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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

INSYST, LTD.,

Plaintiff and Appellant,

v.

APPLIED MATERIALS, INC.,

Defendant and Respondent.

H037022

(Santa Clara County

Super. Ct. No. CV024251)

In 2010 this court reversed a judgment in plaintiff Insyst, Ltd.'s action against defendant Applied Materials, Inc. based on an error granting summary adjudication of Insyst's claim of misappropriation of trade secrets. Upon remand, Applied again moved for summary adjudication, which the superior court granted on a new showing of undisputed facts. Insyst again appeals, contending that the lower court incorrectly found that equitable estoppel did not save the action from the bar of the three-year statute of limitations, Civil Code section 3426.6. We will affirm the judgment.

*Background*

Insyst initiated this action on July 30, 2004. Its first amended complaint, filed March 15, 2006, contained causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, declaratory relief, misappropriation of trade secrets, conspiracy, unfair competition, unjust enrichment, and fraud. Insyst alleged

essentially that during and after their business relationship, Applied treated Insyst's intellectual property (IP) as Applied's property, contrary to the terms protecting Insyst's IP in their past agreements. In January 2001, after Insyst discovered that Applied had been using Insyst's technology in a manner prohibited under the parties' interim agreement and their anticipated long-term agreement, Applied promised that there would be no future violations of the terms of the interim agreement. While negotiating the long-term agreement, Applied also promised to abide by the terms restricting its use of Insyst's IP. Yet, Insyst alleged, even before signing the long-term agreement (which was effective in February 2001), Applied continued to misappropriate Insyst's IP and draft its own patent applications based on Insyst's technology.

The first amended complaint added details of the events leading to its discovery of this continued misappropriation. In August 2002 Applied notified Insyst that it was terminating the long-term agreement, effective November 1, 2002. In December 2002, the first of several patent applications submitted by Applied was published. When Insyst discovered the applications, it became apparent that Applied had terminated the agreement in order to use Insyst's technology "as if it owned it and without any restrictions on its use."

On January 15, 2008 Applied obtained summary adjudication of the misappropriation claim and a jury verdict on the fraud claim.<sup>1</sup> In its summary adjudication order the trial court ruled that the misappropriation claim was barred by Civil Code section 3426.6, which allows three years "after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered." In its order, the court explained that because Insyst had discovered between December 2000 and January 2001 that Applied was performing work that was clearly prohibited under

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<sup>1</sup> The remaining claims were resolved by other procedural devices which are not material to the issues currently before us.

the Interim Agreement and the anticipated Long-Term Agreement, "the cause of action for a misappropriation claim would have accrued by January 2001 at the latest, and the claim would be time-barred after January 2004." The court reasoned further that Applied's assurances that it would abide by the agreement did not extend the limitations period, because Insyst had learned of Applied's patent applications allegedly based on Insyst's IP a year before the limitations period lapsed. Thus, the lower court rejected Insyst's assertions of equitable tolling and equitable estoppel; instead, the court ruled, "[t]he falsity of the misrepresentation that lulls a plaintiff into delaying the filing of a complaint must not be discovered by the plaintiff prior to the running of the statute of limitations in order for the doctrine of estoppel to apply." Subsequently, a jury trial on the remaining fraud allegations culminated in a defense verdict.

In reversing the judgment, this court held that Applied had not established the lapse of the limitations period as a matter of law. We specifically focused on Insyst's assertion that equitable estoppel excused its delay in bringing suit. Applied had produced no evidence that Insyst had failed to act diligently after December 2002 to bring the lawsuit before the statutory period expired in January 2004. Instead, Applied had simply argued that *Insyst* had made no showing of its diligence—an improper way of seeking summary adjudication. We concluded: "Without evidence of when plaintiff discovered defendant's December 2002 patent application or what plaintiff did after this discovery, we cannot determine as a matter of law whether plaintiff had ample time or was diligent in filing suit on July 30, 2004."<sup>2</sup>

On October 20, 2010, upon remand to superior court, Applied again moved for summary judgment. This time it addressed Insyst's estoppel theory by offering testimony and declarations from Insyst witnesses to show that Insyst could have brought suit a year

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<sup>2</sup> We found no error arising from the trial of the fraud allegations.

before the statutory period lapsed, but instead "spent eighteen months arguing about strategy, dickering about how to divide anticipated spoils and letting the statute of limitations expire."

