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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DESIREE E. COSBY,

Cross-complainant and Appellant,

v.

ROBERT G. JOHNSON, JR.,

Cross-defendant and Respondent.

G050516

(Super. Ct. No. 30-2013-00632436)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregory H. Lewis, Judge. Reversed.

Stobart Law Firm, John E. Stobart; Russell & Lazarus and Marc Lazarus for Cross-complainant and Appellant.

Law Offices of Robert G. Johnson, Robert G. Johnson; Law Offices of William J. Kopeny and William J. Kopeny for Cross-defendant and Respondent.

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Cross-complainant and appellant Desiree E. Cosby appeals from a judgment dismissing her cross-complaint for breach of a written agreement against cross-defendant and respondent Robert G. Johnson. Cosby alleged Johnson agreed to represent her on a wrongful termination claim against her former employer for a 40 percent contingency fee, but after Cosby prevailed on that claim Johnson breached the agreement by retaining more than 65 percent of the total recovery as his fee. Johnson demurred on the ground Cosby's claim was time-barred based on the one-year limitations period Code of Civil Procedure section 340.6, subdivision (a) (hereafter section 340.6(a)), established for actions against an attorney for a wrongful act or omission arising in the performance of professional services. The trial court agreed section 340.6(a) governed Cosby's claim and sustained Johnson's demurrer without leave to amend.

We reverse. The Supreme Court recently announced "section 340.6(a) applies to a claim when the merits of the claim will necessarily depend on proof that an attorney violated a professional obligation—that is, an obligation the attorney has *by virtue of* being an attorney—in the course of providing professional services." (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1229 (*Lee*)). Although Johnson's alleged conduct in charging Cosby more than the agreed-upon fee may violate an attorney's professional obligations, imposed by virtue of being an attorney, Cosby does not need to prove Johnson violated those professional obligations to succeed on her breach of contract claim. Rather, Cosby need only prove Johnson agreed to represent her in exchange for 40 percent of the total amount recovered from Cosby's former employer, but kept more than 40 percent as his fee. Cosby alleged those facts in her cross-complaint and we must accept them as true on this appeal. The trial court therefore erred in concluding section 340.6(a)'s one-year limitation period barred Cosby's breach of contract claim.

# I

## FACTS AND PROCEDURAL HISTORY

Cosby and Johnson entered into the “Contingency Fee Agreement” (Agreement) for Johnson to represent Cosby and prosecute a wrongful termination claim against Cosby’s former employer, the City of Orange (City). The Agreement provided Johnson “shall be compensated for his services by means of a Contingency Agreement, whereby he is to be paid Forty Percent (40%) of the gross monies recovered by settlement, arbitration, or judgment in his representation of [Cosby’s] claim against the responsible parties.” The Agreement required Cosby to “reimburs[e] [Johnson] for any and all costs advanced by [Johnson] from [Cosby’s] portion of the gross monies recovered from her case,” but the Agreement was silent on who would be entitled to an attorney fee award, or whether Cosby and Johnson would divide such an award.

Johnson tried Cosby’s claim against the City to a jury that returned a special verdict awarding Cosby \$216,575 in damages. Following the jury’s verdict, Johnson filed a motion on Cosby’s behalf seeking an attorney fee award of \$207,270 under Government Code section 12965, which is part of California’s Fair Employment and Housing Act (Gov. Code, § 12900 et seq.; FEHA). Before the hearing on the motion, the City offered to settle the matter by paying the verdict’s full amount plus \$193,415 in attorney fees and costs. Cosby accepted the offer and the City paid a total of \$409,990 to Johnson on Cosby’s behalf. In doing so, the City made two separate payments, one in the amount of the verdict and a second in the agreed-upon amount for attorney fees and costs.

