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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

TRACY M. CAVARETTA, as Special Administrator, etc.,

Plaintiff and Appellant,

v.

LINDA J. RETZ et al.,

Defendants and Respondents.

B270928

(Los Angeles County Super. Ct. No. BC592755)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rolf M. Treu, Judge. Affirmed.

Burkley, Brandlin, Swatik & Keesey, Walter R. Burkley, Jr. and Deborah C. Keesey for Plaintiff and Appellant.

Stephen R. Rykoff, for Defendants and Respondents Linda J. Retz and Law Offices of Linda J. Retz.

Lewis Brisbois Bisgaard & Smith, Raul L. Martinez, Patrik Johansson, and Kenneth C. Feldman for Defendants and Respondents James Scott Bovitz and Bovitz & Spitzer.

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Two sets of attorneys representing an estate did not object when a probate court ruled that the estate was entitled to double damages against a person who was in the midst of bankruptcy. After the probate court's ruling was overturned as void for violating the bankruptcy court's "automatic stay," the estate sued the two sets of attorneys for malpractice. The trial court sustained a demurrer to the malpractice claim without leave to amend on the ground that it was brought too late. We agree with the trial court's ruling and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In 2009, an attorney helped Albert Duclos (Duclos) liquidate the family residence in a dissolution proceeding, but never returned the proceeds kept in his client trust account. After Duclos died, plaintiff Estate of Albert Duclos (the estate) in 2011 sued the attorney in probate court (1) for the funds the attorney wrongfully withheld, pursuant to Probate Code section 850 (see Prob. Code, § 850[1] [authorizing suit to reclaim property belonging to a deceased's estate]), and (2) for a penalty equaling twice the amount withheld in "bad faith" and for attorney's fees, pursuant to section 859 (see § 859 [so authorizing]). The estate retained defendants Linda J. Retz and the Law Offices of Linda J. Retz (Retz defendants) as counsel.

In June 2011, the probate court ordered Duclos's attorney to pay the estate the $317,800.53 wrongfully withheld and to perform an accounting. Before the probate court ruled on the estate's further request for double damages and attorney's fees,

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1 All further statutory references are to the Probate Code unless otherwise indicated.

Duclos's attorney filed for bankruptcy. The estate hired defendants James Scott Bovitz and Bovitz & Spitzer (Bovitz defendants) as bankruptcy counsel.

The estate filed a motion in bankruptcy court for relief from the "automatic stay" that, until lifted, precludes the "continuation" of "a judicial . . . proceeding" against a bankruptcy debtor. (11 U.S.C. § 362(a).) The bankruptcy court granted the estate's motion for relief on February 21, 2012, but did not enter its order into its docket until March 20, 2012. A bankruptcy court's order is not effective until entered into the docket. (Fed. Rules Bankr. Proc., rules 5003(a) & 9021.) However, the Retz defendants and Bovitz defendants did not object when the probate court ruled—on March 7, 2012 (and thus, 13 days before the order lifting the automatic stay became effective)—that the estate was entitled to double damages (but not attorney's fees).

Duclos's attorney appealed the probate court's rulings. In an opening brief filed on August 1, 2013, the attorney made several arguments, including that the probate court's double damages award was void because it was entered before the automatic stay had been lifted. The estate's responding brief was filed on November 22, 2013. On September 2, 2014, the Court of Appeal reversed the probate court's order doubling the estate's damages on the ground that it was void. (See *Cavaretta v. Bixby* (Sept. 2, 2014, B243891 [nonpub. opn.].)

II. Procedural Background

On August 27, 2015, the estate sued the Retz defendants and the Bovitz defendants for legal malpractice, alleging negligence in not advising the probate court to hold off ruling on the pending double damages motion until the bankruptcy court's docket reflected its order lifting the automatic stay. Both sets of

defendants demurred. The trial court sustained both demurrers without leave to amend, ruling that the estate's malpractice lawsuit was barred by the one-year statute of limitations. Specifically, the court ruled that the estate "suffered actual injury and was on inquiry notice at least as of November 22, 2013 when [it] responded [in its respondent's brief] to the challenge to the validity of the [double damages award]."

After the trial court entered judgments of dismissal as to each set of defendants, the estate filed a timely notice of appeal.

DISCUSSION

I. Demurrer

In reviewing a trial court's order sustaining a demurrer, we ask (1) whether the demurrer was properly sustained, and (2) whether leave to amend was properly denied. The first question requires us to independently decide ""'whether the complaint states facts sufficient to constitute a cause of action'"" (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1010), as well as whether it "'shows on its face that it is barred by a statute of limitations.'" (*Barker v. Garza* (2013) 218 Cal.App.4th 1449, 1454; accord, *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1232 (*Lee*); see generally Code Civ. Proc., § 430.10). In making these assessments, we accept as true "all material facts properly pled" in the operative complaint. (*Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 152; accord, *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We also accept as true all materials properly subject to judicial notice, and disregard any allegations in the operative complaint that are contradicted or negated by those judicially noticed facts. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20 ["a demurrer assumes the truth of the complaint's properly

pleaded allegations, but not of mere contentions or assertions contradicted by judicially noticeable facts"].)

