2005 CAL.APP.UNPUB. LEXIS 8512

FRITZI BENESCH, Plaintiff and Appellant, v. WILLIAM HOISINGTON ET AL., Defendants and Respondents.

A102296

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE

2005 Cal. App. Unpub. LEXIS 8512

September 21, 2005, Filed

PRIOR HISTORY: San Francisco County Super. Ct. No. 317187.

JUDGES: Corrigan,J.; McGuiness, P.J., Parrilli, J. concurred.

OPINION BY: Corrigan

OPINION:

Fritzi Benesch appeals from a dismissal following the grant of summary judgment in a suit against her former attorneys William Hoisington and Orrick, Herrington & Sutcliffe LLP (Orrick). Appellant contends the statute of limitations on her legal malpractice claim was tolled by respondents' continuing legal representation. We reverse.

Factual and Procedural Background

On August 8, 2000, appellant filed suit, alleging in her cause of action for professional negligence that respondents had "failed to consult with or properly advise [her]" and had "breached the duty of loyalty by agreeing to represent [appellant's daughter and her husband] without informing [appellant] and without obtaining [her] consent." As a result, **[*2]** appellant alleged that she had "entered into agreements which were inadvisable on their face, and which contained terms and conditions the [respondents] knew, or should have known, were unreasonable and unfair to [her]." n1 Appellant also alleged that she and her husband had retained respondents as their attorneys in 1977, and that their attorney-client relationship had continued until August 14, 1999. In August 1999, appellant met with Hoisington and told him that she had separated from her husband and wished to change her estate plan. Hoisington informed appellant that he could

not continue to represent her due to a conflict of interest, and referred her to another attorney. After reviewing the family estate plan with her divorce lawyer, appellant filed the present action against her husband, the Tandlers, and respondents.

n1 Appellant later filed an amended complaint containing similar allegations. According to the amended complaint, beginning in the 1940's, appellant and her husband operated a clothing business. One of their daughters, Valli, later became president of the company. In 1977, appellant and her husband retained Hoisington to plan their estate. Hoisington prepared various documents over the ensuing twenty-two years. In 1981, Valli retained Hoisington to advise her on estate, corporate and tax matters. Hoisington and Orrick did not inform appellant that they were also representing Valli and her husband (the Tandlers), nor did they seek a conflict waiver from appellant. Seventy percent of the company stock was subsequently transferred to the Tandlers, leaving appellant and her husband with seventeen percent and their other daughter with eleven percent.

[*3]

Respondents moved for summary judgment on the grounds that the statute of limitations barred appellant's legal malpractice claim because the stock transactions at issue had occurred in 1992 and 1998, more than a year before the suit was filed. Respondents also argued that their representation of appellant had ended on March 31, 1999, when Hoisington retired from Orrick, and appellant therefore "missed the cut-off by four months." Appellant contended that respondents continued to represent her until August 17, 1999, when Hoisington drafted a will codicil regarding the disposition of her jewelry. In response to appellant's interrogatory, Hoisington admitted his representation did not end until August 17, 1999. Appellant also argued that there was no evidence Orrick's representation of her had ended before August 17, 1999, when it sent her new attorney copies of her files. Appellant also testified during her deposition, however, that she had no contact with any Orrick attorney for a year before August 1999.

The trial court granted summary judgment based on the statute of limitations, opining that "disposing of a few pieces of jewelry" did not involve the same specific subject matter **[*4]** as "the transfer of shares of stock owned as community property . . . as part of an estate plan devised to protect the family-owned business . . . ." The court concluded that "the continuous representation ended, and the statute of limitation began to run (assuming plaintiff had discovered or should have discovered the wrongful acts) on March 31, 1999." The trial court further ruled that appellant "discovered or through the use of reasonable diligence should have discovered that [respondents] had breached their duty to advise her as early as 1992." Summary adjudication for respondents was denied as to breach and causation. This timely appeal followed the ensuing judgment for respondents.

Discussion

"Summary judgment is proper only if there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (*Code Civ. Proc., § 437c*, subd. (c).)[n2] A court must 'strictly construe the moving party's papers and liberally construe those of the opposing party to determine if they raise a triable issue of material fact.' [Citation.]" (*Calhoon v. Lewis (2000) 81 Cal.App.4th 108, 112.)* "On **[*5]** appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving

and opposition papers except that to which objections have been made and sustained. [Citation.]" n3 (*Guz v. Bechtel National, Inc. (2000) 24 Cal.4th 317, 334.)* We view the evidence and the inferences reasonably drawn therefrom in the light most favorable to appellant. (*Alexander v. Codemasters Group Limited (2002) 104 Cal.App.4th 129, 139.)* "Due to the drastic nature of summary judgment, any doubts about the propriety of granting the motion must be resolved in favor of the party opposing the motion. [Citations.]" (*Kolodge v. Boyd (2001) 88 Cal.App.4th 349, 355.)*

n2 Subsequent statutory references are to the Code of Civil Procedure.

n3 Respondents moved to strike appellant's statement of additional facts for failure to comply with the rules of court. A "working copy" of the trial court's tentative rulings in preparation for the hearing on November 13, 2002, indicates the court's apparent intention to grant the motion to strike. The court's summary judgment order, however, contains no reference to such an evidentiary ruling, nor has respondent directed our attention to any final ruling on this matter contained in the record before us. During a hearing approximately two months earlier, when *plaintiff's* counsel referred to the anticipated need for evidentiary rulings, the court responded: "That, by the way, I have done. And I have to say I didn't find them-you have a lot of overrules, everybody, a lot of overrules. That was the first thing I worked my way through." These somewhat ambiguous comments do not constitute a clear ruling on respondents' motion to strike, and the rule is well-established that objections not ruled upon are deemed waived. (*Ann M. v. Pacific Plaza Shopping Center (1993) 6 Cal.4th 666, 670, fn. 1.)*