On April 25, 2008, Johnson sent Cosby a check for \$129,945, representing 60 percent of the jury’s verdict in Cosby’s favor. Johnson retained the remaining 40 percent of the jury’s verdict and the entire amount the City paid to settle the attorney fee motion. Consequently, Cosby received \$129,945 or about 32 percent of the total amount the City paid, and Johnson received \$280,045 or about 68 percent.

Nearly four years later, on April 12, 2012, Cosby filed a petition against Johnson with the Orange County Bar Association to arbitrate an attorney-client fee dispute under the Mandatory Fee Arbitration Act (Bus. & Prof. Code, § 6200, et seq.; Act). A three-arbitrator panel conducted a hearing on Cosby's petition and issued a decision awarding her slightly more than \$151,000 against Johnson, which included more than \$47,000 in interest and nearly \$1,400 for her filing fee. The panel found the Agreement's language entitled Cosby to receive 60 percent of the total amount the City paid, not merely 60 percent of the jury's verdict. Under the Act, the panel's award was advisory only, and either side could seek a trial de novo in court within 30 days. (Bus. & Prof. Code, § 6204.)

Johnson timely filed this action. His complaint alleged a single cause of action seeking a judicial declaration the arbitration award is "null and void" because he timely sought a trial de novo. He also sought a declaration that all claims Cosby could have asserted against him were time barred under section 340.6(a)'s one-year statute of limitations for an attorney's wrongful act or omission arising in the performance of professional services.

Cosby filed a cross-complaint against Johnson, alleging he breached the Agreement by failing to pay her 60 percent of the total amount recovered from the City.<sup>1</sup> Johnson demurred, arguing section 340.6(a)'s one-year limitations period barred Cosby's claim because that period governs all claims by a client against an attorney arising out of an attorney's performance of professional services regardless of whether it was alleged as a tort or contract claim. In opposition, Cosby argued her claim was not a

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<sup>1</sup> Cosby named Robin J. Black as an additional cross-defendant. Black is an attorney who worked with Johnson on Cosby's case against the City. Cosby later dismissed Black from the action and she is not a party to this appeal. Cosby also sought to allege a claim based on the arbitration award in her favor, but the trial court repeatedly sustained Johnson's demurrers to that claim and Cosby does not challenge that ruling on appeal.

legal malpractice action subject to section 340.6(a)'s limitations period, but rather a claim for breach of written contract and therefore subject to Code of Civil Procedure section 337's four-year limitations period because she merely sought to recover the amount the Agreement required Johnson to pay. The trial court agreed with Johnson and sustained his demurrer with leave to amend. Cosby amended her cross-complaint three times seeking to avoid section 340.6(a)'s one-year limitations period, but each time the court concluded her claim was time barred. Cosby's operative pleading is her third amended cross-complaint.

Cosby appealed from the trial court's order sustaining Johnson's demurrer to her third amended cross-complaint without leave to amend, but she did not wait for the trial court to enter a judgment dismissing her claim before she filed her notice of appeal. We issued an order notifying Cosby that we were considering dismissing her appeal because the trial court's order sustaining Johnson's demurrer was not an appealable order. We directed Cosby to obtain a judgment of dismissal from the trial court and file a copy with this court. She did so and we now proceed to decide her appeal on the merits.<sup>2</sup>

## II

### DISCUSSION

#### A. *Standard of Review*

"We independently review the superior court's ruling on a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action

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<sup>2</sup> Although he did not file a motion to dismiss, Johnson contends we should dismiss Cosby's appeal because she failed to file a second notice of appeal after the trial court entered its judgment of dismissal. We decline Johnson's invitation. Instead, we exercise our discretion to treat Cosby's notice of appeal as filed immediately after the trial court entered the judgment of dismissal. (Cal. Rules of Court, rule 8.104(d); *Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 741-742, fn. 2.)

or discloses a complete defense. [Citations.] We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken.” (*Gilkyson v. Disney Enterprises, Inc.* (2016) 244 Cal.App.4th 1336, 1340 (*Gilkyson*)). “Whether the plaintiff will be able to prove these allegations is not relevant; our focus is on the legal sufficiency of the complaint.’ [Citations.] ‘Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.’” (*Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 438-439.) We are not bound by the trial court’s construction of the complaint (*Crawley v. Alameda County Waste Management Authority* (2015) 243 Cal.App.4th 396, 403), and we do not review the validity of the trial court’s reasoning (*Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 994).