In evaluating the second question, we must "decide whether ""there is a reasonable possibility that the defect [in the operative complaint] can be cured by amendment."""" (*McClain v. Sav-On Drugs* (2017) 9 Cal.App.5th 684, 695, review granted June 14, 2017, S241471 (*McClain*).)

A. Was the demurrer properly sustained?

A claim for legal malpractice is timely only if filed "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," and in no event more than "four years from the date of the wrongful act or omission." (Code Civ. Proc., § 340.6, subd. (a); *Lee*, *supra*, 61 Cal.4th at p. 1234.) This time to file is "tolled" if "[t]he plaintiff has not sustained actual injury." (Code Civ. Proc., § 340.6, subd. (a)(1).) For these purposes, "[a]ctual injury occurs when the client suffers any loss or injury legally cognizable as damages in a legal malpractice action based on the asserted errors or omissions." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 742-743 (*Jordache*).) Because none of the statute's other tolling exceptions applies here, whether the estate's malpractice action is timely in this case depends on whether it filed its malpractice lawsuit within one year of the latter of (1) when the estate sustained actual injury and (2) when it discovered, or reasonably should have discovered, that injury.

Applying these rules, the estate's malpractice lawsuit is untimely because the estate sustained—and reasonably should have known it sustained—actual injury no earlier than August 1, 2013, and no later than November 22, 2013.

The time to file the malpractice lawsuit at the earliest started running on August 1, 2013. By that time, the attorneys' alleged malpractice had caused the estate actual injury. Although the probate court's entry of a void double damages order may not have injured the estate insofar as it could still obtain double damages by filing a second motion for such damages (cf. *Jordache*, *supra*, 18 Cal.4th at p. 744 [ordinarily, "[t]he loss or diminution of a right or remedy constitutes injury or damage"]), the invalidity of the original order for double damages meant that the estate would not obtain those damages until some point in the future—rather than on July 11, 2012, the date that the probate order issued a minute order memorializing its earlier March 7, 2012 ruling, and thus the date on which the estate would have obtained the double damages had the probate court's order been valid. Attorney negligence that "prevent[s] plaintiffs from obtaining their money earlier" constitutes actual injury. (*Croucier v. Chavos* (2012) 207 Cal.App.4th 1138, 1150; *Jordache*, at pp. 743-744.) The estate became aware of this loss and of the Retz defendants' and Bovitz defendants' potential negligence underlying that loss by August 1, 2013, the date on which Duclos's attorney argued in his opening appellate brief that the probate court's double damages award was void. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 685 ["'suspicion of wrongdoing'" triggers duty to file malpractice suit]; *Village Nurseries v. Greenbaum* (2002) 101 Cal.App.4th 26, 33-34 [same].)

The time to file the malpractice lawsuit at the latest started running on November 22, 2013. By that time, the estate's newly hired lawyers had filed the estate's brief in the appeal of the probate court's double damages order responding, in part, to

the attack on that order as void. "A client suffers damage when [it] is compelled, as a result of the attorney's error, to incur or pay attorney fees." (*Sirott v. Latts* (1992) 6 Cal.App.4th 923, 928 (*Sirott*); *Truong v. Glasser* (2009) 181 Cal.App.4th 102, 114 (*Truong*) [same]; *Jordache*, *supra*, 18 Cal.4th at pp. 743-744 [same].) What matters is the date the fees were incurred, not when or if they were eventually paid. (*Bennett v. McCall* (1993) 19 Cal.App.4th 122, 128.) For obvious reasons, the estate was also on notice of the Retz defendants' and Bovitz defendants' potential negligence, as well as its resulting injury, by the time it filed its respondent's brief.

The estate makes three arguments in response. First, the estate asserts that it did not suffer any injury until the Court of Appeal issued its September 2, 2014 opinion definitively declaring the double damages order void. For support, it cites *Sirott*, *supra*, 6 Cal.App.4th 923. Our Supreme Court in *Jordache* refused to adopt a general rule mandating that "an adjudication or settlement must first *confirm* a causal nexus between [an] attorney's error and the asserted injury." (*Jordache*, *supra*, 18 Cal.4th at p. 752, italics added; *id.* at p. 755 ["the determination of actual injury does not necessarily require some form of adjudication, judgment, or settlement"].) Instead, "the facts and circumstances of *each case* determine when the plaintiff suffered actual injury." (*Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 226, italics added.) In this case, the estate was injured when the trial court entered an order that was void as a matter of law (by virtue of its timing) as well as when the estate incurred attorney's fees responding to the appeal calling the order's voidness to the appellate court's attention. Neither of these injuries was dependent on the outcome of the appeal: The

double damages order was void (and plaintiff therefore suffered a delay in collecting double damages) under the Bankruptcy Court rules based solely on the date the order was entered, and the attorneys fees were incurred irrespective of the outcome of the appeal. By contrast, and as *Jordache* itself noted, *Sirott* involved "an instance where the propriety of the attorney's advice or actions depended on the outcome of a claim by or against a client." *Sirott* did not, *Jordache* held, "support a general rule that judicial determinations are necessary precursors to actual injury." (*Jordache*, at p. 759.)

