SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 1, Honorable Jacquline Duong, Presiding
Mai Jansson, Courtroom Clerk

191 North First Street, San Jose, CA 95113
Telephone 408.882-2120

To contest the ruling, call (408) 808-6856 Or Email at Department1@scscourt.org before 4:00 P.M.

PROBATE LAW AND MOTION TENTATIVE RULINGS
DATE: November 15, 2024 TIME: 10:00 A.M.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	21PR189977	Amended and Restated Trostle Living Trust dated 8-22-1995	Click on LINE 1 or scroll down for attached Tentative Ruling.

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PROBATE LAW AND MOTION TENTATIVE RULINGS

LINE 2	20141PR173920	Paul D. Cureton Irrevocable Trust	Click on LINE 2 or scroll down for attached Tentative Ruling.
LINE 3			Click on LINE 3or scroll down for attached Tentative Ruling.
LINE 4			
LINE 5			
LINE 6			

Line 1

Case Name: *The Amended or Restated Trostle Living Trust dated August 22, 1995*
Case No.: 21PR189977
Hearing date, time, and department: November 15, 2024, at 10:00 a.m. in Department 1

INTRODUCTION

On April 19, 2021, Chelsea Trostle Novak ("Novak") initiated this case by filing a petition for redress of breach of trust alleging, *inter alia*, that Novak's aunt, Anne Trostle Johnson ("Johnson"), trustee of the Trostle Living Trust dated August 22, 1995, as amended and restated, improperly entered into a settlement agreement with Novak's father, Courtney Trostle III (Trostle III), who was not a beneficiary of the trust, to settle an issue regarding the validity of Johnson's proffered version of the trust. According to Novak, Johnson distributed approximately $444,000 directly to Trostle III and the settlement agreement did not provide that the funds were held by Trostle III in a fiduciary capacity for Novak's benefit. On November 22, 2021, Johnson opposed Novak's petition, asserting that she entered into the settlement agreement in good faith on the advice of her attorney.

On May 30, 2024, Johnson filed a petition naming as respondent, her former attorney Michael P. Kerner ("Kerner"). Johnson's petition alleged causes of action for (1) professional negligence (legal malpractice), (2) breach of contract, and (3) breach of fiduciary duty. Johnson argued that the attorney she hired to represent her as to matters of the trust failed to advise her that a guardian ad litem should have been appointed to review the settlement agreement as Novak was then a minor beneficiary. On September 10, 2024, Johnson filed an amended petition ("Amended Petition") alleging all three cause of action alleged in her May 30, 2024 petition and adding a fourth cause of action for fraud.

Currently before the court is Kerner's demurrer. Johnson has opposed the demurrer and Kerner has filed a reply.

DISCUSSION

I. Preliminary Matters

A. Timeliness

"A person against whom a complaint or cross-complaint has been filed may, within 30 days after service of the complaint or cross-complaint, demur to the complaint or cross-complaint." (Code Civ. Proc., § 430.40, subd. (a).)[1] Even if a demurrer is untimely filed, the court has discretion to hear the demurrer so long as its action ". . . 'does not affect the

[1] All further undesignated statutory references are to the Code of Civil Procedure.

substantial rights of the parties.' [Citations.]" (See *McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 281-282.)

Here, Johnson's amended petition was filed September 10, 2024. The instant demurrer was filed and served on October 14, 2024, more than 30 days later. Johnson does not argue that the demurrer is untimely. Even if the demurrer is untimely, the court will reach the merits of the demurrer.

B. Meet and Confer

"Before filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer." (§ 430.41, subd. (a).) "As part of the meet and confer process, the demurring party shall identify all of the specific causes of action that it believes are subject to demurrer and identify with legal support the basis of the deficiencies." (§ 430.41, subd. (a)(1).) "Any determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer." (§ 430.41, subd. (a)(4).)

Kerner has provided the declaration of his counsel indicating that counsel met and conferred with counsel for Johnson on the phone prior to the filing of the demurrer and that they could not reach an agreement. Johnson does not argue that Kerner's meet and confer efforts were insufficient. Accordingly, the court will reach the merits of the demurrer.

