

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ANN MILES,

Plaintiff and Appellant,

v.

KRISTA POWERS,

Defendant and Respondent.

G056486

(Super. Ct. No. 30-2017-00938755)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frederick P. Horn, Judge. (Retired judge of Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Ann Miles, in pro. per., for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith and Corinne C. Bertsche for Defendant and Respondent.

*

*

*

Plaintiff Ann Miles, one of four beneficiaries of two trusts, filed a lawsuit against defendant/attorney Krista Powers based upon legal services she provided to the trusts' trustees.¹ The trial court sustained demurrers to Miles' original and first amended complaints based upon the one-year statute of limitations of Code of Civil Procedure section 340.6, subdivisions (a),² with leave to amend. In her second amended complaint, Miles included fraud claims based upon the same operative facts. The trial court sustained Powers' demurrer to that complaint based upon the same statute of limitations, but without leave to amend. Finding no error in the result, we affirm the judgment.

I

FACTS AND PROCEDURAL HISTORY

The following summary of facts includes the allegations of Miles' second amended complaint. In 2007, Powers—a certified specialist in trusts since 1997—began serving as the attorney for the trustees of two trusts: the Santa B. Hickey Revocable Trust and Joseph Bonsignore Trust (Hickey trust and Bonsignore trust respectively). Powers did not file accountings in any probate court for either trust during the next six years.

Prior to this case, Miles had been one of four siblings who were equal beneficiaries of the Hickey and Bonsignore trusts—i.e., all four siblings had respective 25 percent interests in both trusts. Central to this appeal, the trusts had joint ownership of real property located in Encinitas, California (the property): the Hickey trust owned a 60 percent interest in the property and the Bonsignore trust owned the other 40 percent.

¹ At all relevant times, Miles' beneficial interest was held by the Santa B. Hickey Revocable Trust for the benefit of Ann Miles and Miles' daughter was the trustee.

² All further undesignated statutory references are to the Code of Civil Procedure.

A. Miles' 10 Percent Interest and the Transfer Deed

Prior to this case, Miles had been indebted to the Hickey trust based upon a \$200,000 promissory note. In October 2012, in exchange for a satisfaction of the note, Miles transferred her interest in the Hickey trust's ownership of the property (i.e., a 10 percent total interest in the property derived from Miles' 25 percent interest in the Hickey trust's 40 percent interest in the property; hereinafter the 10 percent interest). On some date not identified by Miles, Powers wrote an e-mail to the trustees of the Hickey trust discussing the valuation of Miles' 10 percent interest (valuation e-mail). According to Miles' allegations, Powers' e-mail "stated and advised the trustees . . . that [Miles] was not entitled to an additional \$105,000 valuation concerning [Miles'] 10% beneficial interest in the [the property] which [Miles] had transferred to and used to pay off her debt [owed under the promissory note]." On an unstated date, the trustees forwarded the valuation e-mail to Miles.

In August 2013, Powers filed a "Trust Transfer Deed" with the San Diego County Recorder's Office, adjusting the total ownership percentages in the property for the beneficiaries of both trusts (transfer deed). Specifically, the transfer deed granted to each of Miles' three siblings a 28.333 percent interest in the property and to Miles a 15 percent interest.

B. Probate Litigation and Reports

In November 2013, two petitions to compel accountings for both the Hickey and Bonsignore trusts (respectively the Hickey petition and Bonsignore petition; collectively the probate petitions) were filed in the Orange County Superior Court on behalf of Miles.³ Powers resigned as counsel for the trustees that same month. On May 20, 2014, the trustees' new counsel filed two respective reports in the superior court, both

³ The petitions were filed by Miles' daughter, as the trustee of the Hickey trust for the benefit of Miles.

named “Successor Trustees’ First Account Current and Report,” in response to Miles’ probate petitions (respectively the Hickey report and Bonsignore report; collectively the accounting reports). Both reports reflected the October 2012 transfer of Miles’ 10 percent interest in the property. Additionally, the Hickey report contained an annotation confirming the recording of the transfer deed and an indication that Miles and her siblings were going to attend a mediation “following petitioners’ review of the accountings to resolve all issues between them.”

