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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MADISON HARBOR, ALC,

Plaintiff, Cross-defendant, and  
Respondent,

v.

TU MY TONG,

Defendant, Cross-complainant, and  
Appellant,

ROBERT SABAHAHAT et al.,

Cross-defendants and Respondents.

G046191

(Super. Ct. No. 06CC07137)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Derek W. Hunt, Judge. Affirmed in part, reversed in part, and remanded with directions.

Tu My Tong, in pro. per., for Defendant, Cross-complainant, and Appellant.

Madison Harbor, Ali Parvaneh and Jenos Firouznam-Heidari for Plaintiff, Cross-defendants, and Respondents.

For the third time, we are asked to resolve an appeal in a case with approximately \$30,000 to \$40,000 in unpaid legal bills at stake. (See *Madison Harbor v. Tong* (May 18, 2009, G039798) [nonpub. opn.] (*Tong I*); *Madison Harbor v. Tong* (Oct. 28, 2010, G042540) [nonpub. opn.] (*Tong II*)). The first two appeals pertained to a default judgment obtained by plaintiff Madison Harbor, ALC (Madison Harbor), against defendant Tu My Tong, which was ultimately set aside. This time, Madison Harbor moved for summary judgment and obtained a judgment on the merits. Tong contends the trial court wrongly granted summary judgment, in particular with regard to her cross-complaint against Madison Harbor and two attorneys affiliated therewith, Robert Sabahat and Ali Parvaneh. We affirm in part and reverse in part.

## FACTS

On June 15, 2006, Madison Harbor filed a complaint against Tong, alleging Tong breached her contract with Madison Harbor by failing to pay \$30,295 for legal services rendered. Default was entered against Tong and the court entered a default judgment in June 2007, but the court eventually granted a motion to set aside the default and default judgment as void for lack of proper service of summons. In October 2010, in *Tong II*, we affirmed the court's ruling setting aside the default and default judgment. On April 5, 2011, Madison Harbor filed an amended complaint seeking \$41,895.38 in damages for unpaid legal bills.

On March 7, 2011, Tong filed a cross-complaint against Madison Harbor, Sabahat, and Parvaneh for breach of contract, declaratory relief, legal malpractice, and conversion. The court sustained a demurrer without leave to amend as to the declaratory relief cause of action; Tong concedes the correctness of this ruling.

Madison Harbor (and Sabahat and Parvaneh) filed a motion for summary judgment in July 2011. Madison Harbor claimed the undisputed facts showed that Tong

maintained an outstanding balance of \$41,895.38 as of March 2006, at which time the relationship between Tong and Madison Harbor ended. As to the cross-complaint, cross-defendants asserted that the statute of limitations precluded Tong's legal malpractice cause of action, the breach of contract cause of action was simply a set off defense to Madison Harbor's complaint, Tong suffered no damages as to any of her causes of action, and the conversion cause of action failed because cross-defendants levied on property pursuant to court order. We will provide further detail of the parties' pleadings and evidentiary submissions below in the discussion section.

The court granted the motion for summary judgment. The court entered judgment against Tong and in favor of Madison Harbor in the amount of \$40,850.

## DISCUSSION

"We review a grant of summary judgment de novo. [Citation.] We assume the role of the trial court and redetermine the merits of the motion." (*Calemine v. Samuelson* (2009) 171 Cal.App.4th 153, 160-161.) In doing so, we follow a three-step process: (1) identify the issues as framed by the pleadings; (2) evaluate whether the moving party has made a prima facie showing that would support summary judgment or summary adjudication; and (3) if the moving party has made a prima facie showing with regard to some or all of the causes of action that are the subject of the motion, determine whether the responding party has demonstrated the existence of a triable factual issue with regard to those causes of action. (*Hamburg v. Wal-Mart Stores, Inc.* (2004) 116 Cal.App.4th 497, 503; Code Civ. Proc., § 437c, subs. (p)(1), (2).)<sup>1</sup>

"The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving

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All statutory references are to the Code of Civil Procedure.

party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment may not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.” (§ 437c, subd. (c).) A cause of action has no merit if “[o]ne or more of the elements of the cause of action cannot be separately established” (*id.* subd. (o)(1)) or if there is “an affirmative defense to that cause of action” (*id.* subd. (o)(2)).