C. Respondent's Request for Judicial Notice

Respondent requests judicial notice of the following documents filed in the instant case:

1. Petition for Redress of Breach of Trust, Accounting, Removal of Trustee and Immediate Suspension Pending Removal, filed by Novak on April 19, 2021, and
2. Opposition to Petition for Redress of Breach of Trust, Accounting, Removal of Trustee and Immediate Suspension Pending Removal, dated November 20, 2021, filed by Johnson.

Johnson objects to the request for judicial notice arguing that the court may not take judicial notice of the fact stated in the above filings and that Novak's April 19, 2021 petition attaches letters that are inadmissible under Evidence Code section 1152 because they contain evidence of settlement discussions.

As to Johnson's first contention, the petition and opposition are court documents properly subject to judicial notice under Evidence Code section 452, subdivision (d). Johnson is correct that while the court is free to take judicial notice of the existence of a document in a court file, it may not take judicial notice of the truth of hearsay statements contained therein. (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882; see also *Intengan v. BAC Home Loans Servicing* LP (2013) 214 Cal.App.4th 1047, 1057

[court may take judicial of existence of declaration but not of facts asserted in it].) However, here, the truth of the assertions in the petition and opposition is not at issue. Instead, the documents are offered to show that Johnson knew or should have known of the facts forming the basis of her contentions in her September 10, 2024 petition as early as 2021, when the petition and opposition were filed.

As to Johnson's argument regarding Evidence Code section 1152, this argument must also be rejected. Evidence Code section 1152, subdivision (a) provides, "Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, *is inadmissible to prove his or her liability for the loss or damage or any part of it*." (Italics added.) Here, as discussed above, Johnson is offering the documents to show Johnson's knowledge of the facts forming the basis of the causes of action raised in her petition, not to establish her liability. Accordingly, the letters are not rendered inadmissible because they contain settlement discussions. (See, e.g., *Truestone, Inc. v. Simi W. Indus. Park II* (1984) 163 Cal.App.3d 715, 725 [offers to compromise may be admissible as statements against interest].)

The request for judicial notice is GRANTED as to both documents.

II. Analysis

A. Legal Background

As relevant to the instant case, "[t]he party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds: (e) The pleading does not state facts sufficient to constitute a cause of action." (§ 430.10, subd. (e).)

The Court in ruling on a demurrer treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.)

B. Merits of the Motion

Kerner demurs to the entirety of Johnson's amended petition filed on September 10, 2024 on the ground that all causes of action are barred by the statute of limitations. "A statute

of limitations defense may be raised by demurrer [citation].” (*Doyle v. Fenster* (1996) 47 Cal.App.4th 1701, 1707.) The statute of limitations may be asserted on demurrer, when the grounds for the defense are disclosed on the face of the complaint or from matters judicially noticed. (See *Vaca v. Wachovia Mortgage Corp.* (2011) 198 Cal.App.4th 737, 746; *Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 995.)

“ ‘A demurrer on the ground of the bar of the statute of limitations will not lie where the action may be, but is not necessarily barred.’ [Citations.] It must appear clearly and affirmatively that, upon the face of the complaint, the right of action is necessarily barred. [Citations.] This will not be the case unless the complaint alleges every fact which the defendant would be required to prove if he were to plead the bar of the applicable statute of limitation as an affirmative defense. [Citation.]” (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 881.)

“A general demurrer based on the statute of limitations is only permissible where the dates alleged in the complaint show that the action is barred by the statute of limitations. [Citation.] The running of the statute must appear ‘clearly and affirmatively’ from the dates alleged. It is not sufficient that the complaint might be barred. [Citation.] If the dates establishing the running of the statute of limitations do not clearly appear in the complaint, there is no ground for general demurrer. The proper remedy ‘is to ascertain the factual basis of the contention through discovery and, if necessary, file a motion for summary judgment . . . .’ [Citation.]” (*Roman v. County of Los Angele*s (2000) 85 Cal.App.4th 316, 324-325.)

A. Section 340.6

Kerner contends that the statute of limitations is contained in section 340.6, subdivision (a), which 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.”