In April 2016, counsel for Miles conducted a deposition of Powers, in the course of litigating the Hickey petition. According to her allegations, prior to then, Miles had been unaware of the fraud she claims in this case. Specifically, Miles alleged that “[she had] assumed and deferred to Powers’ knowledge of the law regarding the issues stated [, i.e., material here, Miles’ 10 percent interest and the transfer deed,] until Powers’ deposition[,] which revealed Powers’ concealments, deceit, fraud, misrepresentations and breaches of fiduciary duties. [Miles] did not intend to file a lawsuit against Powers until she learned during Powers’ deposition that [Powers] admitted that her advice/statements to her trustee clients were false.”

C. Successive Demurrers

This case arrives on appeal after three rounds of demurrers. Miles filed her initial complaint in this case on August 18, 2017, about three years and nine months after filing her November 2013 probate petitions. Miles’ original complaint did not contain a fraud claim and Powers’ demurrer to it was sustained by the trial court with leave to amend. The court reasoned that all claims in Miles’ original complaint were time-barred pursuant to section 340.6 because “[u]nder the facts alleged in the complaint, [Miles’] causes of action would have accrued on November 12, 2013. As a result, they are untimely under a complaint filed on August 18, 2017.” Miles then filed a first amended

complaint which also did not include any fraud claim. Powers demurred again and the court again sustained with leave to amend.

Finally, in her second amended complaint (the operative complaint), Miles alleged six causes of action against Powers: 1) fraud, 2) breach of third party contract, 3) conversion, 4) financial elder abuse, 5) deceit, and 6) breach of fiduciary duties. Miles alleged, as she had previously, she was damaged in the form of having to pay attorney fees and litigation costs “to recover [an] additional 2.5% interest (\$71,559) and [a] \$105,000 undervaluation from the trustees of the Hickey Trust because of Powers’ false assertions, false statements and actions.” In her briefing on appeal, Miles claims she was “deprived” of the “additional 2.5%” interest through the transfer deed, which Miles claims was “secretly prepared and then secretly recorded.” Miles also claims that the “undervaluation” she suffered was due to Powers’ valuation e-mail forwarded to her by the trustees. In essence, Miles’ causes of action are based upon two purported errors regarding ownership percentage and interest valuation. First, Miles claims the net result of the transactions at issue should have resulted in her having a 17.5 percent interest in the property instead of 15 percent. Second, Miles claims the value of the 10 percent interest she exchanged for a satisfaction of the promissory note she owed was \$105,000 lower than what it should have been.

Powers filed a demurrer to Miles’ second amended complaint along with a supporting request for judicial notice. The trial court granted the request in full and granted Powers’ demurrer in full, without leave to amend. The court entered a judgment in favor of Powers and Miles timely appealed.

II DISCUSSION

A. Standard of Review and Relevant law

“On appeal from a judgment dismissing an action after the sustaining of a demurrer, our review is de novo. [Citation.] For the limited purpose of reviewing the propriety of the trial court’s ruling, we accept as true all well-pled factual allegations in the operative complaint, as well as any facts that may be reasonably implied or inferred from those expressly alleged. . . . We do not ‘however, assume the truth of contentions, deductions or conclusions of law.’” (*Foxen v. Carpenter* (2016) 6 Cal.App.5th 284, 287-288.) Moreover, factual allegations are *not* accepted as true if they are found to be contradicted by or inconsistent with facts judicially noticed by the court. (See *Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1474 [rejecting plaintiffs’ characterization of real property transaction where contradicted by judicially noticed deeds of trust]; *Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 38-39 [disregarding plaintiffs’ allegations contradicted by judicially noticed official acts].) Further, we treat statements in parties’ briefings as ““reliable indications”” of their position on facts and laws and can accept them as admissions for statute of limitations purposes. (*Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1152.)

For actions against an attorney, based upon the rendering of legal services, section 340.6, subdivision (a)(3), provides in relevant part that “[a]n 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. . . . [T]he period shall be tolled during the time that . . . : [¶] . . . (3) The attorney willfully conceals the facts constituting the

wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation.”