In its opposition, Insyst added more facts to its first amended complaint. After terminating the long-term agreement, Applied stopped communicating with Insyst. It was only when Insyst discovered a June 2001 patent application that Insyst realized that Applied had "not kept its promises regarding Insyst's intellectual property." This discovery occurred in late December of 2002 (when the patent application was made public) or in January of 2003.

Nevertheless, Insyst argued, while the patent application "claimed inventions of Insyst as its own," it did not indicate whether Applied had continued to use Insyst's IP in its business. Because Applied was no longer communicating, Insyst "was forced to look to Applied's public and industry statements to try to determine whether or not Applied was using Insyst's intellectual property." As part of its investigation, Insyst representatives attended industry conferences and reviewed Applied's public statements; but none of these strategies confirmed Applied's continued use of Insyst's IP. In addition, Applied continued representing to Insyst that it was not using Insyst's IP. It was not until May 20, 2004, that Applied "confessed" to Insyst that it had been using Insyst's IP "all along."

#### *Discussion*

We need not remind the parties of the standard of review. Instead, we proceed to examine de novo whether Applied has established that Insyst cannot rely on equitable estoppel to overcome the statute of limitations for misappropriation of trade secrets, Civil Code section 3426.6. Of the facts offered by Applied, we include in our discussion only those that are either undisputed or are supported by relevant evidence in the record. If Applied meets its burden, we consider the evidence supplied by Insyst to determine whether it raises a triable issue of fact material to the issue before us, the applicability of

equitable estoppel. We also briefly address the evidentiary rulings excluding Insyst's evidence as hearsay.<sup>3</sup>

The superior court received declarations from two Insyst founders, Arthur Goldman and Yossi Fisher. Goldman, who was chief executive officer from 1998 to August of 2003, described the severe financial challenges Insyst experienced after Applied terminated the long-term agreement. He stated that beginning in late 2002 Insyst began looking for counsel to evaluate a potential claim against Applied. It considered retaining David Levin, who had represented Insyst in a December 2002 arbitration involving Applied. Levin, however, lacked the resources or support necessary to bring a lawsuit against Applied. Because of Insyst's "financial distress," it needed an attorney who would be compensated on a contingent basis.

Beginning with the "investigation" of Levin in late 2002 and continuing into 2003, Insyst looked for litigation counsel. In late 2003 Goldman found an attorney willing to handle the case, but Insyst and counsel did not agree on terms, including contingent representation, until late June of 2004. Meanwhile, counsel "spent significant time investigating the case."

Goldman acknowledged that there was "some disagreement internally" as to whether to file a lawsuit against Applied.<sup>4</sup> He believed, however, that this disagreement

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<sup>3</sup> In *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535, our Supreme Court found it unnecessary to "decide generally whether a trial court's rulings on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo." In the case before us the outcome is unaffected by the review standard that is applied.

<sup>4</sup> In an earlier deposition in February 2007 Goldman explained that the disagreement was among directors of the company, regarding how to direct the resources it had. Goldman wanted to diversify its applications from the process industry and concentrate on litigation against Applied. Fisher, Goldman recalled, wanted to concentrate resources on the process industry and was not in favor of litigation.

did not protract the delay in filing the action. Instead, it was the effort to find counsel and determine whether Applied was in fact using its IP that forestalled the filing of the complaint until July 30, 2004.

Fisher's declaration echoed key parts of Goldman's. As chief operating officer, Fisher had the task of finding out whether Applied had continued to use Insyst's IP. After the agreement with Applied ended in November 2002, Fisher attended conferences and exhibitions and assigned others to attend conferences as well. None of the information derived from these events in 2003 enabled Fisher to confirm Applied's unauthorized use of Insyst's IP. At a symposium in April 2004, however, Fisher obtained specific, "alarming" information from which he concluded that Applied was indeed using Insyst's IP.