“Both the one-year and four-year limitations periods are tolled, however, until the plaintiff sustains ‘actual injury.’ (§ 340.6, subd. (a)(1); *Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 567.) The four-year limitations period also is tolled while ‘[t]he attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney … .’”(§ 340.6, subd. (a)(3) [‘this subdivision shall toll only the four-year limitation’].) ‘Thus, the limitations period is one year from actual or imputed discovery, or four years (whichever is sooner), unless tolling applies.’ [Citation.]” (*Genisman v. Hopkins Carley* (2018) 29 Cal.App.5th 45, 50 (*Genisman*).)

In *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1229 (*Lee*), the California Supreme Court held that “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.

Such claims brought more than one year after the plaintiff discovers or through reasonable diligence should have discovered the facts underlying the claim are time-barred by section 340.6(a) unless the plaintiff alleges actual fraud." "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." (*Id.* at p. 1238.)

As mentioned above, Johnson pleads four causes of action in her amended petition: (1) professional negligence (legal malpractice), (2) breach of contract, and (3) breach of fiduciary duty, and (4) fraud. In *Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 57 (*Quintilliani*), the Court of Appeal held that section 340.6 "is a defense against causes of action for breach of contract, breach of fiduciary duty and negligent misrepresentation" alleged against an attorney providing legal services. " '[T]he gravamen of a complaint and the nature of the right sued on, rather than the form of the action or relief demanded, determines which statute of limitation applies.' [Citation.]" (*Id.* at p. 66.) Here, as in *Quintilliani*, the professional negligence, breach of contract, and breach of fiduciary causes of action all stem from Kerner's provision of legal services to Johnson.

Johnson argues that the gravamen of her claims is actual fraud and, thus, her claims do not fall under section 340.6. She asserts that Kerner concealed and failed to disclose his obligations to her. She contends that she hired Kerner, an estate planning, trust, and probate specialist, to assist her "with a beneficiary distribution from the Trust to the two named beneficiaries who were the minor children of her brother, Trostle Ill." (Amended Petition, ¶¶ 14, 15.) She alleges that she relied on Kerner's advice and assistance in drafting the settlement agreement and that Kerner never informed her that the settlement may have been in violation of her duties to Novak or that the settlement agreement should have been approved by the court. (*Id.* at ¶¶ 17-19.)

It is clear that the first through third causes of action, at least, "depend on proof that an attorney violated a professional obligation in the course of providing professional services" and, thus, the one-year statute of limitations under section 340.6 applies. (*Lee*, *supra*, 61 Cal.4th at pp. 1236-1237.) Johnson alleges that she entered into the settlement agreement "[b]ased on KERNER's advice and assurances" as a certified estate planning, trust, and probate specialist. (Amended Petition, ¶¶ 15-19.) In connection with the professional negligence claim (first cause of action), Johnson contends that Kerner violated Rule 3-110 of the Rules of Professional Conduct by failing to act as a competent attorney. (*Id.* at ¶ 34.) Paragraph 33 of the Amended Petition, also contained in the first cause of action states, "KERNER had a duty to use such skill, prudence, and diligence that member of the legal profession commonly possesses and exercises to provide legal services to Petitioner JOHNSON, especially since KERNER was a certified specialist in trust and probate law." The second cause of action for breach of contract states, "Implicit in the contract for legal services is the requirement that Respondent [Kerner], and each of them [sic], performs such services competently and legally based on his or their years of handling trust, estate and probate cases." (*Id.* at ¶ 45.) It goes on to state, "As a direct and proximate result of KERNER's incompetent and erroneous advice in

this action and his contractual breaches, JOHNSON suffered damages[.]" (*Id.* at ¶ 49.) In the third cause of action for breach of fiduciary duty, Johnson contends, "A client's retention of a law firm gives rise to a fiduciary relationship between the parties. The scope of an attorney's fiduciary obligations is determined as matter of law based on the California Rules of Professional Conduct which were in effect in 2007, together with other statutes and general principles relating to fiduciary relationships. These fiduciary duties include duties of care and loyalty and an obligation to keep the client informed of her legal requirements and options." (*Id.* at ¶ 51.)