“Where a complaint is based on a written contract which it sets out in full, a general demurrer to the complaint admits not only the contents of the instrument but also any pleaded meaning to which the instrument is reasonably susceptible.’ [Citation.] “[W]here an ambiguous contract is the basis of an action, it is proper, if not essential, for a plaintiff to allege its own construction of the agreement. So long as the pleading does not place a clearly erroneous construction upon the provisions of the contract, in passing upon the sufficiency of the complaint, we must accept as correct plaintiff’s allegations as to the meaning of the agreement.”” (*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 229 (*Rutherford Holdings*)).

“The application of a statute of limitations based on facts alleged in the complaint is a legal question subject to de novo review.” (*Gilkyson, supra*, 244 Cal.App.4th at p. 1340.)“““A demurrer based on a statute of limitations will not lie where the action may be, but is not necessarily, barred. [Citation.] In order for the bar . . . to be raised by demurrer, the defect must clearly and affirmatively appear on the face of

the complaint; it is not enough that the complaint shows that the action may be barred.”””” (Lee, supra, 61 Cal.4th at p. 1232.)

B. *The Trial Court Erred in Dismissing Cosby’s Cross-Complaint Based on the Statute of Limitations*

Cosby contends the trial court erred in finding section 340.6(a)’s one-year limitations period barred her claim because she alleged a simple breach of written contract claim based on Johnson’s failure to pay her the full amount owed under the Agreement, and therefore Code of Civil Procedure section 337’s four-year limitations period for breach of a written contract governs. We agree.

Section 340.6(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.”

The Legislature enacted section 340.6(a) in 1977 to provide greater certainty in the law regarding the governing limitations period for legal malpractice claims, and thereby stem the tide of rising malpractice insurance premiums. At the time, a cause of action for legal malpractice did not accrue until the client discovered, or should have discovered, the facts establishing the elements of the claim, and therefore it was difficult to determine when a cause of action accrued and when the limitations period expired. Moreover, the limitations period for a legal malpractice lawsuit turned on the particular cause of action the plaintiff alleged. If the plaintiff alleged his or her claim as a breach of written contract, a four-year limitations period applied, but the period was three years if the plaintiff alleged fraud and two years if the plaintiff alleged breach of oral contract or a tort affecting intangible property. (Lee, supra, 61 Cal.4th at pp. 1233-1234.)

After section 340.6(a)'s enactment, the focus shifted to the alleged wrongful conduct, rather than the particular legal theory, to determine the governing statute of limitations. If the conduct alleged was based on an attorney's performance of professional services, section 340.6(a)'s limitations period applied regardless of whether the plaintiff alleged the claim as professional negligence, breach of contract, breach of fiduciary duty, or even malicious prosecution. (*Lee, supra*, 61 Cal.4th at p. 1236; see, e.g., *Prakashpalan v. Engstrom, Libscomb & Lack* (2014) 223 Cal.App.4th 1105, 1121-1122 [breach of fiduciary duty]; *Yee v. Cheung* (2013) 220 Cal.App.4th 184, 195-196 [malicious prosecution]; *Vafi v. McCloskey* (2011) 193 Cal.App.4th 874, 881-883 [malicious prosecution]; *Stoll v. Superior Court* (1992) 9 Cal.App.4th 1362, 1366-1368 [breach of fiduciary duty]; *Southland Mechanical Constructors Corp. v. Nixen* (1981) 119 Cal.App.3d 417, 428-431 (*Southland*) [breach of contract].)