For a fraud claim, the statute of limitations is three years pursuant to section 338. “This section effectively codifies the delayed discovery rule in connection with actions for fraud, providing that a cause of action for fraud ““is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.””” (*Britton v. Girardi* (2015) 235 Cal.App.4th 721, 733-734.)

In addition to the general rule that fraud claims must be pled with specificity (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184), a plaintiff who “relies on the discovery rule or allegations of fraudulent concealment,” as an excuse for belatedly filing a lawsuit bears a burden of “pleading and proving” reasonable reliance on the at issue misrepresentations. (*Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 174-175 (*Czajkowski*).) “More specifically, to overcome an apparent limitations bar, the plaintiff claiming delayed discovery of the facts constituting the cause of action has the burden of setting forth pleaded facts to show ““(1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence. The burden is on the plaintiff to show diligence, and conclusory allegations will not withstand demurrer.””” (*Id.* at p. 175.)

“In evaluating the reasonableness of a plaintiff’s reliance on alleged misrepresentations, the courts will consider what is apparent from the pleadings about the plaintiff’s knowledge and experience. ““Generally, ‘[a] plaintiff will be denied recovery only if his conduct is manifestly unreasonable in the light of his own intelligence or information.’””” (*Ibid.*) Similarly, with respect to applying the doctrine of equitable estoppel against a statute of limitations bar, an appellant has the burden of showing that detrimental reliance on the claimed inequitable conduct was reasonable. (*May v. City of Milpitas* (2013) 217 Cal.App.4th 1307, 1337-1338.)

Where a trial court denied a plaintiff leave to amend a complaint, we review for abuse of discretion and “decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We review a trial court’s decision for its result and not necessarily its reasoning. (*D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 18-19.)

B. Nonfraud Claims

Miles claims the demurrer should not have been sustained because her claims are not time-barred. Her primary argument is that section 340.6’s one-year statute of limitations does not apply to her claims because the particular facts included in each claim implicate other statutes of limitations. For example, Miles argues a four-year statute of limitations should be applied to her financial elder abuse claim because Miles was 65 years old when she realized, in 2016, that Powers had concealed and suppressed a material fact. We reject Miles’ argument with respect to all of her claims not based upon a theory of fraud. Except for claims of actual fraud, the time limits of section 340.6 apply to all causes of action alleged against an attorney where the merits depend upon proof that the attorney violated an obligation imposed by their role as an attorney. (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1236-1237, 1239.)

All of Miles’ claims against Powers—even her fraud claims—are based upon Powers’ role as an attorney. Accordingly, all of Miles’ claims which did not amount to a claim of “actual fraud” were subject to section 340.6 and time-barred because none of the exclusive tolling provisions were implicated. (*Gordon v. Law Offices of Aguirre & Meyer* (1999) 70 Cal.App.4th 972, 980.) Accepting Miles’ own allegations at face value clearly shows that, at best, actual discovery of “the facts constituting the wrongful act or omission” occurred no later than April 2016, when

Powers was deposed, more than one year before Miles filed her initial August 2017 complaint in this case. Accordingly, four of Miles' six claims—breach of third party contract, conversion, financial elder abuse, and breach of fiduciary duty—were all properly found by the trial court to be time-barred pursuant to section 340.6.

C. Claims of Actual Fraud

Miles is correct to the extent her fraud and deceit causes of action are not subject to section 340.6. The error of the trial court's ruling that *all* of Miles' claims were time-barred based upon section 340.6, however, does not require reversal because it does not change the conclusion that her fraud claims were nevertheless time-barred. (*F.P. v. Monier* (2017) 3 Cal.5th 1099, 1107-1108.)