The above contentions clearly fall within the scope of professional obligations owed by an attorney to a client and thus, proof of a violation of said obligations would necessarily be required to succeed on the merits. In *Nguyen v. Ford* (2020) 49 Cal.App.5th 1, 17, the Court of Appeal held that the plaintiff's claims were barred by section 340.6 where "Nguyen's complaint alleges that Ford is an attorney who breached her fiduciary duty to Nguyen. The cause of action asserts that Ford 'breached fiduciary duties owed' to Nguyen in a variety of ways. In her opening brief in this court, Nguyen emphasizes Ford's purported violations of the rules of professional conduct applicable to attorneys." Here, similarly, the Amended Petition asserts that Kerner violated his professional obligations as an attorney by failing to properly advise her as to the need for a guardian ad litem.

As to the fourth cause of action for fraud specifically, Johnson contends that, because of Kerner's experience and knowledge in the area of probate, "it appears that he deliberately and consciously failed to advise JOHNSON of the legal requirements for distribution to minor beneficiaries." (Amended Petition, ¶ 59.) In the court's opinion, the allegations in the fraud cause of action also rely on evidence of a violation of Kerner's professional obligations as an attorney. However, in any event, even if the three-year statute of limitations applies to the fraud claim, the claim is still barred as discussed below. (*Austin v. Medicis* (2018) 21 Cal.App.5th 577, 588 ["A cause of action for fraud accrues when the aggrieved party discovers the facts constituting the fraud. (*Lee v. Escrow Consultants, Inc.* (1989) 210 Cal.App.3d 915, 921 [259 Cal. Rptr. 117].) At that point, the plaintiff has three years to bring an action. (§ 338, subd. (d).)"].)

B. Application of the Statute of Limitations

As to the running of the statute of limitations, Kerner argues that Johnson discovered or should have discovered the facts constituting the wrongful act or omission, at the latest, by February 10, 2021, when Johnson's attorney addressed the failure to seek a guardian ad litem in a letter to Novak's counsel. He contends that Novak's petition, the letters attached thereto, and Johnson's opposition to Novak's petition show that Johnson was on inquiry notice of the fact that Johnson was allegedly misadvised as to the propriety of entering into the settlement agreement with Trostle III without seeking appointment of a guardian ad litem for Novak. Finally, Kerner contends that, assuming that Johnson did not sustain "actual injury" within the meaning of section 340.6, subdivision (a) until Novak filed her petition, the statute of limitations would have begun to run on April 19, 2021.

In Novak's petition filed on April 19, 2021, Novak alleged that, in 2007, Johnson, acting as trustee, entered into a settlement agreement and distributed $443,724.50 of trust funds to Novak's father, Trostle III, who was not a beneficiary of the trust. (Petition filed April 19, 2021, p. 2:5-6.) Johnson did so, according to Novak, to absolve herself of any liability from her alleged procurement of an amendment to the trust. (*Id.* at p. 2:6-8.) Attached to the petition as Exhibit D was a letter, dated November 9, 2020, from Novak's counsel to Johnson's counsel asserting that no guardian ad litem had been appointed for Novak and the settlement agreement had not been submitted for court approval back in 2007. (*Id.* at Ex. D, p. 1.) Attached to the petition as Exhibit G is a letter from Johnson's counsel to Novak's counsel dated January 14, 2021, in which Johnson's counsel states, "Even though Anne Trostle [Johnson] and Courtney Trostle [Trostle III] were represented by attorneys, such attorneys failed to inform them that in order for Courtney Trostle to be authorized to act on behalf of Chelsea [Novak] and Christian [Novak's brother] he would need to be appointed their guardian ad litem. Anne Trostle will now take responsibility for this error and allocate $443,724.50 to the By-Pass Trust." (*Id*. at Ex. G, p. 2.) Also attached to the petition is a letter, dated February 10, 2021, from Johnson's counsel to Novak's counsel indicating that the parties to the settlement agreement had been represented by counsel and that counsel did not suggest that court approval of the settlement agreement was necessary. (*Id.* at Ex. I, p. 3.) Johnson's counsel also maintained that the trust did not require appointment of a guardian ad litem for minor beneficiaries. (*Ibid*.)