Section 340.6(a), however, does not define its phrase “‘arising in the performance of professional services,’” and its text does not make clear whether that phrase “limits the scope of section 340.6(a) to legal malpractice claims or covers a broader range of wrongful acts or omissions that might arise during the attorney-client relationship.” (*Lee, supra*, 61 Cal.4th at p. 1233.) The Supreme Court's recent *Lee* decision resolved this issue and established the standard for determining which acts or omissions by an attorney arise in the performance of professional services, and therefore are governed by section 340.6(a)'s limitation period.

In *Lee*, the Supreme Court held, “section 340.6(a)'s time bar applies to claims whose merits necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services. In this context, a ‘professional obligation’ is an obligation that an attorney has by virtue of being an attorney . . . . By contrast, . . . section 340.6(a) does not bar a claim for wrongdoing—for example, garden-variety theft—that does not require proof that the attorney has violated a professional

obligation, even if the theft occurs while the attorney and the victim are discussing the victim's legal affairs.” (*Lee, supra*, 61 Cal.4th at pp. 1236-1237.)

The *Lee* court emphasized, “[S]ection 340.6(a)[does not] necessarily apply whenever a plaintiff's allegations, if true, would entail a violation of an attorney's professional obligations [because] [t]he obligations that an attorney has by virtue of being an attorney are varied and often overlap with obligations that all persons subject to California's laws have. For example, everyone has an obligation not to sexually batter others (see Civ.Code, § 1708.5, subd. (a)), but attorneys also have a professional obligation not to do so in the particular context of the attorney-client relationship (see Rules of Prof. Conduct, rule 3-120). For purposes of section 340.6(a), the question is not simply whether a claim alleges misconduct that entails the violation of a professional obligation. Rather, the question is whether the claim, in order to succeed, necessarily depends on proof that an attorney violated a professional obligation as opposed to some generally applicable nonprofessional obligation.” (*Lee, supra*, 61 Cal.4th at p. 1238.)

The plaintiff in *Lee* was a client who deposited \$110,000 with the defendant attorney as an advance on the attorney fees and costs to be incurred in the client's civil litigation matter. After the litigation settled, the attorney sent a letter and invoice explaining the client had a credit balance of approximately \$46,000. The client demanded the attorney return the credit balance, but the attorney refused. More than a year later, the client sued the attorney to recover the credit balance and the attorney demurred, arguing section 340.6(a)'s one-year limitations period barred the client's claim. The trial court agreed and sustained the attorney's demurrer without leave to amend. (*Lee, supra*, 61 Cal.4th at pp. 1230-1231.)

Applying the foregoing standard, the Supreme Court reversed: “[The client's] complaint may be construed to allege that [the attorney] is liable for conversion for simply refusing to return an identifiable sum of [the client's] money. Thus, at least one of [the client's] claims does not necessarily depend on proof that [the attorney]

violated a professional obligation in the course of providing professional services. Of course, [the client's] allegations, if true, may also establish that [the attorney] has violated certain professional obligations, such as the duty to refund unearned fees at the termination of the representation (Rules of Prof. Conduct, rule 3-700(D)(2)), just as an allegation of garden-variety theft, if true, may also establish a violation of an attorney's duty to act with loyalty and good faith toward a client. But because [the client's] claim of conversion does not necessarily depend on proof that [the attorney] violated a professional obligation, her suit is not barred by section 340.6(a)." (*Lee, supra*, 61 Cal.4th at p. 1240.)

The *Lee* court emphasized it was considering the issue following the sustaining of a demurrer, and therefore the court was required to assume the truth of all facts the client alleged and make all reasonable inferences that could be made based on those facts. (*Lee, supra*, 61 Cal.4th at p. 1240.) Despite its conclusion section 340.6(a) did not bar the client's claim at the pleading stage, the Supreme Court explained section 340.6(a) ultimately could bar the claim depending on the facts necessary to prove the client's claim: "If, for example, [the client's] claim turns out to hinge on proof that [the attorney] kept her money pursuant to an unconscionable fee agreement (Rules of Prof. Conduct, rule 4-200) or that [the attorney] did not properly preserve client funds (*id.*, rule 4-100), her claim may be barred by section 340.6(a). At this stage, however, without any development of the facts, we cannot conclude that section 340.6(a) necessarily bars [the client's] claim." (*Lee*, at p. 1240.)