Relatedly, the estate makes a public policy argument that it is better to wait for a court to issue a definitive and final resolution of an issue related to malpractice; doing otherwise, the estate reasons, would require litigants to pursue malpractice claims prematurely. *Jordache* rejected precisely this argument when it refused to adopt a general rule requiring judicial confirmation of a loss as an essential requirement of any malpractice injury. (*Jordache*, *supra*, 18 Cal.4th at pp. 757-758; see also *Adams v. Paul* (1995) 11 Cal.4th 583, 592-593 ["concerns [about] the premature filing of legal malpractice claims . . . can be readily overcome . . . [by] trial courts['] inherent authority to stay malpractice suits, holding them in abeyance pending resolution of the underlying litigation"].)

Second, the estate argues that it never alleged in its complaint that it incurred attorney's fees in responding to Duclos's attorney's appeal. Thus, the estate continues, we may not cite or rely upon the incursion of such fees as actual injury. This argument ultimately has no effect on the timeliness of the estate's malpractice action because, as discussed above, the estate also suffered actual injury when its receipt of the double

damages award was delayed.

The estate's argument lacks merit in any event. The estate cannot survive a demurrer by simply refusing to plead a fact "of generalized knowledge that [is] so universally known that [it] cannot reasonably be the subject of dispute" (Evid. Code, § 451, subd. (f)), and thus a fact of which we may take judicial notice (*id.*, § 459). The fact that people (including attorneys) do not work for free is just such a fact. (Accord, *Jordache*, *supra*, 18 Cal.4th at pp. 743-744 [noting how attorney's fees are "necessarily" incurred].) This is especially true when the estate has only disputed its *failure to plead* its incursion of attorney's fees, but not the *fact* that it actually incurred those fees.

The estate's subsidiary challenges to our reliance on its incursion of attorney's fees also lack merit. The estate argues that it hired its attorneys long before the prior appeal, but *when* or *why* the estate hired them does not alter the fact that some of those fees were incurred in responding to an issue caused by the Retz defendants' and Bovitz defendants' alleged negligence. (*Sirott*, *supra*, 6 Cal.App.4th at p. 928 [requiring causal link between attorney error and fees later incurred].) The estate notes that the prior appeal involved several issues in addition to the voidness of the double damages order, but this does not alter the fact that some of the fees were incurred to address the issue tied to the alleged malpractice. The estate contends that it incurred additional attorney's fees when filing a renewed motion for double damages in September 2014, but the inclusion of fees in the prior appeal is sufficient to constitute actual injury because a malpractice action accrues "even if the client has yet to 'sustain[] all, or even the greater part, of the damages occasioned by [the] attorney's negligence.'" (*Shaoxing City Maolong*

Wuzhong Down Products, Ltd. v. Keehn & Associates, APC (2015) 238 Cal.App.4th 1031, 1036, quoting *Budd v. Nixen* (1971) 6 Cal.3d 195, 201.)

Third, the estate contends that the question of whether the statute of limitations bars an action "is predominantly a factual inquiry" (*Jordache*, *supra*, 18 Cal.4th at p. 751), and thus one not to be decided on summary judgment, let alone demurrer. However, where a "trial court can resolve the matter as a question of law," there is no basis for refusing to resolve it on summary judgment or demurrer. (*Truong*, *supra*, 181 Cal.App.4th at p. 111; *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191 [court may sustain demurrer on statute of limitations grounds when the undisputed facts show that the "claim is barred as a matter of law"].) That is the case here.

B. Was leave to amend properly denied?

The estate asserts that, even if the demurrer was properly sustained, the trial court erred in denying it leave to amend because there is a "reasonable possibility" it could amend the complaint to cure the statute of limitations defects. (*McClain*, *supra*, 9 Cal.App.5th at p. 695, review granted.) Specifically, the estate posits that it can allege that (1) it did not suffer any injury until the Court of Appeal issued its decision in September 2014, (2) it did not incur attorney's fees *solely* due to the Retz defendants' and Bovitz defendants' negligence, and (3) the only damages it seeks are the attorney's fees it incurred to renew its motion for double damages after it lost on appeal.

These amendments do not cure the defect in the complaint. The first proposed amendment is a legal conclusion, one that is directly at odds with our opinion today and that must, in any

event, be disregarded. (E.g., *Tepper v. Wilkins* (2017) 10 Cal.App.5th 1198, 1203 [courts may disregard "legal conclusions pleaded in the complaint"].) The second proposed amendment ignores that the incursion of *any* fees is sufficient to constitute actual injury; moreover, this amendment does not address the independent injury arising from the delayed receipt of the double damages. The final proposed amendment also fails to address the independent injury arising from the delayed receipt of the double damages; what is more, the estate's decision not to pursue damages for some actual injuries does not negate the existence of those injuries or their impact on when the limitations clock begins to tick.

DISPOSITION

The judgment is affirmed. Defendants are entitled to their costs on appeal.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
CHAVEZ

_____, J.*
GOODMAN

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