Miles' two fraud claims were still time-barred based upon the delayed discovery rule codified in section 338. Prior to her operative complaint, the trial court had sustained demurrers to its two previous versions, on statute of limitations grounds. Particularly within this context, Miles' operative complaint did not meet her burden to demonstrate reasonable reliance on Powers' alleged misrepresentations or concealments, for the purpose of evaluating her fraud claims according to section 338's statute of limitations. (*Czajkowski, supra*, 208 Cal.App.4th at p. 175.) First, Miles did not specify when the purportedly fraudulent valuation e-mail by Powers was created nor forwarded to Miles by the trustees. More importantly, it is clear by judicially noticeable filings and the parties' briefing that the valuation of Miles' 10 percent interest was documented in the May 2014 accounting reports filed in response to both of Miles' probate petitions. This means Miles had notice of Powers' valuation of Miles' 10 percent interest by no later than that date. Similarly, regarding the purportedly "secret" transfer deed, both the Hickey report and the deed itself clearly showed that the public filing of the deed occurred in 2013, four years before Miles filed her initial complaint in this case. In sum, it appears beyond dispute that Miles had access to the information that forms the basis of

her fraud claims by no later than May 2014, more than three years before her August 2017 complaint in this case.

In addition, during the same time frame, Miles was represented by her own counsel who even sent Powers an unfiled draft of at least one of the probate petitions, prior to filing them in November 2013. Indeed, Miles seeks attorney fees and litigation costs incurred litigating the Hickey petition. This further supports the conclusion that, according to “plaintiff’s knowledge and experience,” Miles has failed to meet her burden of showing reasonable reliance upon Powers’ purported misrepresentations and concealment. (*Czajkowski, supra*, 208 Cal.App.4th at p. 175; see *Laukkare v. Abramson* (1935) 9 Cal.App.2d 447, 449 [“knowledge of an attorney is imputed to his clients”]) In her briefing, both at the trial court level and on appeal, Miles cites to this court’s opinion in *WA Southwest 2, LLC v. First American Title Ins. Co.* (2015) 240 Cal.App.4th 148, 156, to contend that her burden to discover the purported fraud was lessened because of her fiduciary relationship with Powers, a certified trust specialist. Even if we assumed this general proposition could be applied to Miles’ relationship with Powers, it would not help Miles in this case. Powers ceased being the attorney of the Hickey and Bonsignore trusts’ trustees in November 2013, six months before the accounting reports were filed (in May 2014) in response to Miles’ probate petitions. (See *United States Liability Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 597 [causes of action against fiduciary insurance agent were not barred by statute of limitations because they began to accrue upon termination of fiduciary relationship between plaintiff and agent].) In other words, any purported fiduciary relationship between Miles and Powers that may have existed would in any case have no material impact on the fact that three years and three months elapsed between the May 2014 accounting reports and Miles’ initial lawsuit in this case in August 2017.

Under the circumstances of this case, Miles’ complaint allegation that, during the (unspecified) period of time between Powers’ purportedly fraudulent conduct

and her 2016 deposition testimony during the litigation of the Hickey petition, Miles had simply “assumed and deferred to [Powers’] knowledge of the law” is insufficient to prove reasonable reliance on the at issue misrepresentations. (*Czajkowski, supra*, 208 Cal.App.4th at pp. 174-175.) Given Miles’ initiation of her probate petitions through her own counsel, and the subsequent accounting reports filed in May 2014, Miles has not “pleaded facts to show “. . . the inability to have made earlier discovery despite reasonable diligence.”” (*Id.* at p. 175.) In other words, Miles did not meet her burden to show that the discovery rule saved the fraud claims alleged in her August 2017 lawsuit. Given that it was filed more than three years after the May 2014 accounting reports, Miles’ fraud claims were time-barred pursuant to section 338.

D. Equitable Estoppel

None of Miles’ claims are saved by equitable estoppel. As stated above, she has not shown reasonable reliance on Powers’ purported conduct. (*Orange County Water Dist. v. Association of Cal. Water etc. Authority* (1997) 54 Cal.App.4th 772, 780.)

E. Leave to Amend

Finally, Miles has failed to demonstrate a “reasonable possibility” of amending her complaint to cure the insufficiencies discussed above. (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1491 [“The plaintiff bears the burden of proving there is a reasonable possibility of amendment”].)

III

DISPOSITION

The judgment is affirmed. Powers is entitled to her costs on appeal.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

DUNNING, J.*

*Retired Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.