Here, Cosby's cross-complaint alleged a breach of written contract claim against Johnson and attached a copy of the written Agreement, which provides Johnson shall be paid "Forty Percent (40%) of the gross monies recovered by settlement, arbitration, or judgment." Cosby alleged Johnson breached the Agreement because he recovered \$409,990 on Cosby's behalf, but charged her a contingency fee of approximately 65 percent of that recovery by retaining \$266,414 as his fee. These

allegations do not necessarily depend on proof Johnson violated a professional obligation he owed Cosby. Surely, Johnson's alleged failure to pay Cosby the full amount she was due under the Agreement may violate professional obligations he owed her by virtue of being her attorney, but Cosby's breach of contract claim does not necessarily depend on proof that Johnson violated those professional obligations. Rather, Cosby may succeed on her claim simply by showing the Agreement required Johnson to pay her 60 percent of the total amount recovered and he failed to do so. As in *Lee*, we therefore cannot conclude section 340.6(a)'s one-year limitation period necessarily bars Cosby's claim.

Johnson contends section 340.6(a) applies because Cosby's claim necessarily depends on alleged errors he made in exercising his professional judgment. According to Johnson, he exercised his professional judgment in keeping the fees because he performed the work and had an ethical obligation not to share fees with nonattorneys like Cosby. This argument misconstrues both *Lee* and Cosby's claim.

Under *Lee*, section 340.6(a) applies when the plaintiff can prevail only by proving the attorney violated a professional obligation he or she owed by virtue of being an attorney. If the alleged misconduct violated an obligation the attorney owed regardless of whether he or she is an attorney, but also happened to violate a professional obligation the attorney owed by virtue of being an attorney, section 340.6(a) does not apply. (*Lee, supra*, 61 Cal.4th at pp. 1236-1237.) As explained above, the breach of contract claim Cosby alleged does not require proof Johnson violated a professional obligation he owed by virtue of being Cosby's attorney; she can prevail simply by showing Johnson agreed to pay her 60 percent of the total amount he recovered on her behalf and he failed to do so.

Johnson's arguments about his alleged exercise of professional judgment simply amount to justifications for why he did not pay Cosby 60 percent of the total recovery, but his reasons for failing to pay that amount are irrelevant to the breach of contract claim Cosby alleged, especially at the demurrer stage. Cosby alleged the

Agreement required Johnson to pay her 60 percent of the total recovery and we must accept that interpretation because the Agreement is reasonably susceptible to it. (See *Rutherford Holdings, supra*, 223 Cal.App.4th at p. 229 [in ruling on demurrer, court must accept any meaning plaintiff pleads to which an agreement is reasonably susceptible].) Certainly, Johnson will argue the Agreement’s language only required him to pay Cosby 60 percent of the verdict, but that is a contract interpretation issue the trial court will resolve in deciding the merits of Cosby’s claim. It is not an issue we may resolve on demurrer because the Agreement is reasonably susceptible to the interpretation Cosby alleged.<sup>3</sup> (*Ibid.*)

Johnson also contends section 340.6(a) governs Cosby’s claim because, “absent any allegation of fraud (and there is none in this case), the statute of limitations for any action by a client against an attorney, whether it sounds in contract or tort, is [section 340.6(a)’s one-year limitations period].” Not so. The *Lee* court rejected the same contention: “Although the Legislature intended section 340.6(a) to apply to most