Kerner also relies on Johnson's opposition, filed November 22, 2021, to Novak's April 19, 2021 petition. In that opposition, Johnson argued that she was not advised by her attorney, Kerner, that providing the distribution to Trostle III would breach her duty to Novak. (Opposition filed November 22, 2021, p. 7:18-20.)

Johnson argues that she first became aware that her distribution to Trostle III could have been in error on July 31, 2023, when the mediator who assisted the parties in mediation of Novak's April 19, 2021 petition told the parties that a guardian ad litem should have been appointed to protect Novak's interest in the trust. In her September 10, 2024 amended petition, Johnson pleads that she was first informed of Kerner's malpractice on July 31, 2023, at the mediation. (Petition filed September 10, 2024, ¶ 26.)

Inquiry notice exists where "the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them. [Citation.] A plaintiff need not be aware of the specific facts necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her. [Citation.] [Citation.]" (*Genisman*, *supra*, 29 Cal.App.5th at pp. 50-51, internal citations and quotation marks omitted.)

In *Genisman*, the Court of Appeal determined that a conversation in which the plaintiff was accused of wrongdoing, when the plaintiff knew that the accuser might sue, was sufficient for inquiry notice. (*Genisman*, *supra*, 29 Cal.App.5th at p. 51.) The court explained that the conversation and the subsequent lawsuit "would have prompted a reasonable person to inquire"

into the claims raised. (*Ibid.*) Here, similarly, the letters attached to Novak's petition establish that Johnson was informed of Novak's contentions and her intention to file a petition. And, on April 19, 2021, Novak did file a petition naming Johnson as a respondent. Even if Johnson had no reason to believe that Novak had a basis to file her petition, as the court explained in Genisman, " ' "[s]ubjective suspicion is not required. If a person becomes aware of facts which would make a reasonably prudent person suspicious, he or she has a duty to investigate further and is charged with knowledge of matters which would have been revealed by such an investigation." [Citation.]' [Citation.] Any reasonably prudent person, upon being informed that he or she was being sued for failing to disclose the structure of a transaction, would conduct further investigation into the matter." (*Ibid.*) Accordingly, the statute of limitations began to run by April 19, 2021, when Novak filed her petition, at the latest.

Johnson's contention that she was not aware of the basis for her claims against Kerner until she was informed at mediation that she should have sought the appointment of a guardian ad litem is unavailing. As explained *in Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 685, "It is well settled that the one-year limitations period of section 340.6 is triggered by the client's discovery of the facts constituting the wrongful act or omission, not by his discovery that such facts constitute professional negligence, i.e., by discovery that a particular legal theory is applicable based on the known facts. It is irrelevant that the plaintiff is ignorant of his legal remedy or the legal theories underlying his cause of action. [Citation.] (*Village Nurseries v. Greenbaum* (2002) 101 Cal.App.4th 26, 42-43; see also *McGee v. Weinberg* (1979) 97 Cal. App. 3d 798, 803 ['The statute of limitations is not tolled by belated discovery of legal theories, as distinguished from belated discovery of facts'].)" (Some internal citations and quotation marks omitted.)

Johnson also argues that the court must accept as true her representation that she did not discover the facts forming the basis of her causes of action until July 31, 2023. But, this representation in the Amended Petition is contradicted by the court documents provided by Kerner and of which the court has taken judicial notice. On demurrer, the court assumes the truth of all facts properly pleaded but not when "they are contradicted by judicially noticed facts. [Citations.]" (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1468 [considering judicially noticed loan documents that contradicted allegations in the operative complaint].) " ' "[A] complaint otherwise good on its face is subject to demurrer when facts judicially noticed render it defective." [Citation.]' [Citation.]" (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.)