Fisher's declaration mirrored much of his testimony at the jury trial in 2008. At that trial he stated that it was the beginning of 2003 when, having seen Applied's patent applications, he first suspected that Insyst had been defrauded. He then authorized the action to be brought; indeed, he "wanted very much to sue Applied." His concern, however, was that for a small company such as Insyst, it would be "very difficult to sue a company like Applied."

Insyst offered abundant evidence of Applied's misrepresentations and false assurances in 2001 and 2002, the first two years of the limitations period. We are not concerned, however, with whether that conduct created an estoppel,<sup>5</sup> because the parties have proceeded on appeal in accordance with the trial court's conclusion that an estoppel

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<sup>5</sup> "Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305; *Honeywell v. Workers' Comp. Appeals Bd.* (2005) 35 Cal.4th 24, 37.)

was in fact operative between January 2001 and January 2003. But by January 2003, the court noted, Insyst had "discovered the falsity of [Applied's] prior lulling assurances by reviewing an Applied patent application published in December of 2002." Thus, "the circumstances inducing any delay" in filing the misappropriation action had "ceased to operate at this time, and [Insyst] had ample time after January of 2003 to institute a lawsuit."

On appeal, Insyst contends that in spite of the guidance provided in this court's prior opinion, the superior court improperly measured the success of Applied's showing by citing only the one-year "time frame" without determining whether Insyst exercised reasonable diligence in bringing the lawsuit. Insyst emphasizes that throughout 2003 and the first half of 2004 it was investigating its suspicions about Applied's use of its IP while also looking for counsel who would represent it for a contingent fee.

As we explained in our previous opinion, a plaintiff cannot rely on equitable estoppel to overcome the statute of limitations if a "substantial period for instituting proceedings supervened after expiration of the delay engendered by [the defendant] . . . . A party has a reasonable time in which to bring his action after the estoppel has expired." (*Industrial Indem. Co. v. Industrial Accident Comm.* (1953) 115 Cal.App.2d 684, 690; see also *Regus v. Schartkoff* (1957) 156 Cal.App.2d 382, 387 [substantial period supervened after discovery of fraudulent inducement to delay].) Expressed another way, "If there is still ample time to institute the action within the statutory period after the circumstances inducing delay have ceased to operate, the plaintiff who failed to do so cannot claim an estoppel." (*Lobrovich v. Georgison* (1956) 144 Cal.App.2d 567, 573-574 ["ample time" of more than five weeks]; see also *Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 655-656 [a year was ample time to file claim after plaintiffs stopped relying on defendant's promises]; *Derosé v. Carswell* (1987) 196 Cal.App.3d 1011, 1026 [one year after reaching adulthood]; *Santee v. Santa Clara County Office of Education* (1990) 220 Cal.App.3d 702, 716

[estoppel precluded where two months remained to file claim]; *Ortega v. Pajaro Valley Unified Sch. Dist.* (1998) 64 Cal.App.4th 1023, 1053, 1056 [first molestation victim's claim was timely when filed within two months after estoppel ceased to operate; second victim's claim, filed more than eight months afterward was untimely].)

More recent cases have refined this principle. What amounts to a "substantial period," or a "reasonable" or "ample" time, must be determined by the circumstances of each case. What is clear, however, is that in order to invoke estoppel successfully, the plaintiff must *proceed diligently* once the truth is discovered. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 384, citing *Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1153.)

