion for summary judgment, the trial court has the discretion to consider evidence not mentioned in a party's separate statement, and to permit amendments to the party's submissions, provided the opponent is afforded an adequate opportunity to address the evidence or amendments." (*Jones v. P.S. Development Co., Inc.* (2008) 166 Cal.App.4th 707, 722, fn. 7; see also *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316 ["Whether to consider evidence not referenced in the moving party's separate statement rests with the sound discretion of the trial court," but "[i]n exercising its discretion whether or not to consider evidence undisclosed in the separate statement, the court should also consider due process implications].")

Because we have concluded in our de novo review that summary judgment was warranted even *without* the evidence in the May 2011 letter, we need not, and do not, consider whether the trial court abused its discretion in considering that letter even though it was not referenced in the separate statement. Although the May 2011 letter provides *further* evidence showing that Plaintiffs discovered or should have discovered their claim against Provencher more than one year before they filed this action in January 2014, the evidence that Plaintiffs identified in their separate statement, including Annen's February 28, 2011 letter, provides sufficient evidence to meet Provencher's burden on summary judgment on the statute of limitations defense.

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

HALLER, Acting P. J.

MCDONALD, J.