Even if Johnson was on inquiry notice of the facts forming the basis of the claims raised in her Amended Petition, she must still have suffered an actual injury before the statute of limitations in section 340.6 will begin to run. (*Genisman*, *supra*, 29 Cal.App.5th at p. 52; *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 757 (*Jordache*) ["a plaintiff who actually or constructively discovered the attorney's error, but who has suffered no damage to support a legal malpractice cause of action, need not file suit prematurely"].) "For purposes of section 340.6, 'actual injury occurs when the plaintiff sustains any loss or injury legally cognizable as damages in a legal malpractice action based on the acts

or omissions that the plaintiff alleged.' (*Jordache*, *supra*, at p. 762.)" (*Genisman*, *supra*, 29 Cal.App.5th at p. 52.)

Here, Johnson contends in her Amended Petition that she incurred attorney fees in defending against Novak's petition. (Amended Petition, pp. 1:26-2:2.) This is sufficient to constitute actual injury for the purposes of section 340.6. (*Genisman*, *supra*, 29 Cal.App.5th at p. 52; see also *Truong v. Glasser* (2009) 181 Cal.App.4th 102, 114 ["the trial court correctly found Plaintiffs first sustained actual injury when they were required to obtain and pay new counsel to file a lawsuit seeking to escape the consequences of their signing the lease and Lease Addendum, which were among the actual damages Plaintiffs suffered as a result of Glasser's alleged malpractice."].) Although Johnson's petition does not specifically state when the attorney fees were incurred, Johnson was represented by counsel at the time the letter November 9, 2020 letter referenced above was sent to her counsel. Accordingly, it is clear that actual injury occurred more than one year before Johnson's initial petition against Kerner was filed.

As to the fraud claim specifically, even if the three-year statute of limitations under section 338 applies, the claim is still time-barred. As discussed above, the statute of limitations began to run, at the latest, on April 19, 2021, when Novak's petition was filed. Accordingly, Johnson's initial petition, filed May 30, 2024 was not filed within the three year time-frame provided by section 338. The demurrer is SUSTAINED as to all causes of action.

C. Leave to Amend

"Where a demurrer is sustained or a motion for judgment on the pleadings is granted as to the original complaint, denial of leave to amend constitutes an abuse of discretion if the pleading does not show on its face that it is incapable of amendment. [Citation.]" (*Virginia G. v. ABC Unified School Dist*. (1993) 15 Cal App 4th 1848, 1852.) "[L]eave to amend is properly granted where resolution of the legal issues does not foreclose the possibility that the plaintiff may supply necessary factual allegations. [Citation.] If the plaintiff has not had an opportunity to amend the complaint in response to the demurrer, leave to amend is liberally allowed as a matter of fairness, unless the complaint shows on its face that it is incapable of amendment. [Citations.]" (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747.)

" 'Generally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. [Citation.] . . . Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. [Citations.]" (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) "Plaintiffs have the burden to show how they could further amend their pleadings to cure the defects. [Citation.]" (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 411.)

Notwithstanding that general rule, leave to amend is properly denied where the issue raised in the demurrer is strictly a legal one and no further amendment can alter that issue. (See *Schonfeldt v. State of Calif.* (1998) 61 Cal App 4th 1462, 1465 [leave to amend is properly

denied where the plaintiff cannot succeed as a matter of law].) A claim being barred by the applicable statute of limitations would be an example of when leave to amend could be properly denied.

Here, Johnson argues that the court should allow her to amend. But, she has not stated how she might be able to amend the petition to cure the statute of limitations issue. However, because this is the first time the petition has been amended in response to a demurrer, the court will GRANT leave to amend. (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747 ["[i]f the plaintiff has not had an opportunity to amend the complaint in response to the demurrer, leave to amend is liberally allowed as a matter of fairness, unless the complaint shows on its face that it is incapable of amendment. [Citations.]"].)

CONCLUSION

The demurrer is SUSTAINED as to all causes of action WITH LEAVE TO AMEND.

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Calendar line 2

Case Name: *In the Matter of: The Paul D. Cureton Irrevocable Trust*
Case No.: 2014-1-PR-173920
Hearing date, time, and department: November 15, 2024 at 10:00 a.m. in Department 1

INTRODUCTION

In 2014, trust beneficiary Paul D. Cureton ("Cureton") filed this action against Eric A. Hersh ("Hersh"), trustee of the Paul D. Cureton Irrevocable Trust (the "Trust") contending, inter alia, that Hersh was charging excessive trustee fees. The parties entered into a stipulation and the trust was terminated.