"Although equitable estoppel is generally a question of fact, it is a question of law when the facts are undisputed and only one reasonable conclusion can be drawn from them." (*Mt. Holyoke Homes, LP v. California Coastal Com.* (2008) 167 Cal.App.4th 830, 840; *Molecular Analytical Systems v. CIPHERGEN Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 708.) Here it is undisputed that by January 2003 Insyst was fully aware that Applied had been using Insyst's IP in violation of the long-term agreement. In the one year remaining of the limitations period, it devoted its time to searching for irrefutable evidence of Applied's misappropriation and to finding counsel who would handle the case for a contingent fee. We cannot consider either of these pursuits to be an exercise of reasonable diligence. Absolute certainty of the nature of Applied's improper conduct was not required to institute the action. As for counsel, all Insyst had to do before January 2004 was retain one attorney who would draft and file the complaint. It had a full year to find counsel for this limited purpose; and indeed, it did consider Levin in late 2002 as well as "other counsel" in 2003.

Insyst maintains that it was entitled to at least those extra six months to sue after Applied's two years of deception. This amounts to an assertion that the statute was tolled during the estoppel period. But "[e]quitable tolling and equitable estoppel are distinct doctrines." (*Lantzy, supra*, 31 Cal.4th at p. 383.) "Equitable estoppel differs from equitable tolling in distinct and important ways. They each arise under different circumstances, and have different rationales and different predicates. (*Battuello v. Battuello* (1998) 64 Cal.App.4th 842, 847–848.) Equitable estoppel does not 'extend' a limitations period ' "but rather comes into play only after the limitations period has run and addresses itself to the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period." ' (*Id.* at p. 847.)" (*Doheny Park Terrace Homeowners Assn., Inc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1089.) There is no basis for applying equitable tolling here, and Insyst does not *directly* contend otherwise.

Nor is it helpful to Insyst's position that Applied continued to claim that it did not use Insyst's IP in April and May of 2004. In order to sustain an estoppel theory, the defendants' conduct must have actually *and reasonably* induced the plaintiff to forbear suing within the statutory period. (*Lantzy v. Centex Homes, supra*, 31 Cal.4th at p. 385.) Here Insyst did not rely on these continued assurances; on the contrary, it knew that Applied had violated the agreement. And even if it had trusted Applied's assurances, such reliance would not have been reasonable given what Insyst had already learned. As in *Lantzy, supra*, Applied's 2004 assurances amounted to "mere denial[s] of . . . liability, [which were] insufficient to establish an estoppel to assert the statute of limitations." (*Lantzy, supra*, 31 Cal.4th at p. 385, fn. 20, italics omitted.) In any event, such denials,

however characterized, were immaterial, as they occurred well beyond the expiration of the statutory period.<sup>6</sup>

We thus conclude that the superior court's order was correct. Even if, as Insyst posits, the court's reasoning was based on the passage of "ample time" alone—a premise we do not accept<sup>7</sup>—our task is to review the court's summary adjudication ruling, not its rationale. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.) Applied met its burden to establish the preclusive effect of Civil Code section 3426.6, and Insyst failed to raise a triable issue of material fact as to whether it exercised reasonable diligence in bringing this lawsuit after the estoppel of Applied was no longer operative.

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<sup>6</sup> Insyst briefly contests the exclusion of evidence contained in Yossi Fisher's declaration, in which he described reports received from an Insyst representative, Yigal Tomer, who had attended one of the industry conferences. Tomer reported to Fisher what two Applied employees told him—essentially, that Applied was not selling technology based on Insyst's IP. Insyst opposed Applied's objection to this evidence, arguing that it was admissible to show the "reasonableness of [Insyst's] actions, [its] diligence." We need not enter this debate, however. The excluded evidence pertained to an event preceding the January 2003 discovery of the patent application, which marked the end of the estoppel period. Thus, assuming the statements contained within Tomer's report were admissible, they do nothing to advance Insyst's assertion that it was diligent in bringing suit *after* January 2003.

<sup>7</sup> Fairly viewed, the superior court's analysis did not include simply the statement that Insyst had ample time to bring the action, but made the point that during those 18 months Insyst spent its time investigating Applied's activities and looking for counsel to sue Applied. At that time "it could not longer be said that [Insyst] was lulled into a false sense of security" by Applied.

*Disposition*

The judgment is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.