In her opening brief (Tong did not file a reply brief), Tong claims there were triable issues of fact with regard to her cross-complaint. In particular, Tong claims the statute of limitations had not yet run on her breach of contract and malpractice claims, and that she suffered actual monetary harm as a result of cross-defendants’ allegedly substandard representation of her interests. Tong does not address the court’s grant of summary judgment on Madison Harbor’s complaint or the court’s grant of summary adjudication on the conversion cause of action in the cross-complaint. Appellate courts limit their review to issues specifically raised by the appellant’s briefs. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6 [“Although our review of a summary judgment is de novo, it is limited to issues which have been adequately raised and supported in plaintiffs’ brief”].) We therefore affirm the grant of summary judgment as to the complaint. We also affirm the grant of summary adjudication as to Tong’s conversion cause of action in the cross-complaint.

#### *Tong’s Breach of Contract Action*

Tong’s cross-complaint includes a breach of contract cause of action. Tong alleged that she “entered into a retainer agreement” in April 2004. “Cross-defendants

breached the agreement by charging an unconscionable fee which was not related to the reasonable value of the service rendered, over billed, billed for work not performed, and performed unnecessary work.” Tong did not identify a damages amount or indicate that she actually paid these allegedly improper bills.

A party alleging breach of contract must establish the existence of a contract, his or her own performance, the other party’s breach, and damages suffered by the complaining party. (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1178.)

It is undisputed that several contracts existed between the parties. These agreements called for an hourly rate of \$195. In 2004, Tong hired Madison Harbor to represent her in *Urban Eco Housing v. Tong* (Super. Ct. L.A., No. LASC BC 298372) (*Urban Eco*), a case in the Los Angeles Superior Court. “Tong was billed and paid for those services provided. Sometime in 2005, Tong discharged Madison Harbor and hired” another attorney. “Tong later re-hired Madison Harbor and entered into two separate agreements for legal services . . . . The first was on or about April 26, 2005, for legal services relating to a bankruptcy action [*Doan v. Tong*, BK No. LA 03-31102 TD (*Doan*)] and again [in the *Urban Eco* action]. The second agreement was for legal services relating to” *Tong v. Brownstein* (Super. Ct. L.A., No. LASC BC 335295) (*Brownstein*), another case in the Los Angeles Superior Court. Thus, in early 2005, there was a period of up to four months in which Tong was not represented by Madison Harbor in the *Urban Eco* matter.

It is undisputed that Madison Harbor provided legal services to Tong in these three matters until early 2006. In her declaration, Tong recites a litany of supposed wrongs committed by Madison Harbor (and its individual attorneys) in its representation of Tong in the *Urban Eco*, *Doan*, and *Brownstein* cases. These alleged acts and omissions mirror those alleged in Tong’s malpractice cause of action (e.g., failure to take default of a party in one of the cases, failure to take certain depositions, failure to file

motion to disqualify opposing counsel). In the *Urban Eco* case, Madison Harbor supposedly paid some unspecified amount for jury fees over the expressed wish of Tong to have a bench trial. Madison Harbor also allegedly took \$3,600 from Tong to pay sanctions to the opposing party but did not actually use the money to pay the sanctions award. According to Tong's declaration, "the firm kept the money and did not credit my invoices."