On August 29, 2024, Cureton filed a motion entitled, "MOTION TO CITE HERSH & ASSOCIATES FOR FAILURE TO ABIDE BY TERMS OF STIPULATION TO SETTLEMENT AGREEMENT AND ORDER, THE CLEAR NON-CONTROVERSIAL NATURE OF THE AGREEMENT CALLS FOR A MOTION FOR SUMMARY JUDGEMENT AGAINST THE DEDFENDANT, IN FAVOR OF THE PLAINTIFF", the motion currently before the court. The motion is unopposed.[2]

This matter initially came on for hearing on October 4, 2024. The court continued the hearing as it did not appear that the motion had been properly served. On October 25, 2024, Cureton filed a proof of service indicating that the motion had been served on Hersh himself[3] on October 24, 2024.

DISCUSSION

I. Legal Background

Code of Civil Procedure section 664.6 ("section 664.6") provides, "If parties to pending litigation stipulate, in a writing signed by the parties outside of the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement." (§ 664.6, subd. (a).) The purpose of section 664.6 is "to permit a court, via a summary proceeding, to finally dispose of an action when the existence of the agreement or the terms of the settlement are subject to reasonable dispute, something not

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[2] It appears that Cureton may not have properly served the motion on all parties in the matter as there is no proof of service filed with the court. Code of Civil Procedure section 1005, subdivision (b) provides that "[u]nless otherwise ordered or specifically provided by law, all moving and supporting papers shall be served and filed at least 16 court days before the hearing." The court notes that Cureton should comply with the requirements of the California Code of Civil Procedure and California Rules of Court in any future filings with the court.

[3] Notably, the proof of service does not indicate that Hersh's counsel was served. However, given that the settlement agreement was entered into in 2014, it is not clear that Hersh is still represented by counsel at this time.

permissible before the statute's enactment." (*Viejo Bancorp, Inc. v. Wood* (1989) 217 Cal.App.3d 200, 206.)

" '*If requested by the parties*,' . . . 'the [trial] court may retain jurisdiction over the parties to enforce [a] settlement until performance in full of the terms of the settlement.' (§ 664.6, italics added.) 'Because of its summary nature, strict compliance with the requirements of section 664.6 is prerequisite to invoking the power of the court to impose a settlement agreement.' [Citations.]" (*Mesa RHF Partners, L.P. v. City of Los Angeles* (2019) 33 Cal.App.5th 913, 917 (*Mesa*), italics in original.) "[T]he request for retention of jurisdiction must conform to the same three requirements which the Legislature and the courts have deemed necessary for section 664.6 enforcement of the settlement itself: the request must be made (1) during the pendency of the case, not after the case has been dismissed in its entirety, (2) by the parties themselves, and (3) either in a writing signed by the parties or orally before the court." (*Wackeen v. Malis* (2002) 97 Cal.App.4th 429, 440.) "The request to the court that it retain jurisdiction under section 664.6 must be made by the parties. [Citation.]" (*Mesa*, *supra*, 33 Cal.App.5th at p. 918.)

The court may interpret the terms of the settlement agreement on a motion to enforce such an agreement. "[I]f the requirements of section 664.6 are met the trial court is authorized to resolve remaining questions of disputed fact or interpretation. [Citations.]" (*City of Fresno v. Maroot* (1987) 189 Cal.App.3d 755, 760, fn. 3.) "Section 664.6's 'express authorization for trial courts to determine whether a settlement has occurred is an implicit authorization for the trial court to interpret the terms and conditions to settlement.' [Citation.]" (*Skulnick v. Roberts Express, Inc.* (1992) 2 Cal.App.4th 884, 889.)