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<sup>3</sup> To support his contention an attorney fee award under the FEHA belongs wholly to the attorney as a matter of law, Johnson cites *Flannery v. Prentice* (2001) 26 Cal.4th 572. Johnson, however, reads the holding in *Flannery* too broadly. *Flannery* provides that an attorney is entitled to that portion of a FEHA attorney fee award that “exceed[s] fees the client already has paid.” (*Flannery*, at p. 577; see *id.* at p. 590.) Here, Johnson already has been paid 40 percent of the verdict, or more than \$86,000, as his contingency fee, and Cosby therefore has stated a claim to recover at least that amount of the fees the City paid. Moreover, *Flannery* further provides that an attorney is entitled to retain a FEHA attorney fee award “absent an enforceable agreement to the contrary.” (*Flannery*, at p. 590; see *id.* at p. 577.) By alleging the Agreement entitled her to 60 percent of gross monies recovered, Cosby has alleged an agreement to the contrary. We acknowledge California Rules of Professional Conduct, rule 1-320(A) prohibits an attorney from directly or indirectly sharing legal fees with a person who is not an attorney. We need not decide whether that rule invalidates an agreement between an attorney and a client to share a FEHA attorney fee award, despite *Flannery*’s language to the contrary, because *Flannery* nonetheless would entitle the client at least to be reimbursed from the fee award for the fees already paid, and therefore Cosby has stated a cause of action even if an agreement to share the fee award would be unenforceable.

lawsuits between clients and their attorneys, so as to reduce the uncertainty driving the cost of malpractice insurance premiums [citation], [the contention section 340.6(a) applies to all forms of attorney misconduct, except actual fraud, that occurs during the attorney-client relationship or entails the violation of a professional obligation] sweeps too broadly. [¶] Misconduct does not ‘aris[e] in’ the performance of professional services for purposes of section 340.6(a) merely because it occurs during the period of legal representation or because the representation brought the parties together and thus provided the attorney the opportunity to engage in the misconduct.” (*Lee, supra*, 61 Cal.4th at p. 1238.) Whether section 340.6(a) applies to a particular claim “turn[s] on the conduct alleged and ultimately proven, not on the way the complaint was styled.” (*Lee*, at p. 1236.) As explained above, Cosby’s alleged breach of contract claim does not require proof Johnson violated a professional obligation, and therefore section 340.6(a) does not apply under the standard *Lee* announced.

Finally, Johnson contends *Southland* applied section 340.6(a) to a breach of contract claim by a client against an attorney and requires us to do the same because the *Lee* court cited *Southland* without overturning it. Johnson, however, misconstrues both *Southland* and *Lee*. In *Southland*, a client sued its former attorney for breach of contract, alleging the attorney breached the contract with the client by failing to diligently prosecute a claim the client had against a third party. (*Southland, supra*, 119 Cal.App.3d at pp. 423-425.) Construing section 340.6(a), the *Southland* court concluded the Legislature intended the section to apply to breach of contract claims because an attorney’s failure “to render the requisite degree of skill and knowledge is legal malpractice which ‘constitutes both a tort and breach of contract.’” (*Southland*, at pp 429, 431.)

*Southland* is entirely consistent with *Lee* and the standard it announced. Although alleged as a breach of contract claim, the client based its claim in *Southland* on the violation of the attorney’s professional obligation owed by virtue of being an

attorney—the obligation to ““to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.”” ( *Southland, supra*, 119 Cal.App.3d at p. 426, fn. 3.) The client could not succeed on the claim without showing the attorney violated that professional obligation. Contrary to Johnson’s contention, *Southland* does not stand for the proposition all breach of contract claims by a client against an attorney are subject to section 340.6(a). As explained above, *Lee* rejected all such categorical rules and instead focused on the conduct alleged and ultimately proven by the client. (*Lee, supra*, 61 Cal.4th at p. 1236.)

### III

#### DISPOSITION

The judgment is reversed. Cosby shall recover her costs on appeal.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

FYBEL, J.