To be successful, cross-defendants' motion for summary judgment on the cross-complaint needed to (1) disprove at least one element of each of Tong's causes of action, or (2) establish an affirmative defense to Tong's causes of action. (§ 437c, subd. (p)(2).) In the section of their separate statements pertaining to Tong's breach of contract cause of action, cross-defendants and Tong merely repeat the debate from the Madison Harbor breach of contract cause of action. Cross-defendants cite the existence of contracts, the alleged performance of Madison Harbor by performing all work instructed by Tong, and the failure of Tong to pay her bills.

Tong disputed each alleged fact by claiming Madison Harbor (and its attorneys) "did not perform competently and did not perform as promised." Tong cited her own declaration as the basis for the dispute. These citations refer once again to the same list of perceived negligent acts and omissions by cross-defendants in the course of their representations of Tong. Tong claims she was damaged by cross-defendants actions and omissions because she lost on her cross-complaint in the *Urban Eco* case, her settlement was insufficient in the *Brownstein* case, and she had to hire new counsel in all three cases. Our review of the entire record suggests that Tong's breach of contract cause of action is duplicative of her malpractice cause of action. Thus, as correctly determined by the trial court, Tong's breach of contract cause of action can survive the summary judgment motion only to the extent that her malpractice cause of action survives the motion.

### *Tong's Legal Malpractice Cause of Action*

As noted above, Tong's cross-complaint also includes a cause of action for legal malpractice. "In a legal malpractice action arising from a civil proceeding, the elements are (1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence." (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1199.)

Tong alleges she retained cross-defendants in February 2004 and that they committed a variety of negligent acts at unspecified times in several different cases that are only vaguely referenced (i.e., did not take the defaults of defendants in the *Urban Ecco* case, failed to take the default of Michael Henschel in an unspecified case, failed to take the deposition of a key witnesses in several cases, failed to obtain a judgment in the *Doan* case, engaged in unauthorized settlement negotiations, advised Tong to file for bankruptcy, advised Tong to enter into disadvantageous settlements, paid jury fees in a case in which Tong wanted a bench trial, kept \$3,600 from Tong that should have been used to pay a sanctions award, provided the wrong time for a hearing, did not seek to disqualify opposing counsel in the *Brownstein* case, inaccurately told Tong that Brownstein did not have insurance, and did not file a lawsuit against Michel Rone). Tong allegedly suffered unspecified damages as a result of cross-defendants' alleged professional negligence.

Cross-defendants moved for summary adjudication of the malpractice cause of action based primarily on the theory that the statute of limitations had run. The court granted summary adjudication on this ground as to both the malpractice and breach of contract causes of action. "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.”

(§ 340.6, subd. (a).) Even if a party pleads breach of contract against an attorney, the section 340.6, subdivision (a) one year statute of limitations applies if the gravamen of the claim is legal malpractice. (*Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 65-67.) The statute of limitations can be tolled in certain specified circumstances, including, as relevant here, “(1) The plaintiff has not sustained actual injury” or “(2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred.” (§ 340.6, subd. (a)(1)(2).)

The summary judgment papers, including the parties’ respective separate statements, make clear that the one-year statute of limitations began running as early as January 2006 and by August 2007 at the very latest. The claims at issue are against attorneys for wrongful acts and omissions that occurred during the performance of professional services. It is undisputed that cross-defendants’ representation of Tong ceased in early 2006. Madison Harbor claims it withdrew as counsel in March 2006; Tong claims she terminated the representation in January 2006. It is also undisputed that Tong knew in 2006 about the potential claims she asserted in her cross-complaint, in that she claims to have fired Madison Harbor because of its alleged errors and omissions and she wrote a letter to her attorney in November 2006 discussing the filing of a cross-complaint against Sabahat. Finally, although one could certainly posit actual injury occurred earlier, it is undisputed that Tong had suffered all of her “actual injury” as of August 2007 at the very latest, when the last of the three actions at issue either settled or had judgment entered in Tong’s favor. The essence of Tong’s claim is that cross-defendants prejudiced the amount of her recovery and unnecessarily increased her attorney fees in the three litigation matters at issue.