"In ruling on a motion to enter judgment [or to confirm settlement] the trial court acts as the trier of fact, determining whether the parties entered into a valid and binding settlement. [Citation.] Trial judges may consider oral testimony or may determine the motion upon declarations alone." (*Terry v. Conlan* (2005) 131 Cal.App.4th 1445, 1454.) However, "[t]he power of the trial court under Code of Civil Procedure section 664.6…is extremely limited…[in that] nothing in section 664.6 authorizes a judge to create the material terms of a settlement, as opposed to deciding what terms the parties themselves have previously agreed upon." (*Hernandez v. Board of Ed. Of the Stockton Unified School Dist.* (2004) 126 Cal.App.4th 1161, 1176, internal quotation marks and citations omitted). This is so because "[a] settlement agreement is simply a contract." (*Ibid*.) Thus, "[t]he court is powerless to impose on the parties more restrictive or less restrictive or different terms than those contained in their settlement agreement." (*Ibid*.)

II. Merits of the Instant Motion

Cureton argues Hersh failed "to abide by the court-ordered stipulation to the Settlement Agreement" that the parties signed in "June of 2014." (Motion to Enforce Settlement Agreement ("Motion"), pp. 2:3-5, 3:17-18.) Cureton asserts that Hersh violated the terms of the settlement agreement by seeking $8,375.50 in trustee fees as part of a third and final accounting submitted to the court in 2020. (See *id.* at p. 3:23-24.) According to Cureton, the Settlement Agreement required Hersh to "support the beneficiary, when you reach $5,000, stop for the tax statute, then continue payments for the beneficiary needs, until the trust, literally, is spent to almost zero, and be left with a little remainder." (*Id.* at pp. 3:26-4:2.) Cureton argues that "instead, the Trustee halts the trusts function at $8,400, and then charges this amount in

fees." (*Id.* at p. 4:235.) Cureton requests that the court require Hersh to now pay Cureton the $8,375.50 Hersh sought in trustee fees. (See *id.* at p. 4:9-11.)

The Settlement Agreement, signed by both parties on June 10, 2014, states that "Trustee Eric Hersh of Hersh & Associates will waive all fees incurred but not yet charged to the Trust from October 1, 2013 to the present", "Trustee Eric Hersh of Hersh & Associates will work pro bono from today's date until the trust is terminated", "Trustee Eric Hersh of Hersh & Associates will only be required to issue checks according to Art. Four, paragraph 4.4 of the Trust until the Trust's assets reach $5,000 or the three (3) year IRS statute of limitations on tax liabilities has run", and "[o]nce the 3 year statute of limitations has run, the Trustee shall recommence payments to the Beneficiary pursuant to Article Four, paragraph []4.4 until the Trust terminates." (Motion, Ex. A, ¶¶ 2, 4-6.)

The Third and Final Accounting submitted to the court states that "[a]s authorized by the Stip and Order, Petitioner represents that the fair and reasonable value of services during the period *from 1/14/2013 to 9/30/2013* was $8,375.50." (Third and Final Accounting and Report of Trustee ("Third Accounting"), filed April 21, 2020, p. 3:23-24, italics added.) The Third Accounting further states that pursuant "to the Stip and Order, Petitioner has waived all fees incurred but not yet charged to the Trust from October 1, 2013 to June 5, 2014. Furthermore, he has continued to work on a pro bono basis until the date the Trust is terminated." (*Id.* at p. 3:18-21.)

According to the Third Accounting, Hersh sought $8,375.50 for work performed from January 14, 2013 through September 30, 2013. (Third Accounting, p. 3:23-24.) Thus, Hersh's request for $8,375.50 does not violate the Settlement Agreement's requirements, agreed to by the parties on June 10, 2014, that Hersh "will work pro bono from today's date" and that Hersh will waive all fees incurred but not yet charged to the Trust from October 1, 2013 onwards. (Motion, Ex. A, ¶¶ 2, 4.) Hersh appears to have sought trustee fees from before this period, January 2013 through September 2013. (See Motion, Ex. A, ¶ 2; Third Accounting, p. 3:23-24.)

Moreover, the court notes that Cureton did not object to the Third Accounting in 2020 despite being served with the petition and a notice of hearing. The time to object to the Third Accounting was in 2020 when it was filed yet Cureton did not file his motion until August 2024, four years later.

For these reasons, the court DENIES Cureton's motion.

CONCLUSION

The motion to enforce settlement agreement is DENIED.

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