Thus, the one-year statute of limitations began running by August 2007 (if not earlier) as a matter of law. It was not tolled by any of the statutory exceptions, as it is

undisputed that Madison Harbor's representations of Tong ended in early 2006 and Tong had suffered any "actual injury" by August 2007 at the latest. (See *Croucier v. Chavos* (2012) 207 Cal.App.4th 1138, 1146-1150 [statute of limitations precluded claim against prior attorney for not collecting on judgment before being replaced by new counsel].)

It is also undisputed that the cross-complaint was not filed until March 7, 2011, approximately five years after cross-defendants' representation of Tong ended and more than three years after the last possible date for the accrual of "actual injury." Tong filed a motion for leave to file a cross-complaint on August 17, 2009, but the hearing was vacated in light of a pending appeal (*Tong II*) of the court's order setting aside the entry of default and default judgment. Of course, even if Tong had filed her cross-complaint on August 17, 2009, it would have been untimely, as August 2009 is two years after August 2007. (§ 340.6, subd. (a).)

Tong's contention at the trial court and on appeal is that Madison Harbor's filing of its initial complaint in June 2006 tolled the statute of limitations. "It has consistently been held that the commencement of an action tolls the statute of limitations as to a defendant's then unbarred cause of action against the plaintiff, 'relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought, . . .'" (*Trindade v. Superior Court* (1973) 29 Cal.App.3d 857, 860; see *Jones v. Mortimer* (1946) 28 Cal.2d 627, 633 ["The statute of limitations is not available to plaintiff as to defendants' counterclaim if the period has not run on it at the time of commencement of plaintiff's action even though it has run when the counterclaim is pleaded"]; 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 448, p. 571 ["The statute is a bar to the defendant's affirmative claim only if the period has already run when the complaint is filed. The filing of the complaint suspends the statute during the pendency of the action, and the defendant may set up his or her claim by appropriate pleading at any time"].)

The court correctly granted summary adjudication on the malpractice cause of action (and the breach of contract action, for that matter) to cross-defendants Sabahat and Parvaneh. The principle underlying the rule cited by Tong is that ““““the plaintiff has [by filing the complaint] thereby waived the [statute of limitations] claim and permitted the defendant to make all proper defenses to the cause of action pleaded.”” [Citations.] Since new parties cannot be said to have engaged in any sort of waiver, the rule does not apply to them.” (*Boyer v. Jensen* (2005) 129 Cal.App.4th 62, 70.) Sabahat and Parvaneh did not file a complaint against Tong. The statute of limitations ran with regard to Tong’s malpractice and breach of contract claims against Sabahat and Parvaneh.

With regard to Madison Harbor, on the other hand, Tong is correct. By filing its complaint against Tong in June 2006, Madison Harbor waived the right to assert a statute of limitations defense to a claim brought by Tong that could have been filed in June 2006. Even if the statute of limitations began running in January 2006, Tong’s cross-complaint would have been timely had it been filed in June 2006.

In its appellate brief, Madison Harbor argues that Tong’s claims actually all arose out of Madison Harbor’s initial representation of Tong in 2004 and early 2005 in the *Urban Eco* case (and not the subsequent 2005 to 2006 representations). But this assertion is not established in the separate statement or accompanying evidence presented by the parties. Although Tong is not clear in pointing to specific dates in her accusations and evidence, it is at the very least a triable question of fact as to when the alleged acts and omissions occurred in each of the three underlying matters in which Madison Harbor represented Tong. Despite Tong’s reference to her retainer agreement with Madison Harbor in 2004 (and not the subsequent retainer agreements in 2005), Tong’s list of alleged acts and omissions constituting malpractice traverses all of the Madison Harbor representations, not merely the one representation that ended in 2005. Moreover, it appears that even claims based solely on Madison Harbor’s initial representation in the *Urban Eco* case would be timely, as Madison Harbor was engaged to work on the same

matter again in 2005 and 2006 after ending its representation for several months in early 2005. Even if the statute of limitations ran for up to four months in early 2005, it was tolled once Madison Harbor began working again on the *Urban Eco* matter. (§ 340.6, subd. (a)(2) [statute tolled while “[t]he attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred”].)

Madison Harbor also argues that Tong’s cross-complaint is unrelated to the complaint. “It is not clear whether the . . . rule [tolling the running of the statute of limitations upon filing of a complaint] applies to cross-complaints against plaintiff *unrelated* to ‘the contract, transaction, matter, happening or accident’ alleged in the complaint ([§ 428.10, subd. (a)]) (so-called ‘permissive’ cross-complaints).” (Rylaarsdam & Turner, Cal. Practice Guide: Civil Procedure Before Trial Statute of Limitations (The Rutter Group 2013) ¶ 8:250, p. 8-31 (rev. #1, 2012).) But this argument is belied by common sense. Madison Harbor sued Tong for unpaid legal fees arising out of the 2005 retainer agreements. Tong is suing Madison Harbor for acts and omissions by Madison Harbor in the course of representing Tong in three matters covered by those 2005 retainer agreements. Thus, even if the relation-back rule is limited to claims related to the underlying complaint, Tong’s causes of action are related to Madison Harbor’s complaint.

Madison Harbor made one final attack on Tong’s malpractice claim — a lack of evidence of damages. “Unless a party suffers damage, i.e., appreciable and actual harm, as a consequence of his attorney’s negligence, he cannot establish a cause of action for malpractice. Breach of duty causing only speculative harm is insufficient to create such a cause of action. [Citation.] ‘[D]amages may not be based upon sheer speculation or surmise, and the mere possibility or even probability that damage will result from wrongful conduct does not render it actionable.’” (*Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, 661–662.)

Madison Harbor attempted to establish a prima facie case of lack of damages by introducing evidence that Tong achieved favorable results in each of the three cases in which Madison Harbor represented Tong. Tong asserted in her separate statement that she did not obtain these results because of Madison Harbor. Moreover, Tong stated in her declaration that she would have achieved better results had Madison Harbor performed up to snuff, that she had to pay other attorneys to get up to speed, and that Madison Harbor took \$3,600 from her without using it as instructed (to pay off a sanctions award). Tong also claims she lost a cross-complaint in one of her cases and failed to obtain a judgment against a defendant in the *Urban Ecco* case. It is true that Tong's declaration is somewhat vague. But Tong's evidence demonstrates the shallowness of Madison Harbor's showing. Just because Tong succeeded to some extent in the three underlying actions does not mean she did not suffer damages as a result of Madison Harbor's alleged acts and omissions. Madison Harbor failed to establish there was no triable issue of fact as to damages.

Because Madison Harbor failed to prove there was no triable issue as to the element of damages or the statute of limitations affirmative defense, the court erred by granting summary adjudication as to the malpractice cause of action against Madison Harbor.<sup>2</sup>

#### DISPOSITION

The judgment is affirmed in part, reversed in part, and remanded for further proceedings in conformity with this opinion. The grant of summary judgment on Madison Harbor's complaint is affirmed. Cross-defendants Sabahat and Parvaneh are

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We reject Madison Harbor's invitation to go beyond the scope of the actual summary judgment motion to address what effect, if any, the entry of a judgment on the complaint in favor of Madison Harbor has on the viability of Tong's causes of action for breach of contract and malpractice.

entitled to summary judgment on the cross-complaint; the judgment is affirmed insofar as it dismisses with prejudice the action against Sabahat and Parvaneh. Moreover, the court properly granted Madison Harbor's motion for summary adjudication on the conversion cause of action in the cross-complaint; this aspect of the judgment is affirmed. However, the court incorrectly granted summary judgment on the remainder of Tong's cross-complaint. The judgment is therefore reversed in part in accordance with this opinion. In the interests of justice, the parties shall bear their own costs on appeal.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.