[*6]

"In order to prevail, a defendant moving for summary judgment has the obligation of conclusively negating a necessary element of the plaintiff's cause of action or establishing a complete defense thereto. [Citation.]" (*O'Neill v. Tichy (1993) 19 Cal.App.4th 114, 119* (*O'Neill*).) Resolution of a statute of limitations defense normally presents a question of fact, and summary judgment is proper only "where the uncontradicted facts established through discovery are susceptible of only one legitimate inference . . . ." (*Jolly v. Eli Lilly & Co. (1988) 44 Cal.3d 1103, 1112, 245 Cal. Rptr. 658.)* If the evidence presented on the motion discloses a triable issue of material fact regarding continuous representation tolling, summary judgment is not properly granted. (See *Worthington v. Rusconi (1994) 29 Cal.App.4th 1488, 1491* [triable issue of material fact regarding date on which defendant's representation of plaintiff ended precluded summary judgment]; *O'Neill*, at p. 121 [summary judgment could not be sustained in light of triable issue of material fact concerning date respondents ceased to represent appellants on specific matter **[*7]** in which malpractice allegedly occurred].)

Ordinarily, a client must sue her attorney for malpractice within one year of discovery or within four years of the wrongful act or omission itself, whichever comes first. (§ 340.6, subd. (a).) Subdivision (a)(2) of section 340.6 provides, however, that the statute of limitations is tolled as long as the attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged malpractice occurred. "The continuing-representation tolling provision has two purposes: to prevent the attorney from defeating a malpractice action by continuing to represent the client until the statute of limitations has run; and to avoid forcing the client to file a lawsuit

that would disrupt the ongoing attorney-client relationship and thereby prevent the negligent attorney from attempting to correct or minimize the error. (*Laird v. Blacker (1992) 2 Cal.4th 606, 618 [7 Cal.Rptr.2d 550, 828 P.2d 691].)*" (*Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal.App.4th 1509, 1535* (*Crouse*).) The client's awareness of the attorney's negligence does not interrupt the tolling of the limitations period **[*8]** under the continuous representation doctrine so long as the client permits the attorney to continue representing the client regarding the specific subject matter in which the alleged negligence occurred. (*O'Neill, supra, 19 Cal.App.4th at pp. 120-121.)*

"The continuous representation rule, as codified in section 340.6, subdivision (a), is not triggered by the mere existence of an attorney-client relationship. Instead, the statute's tolling language addresses a particular phase of such a relationship- representation regarding a specific subject matter." (*Foxborough v. Van Atta(1994) 26 Cal.App.4th 217, 228-229* (*Foxborough*).) "Therefore, 'the inquiry is not whether an attorney-client relationship still exists but when the representation of the specific matter terminated.' [Citation.]" (*Id. at p. 229.)* "The test for whether the attorney has continued to represent a client on the same specific subject matter is objective, and ordinarily the representation is on the same specific subject matter until the agreed tasks have been completed or events inherent in the representation have occurred. [Citing *Worthington v. Rusconi, supra, 29 Cal.App.4th at pp. 1496-1497.]* **[*9]** " (*Crouse, supra, 67 Cal.App.4th at pp. 1528-1529.)* "There is no bright-line rule for determining when the representation ended, because the particular circumstances need to be evaluated and may present an issue [of] fact." (3 Mallen & Smith, Legal Malpractice (5th ed. 2003 supp.) Statutes of Limitations, § 22.13, p. 61, fn. omitted.)

"A leading treatise also states that to qualify as the same subject matter 'the activities allegedly constituting continuous representation must relate to the main task or particular undertaking in which the error occurred. . . . [P] . . . The focus should be on the objectives of the prior retention and whether the present activities fall within those objectives.' (2 Mallen & Smith, Legal Malpractice (4th ed. 1996) Statutes of Limitations, § 21.12, p. 824, fn. omitted.)" (*Crouse, supra, 67 Cal.App.4th at p. 1530.)* "The summary purpose of the continuous representation rule is to avoid disrupting the attorney-client relationship unnecessarily. [Citation.]" (3 Mallen & Smith, Legal Malpractice (5th ed. 2000) Statutes of Limitations, § 22.13, p. 430.) "The client, like the patient, should have the benefit **[*10]** of a continuing relationship without having to disrupt the professional's task until the subject matter is completed." (*Id*. at p. 437.)

The parties differ significantly in their definition of the specific subject matter on which respondents represented appellant. Appellant contends that respondents' "longtime representation of [her] involved a singular purpose-to implement and effectuate [her] family estate plan. . . . Each of the transactions [respondents] handled was designed to promote and refine the estate plan-to the end that the plan would achieve [appellant's] desired wealth transfer and tax objectives." Respondents, however, would have the court retroactively segregate the parties' twenty-two year attorney-client relationship into distinct pieces, carving out particular transactions for separate treatment under the statute of limitations. They argue that those distinct transactions involved planning for the disposition of the family business, which should be treated as separate from appellant's other property.

The only reference in respondents' moving papers to the specific subject matter on which they represented appellant was contained in their undisputed fact **[*11]** number five: "In 1977, Fritzi and Ernie retained Orrick partner Bill Hoisington to develop an estate plan." n4 In their

memorandum of points and authorities below, respondents also characterized their legal representation of appellant as "estate planning work[,]" "accomplished . . . primarily through gifts of stock . . . ." Respondents further referred to appellant's having signed "more than 40 estate planning documents" during the years she was represented by respondents, apparently including documents relating to the stock transfers that took place during the 1990's.

n4 Defendants' additional undisputed material facts in support of their statute of limitations defense consisted of the following: "1. In 1947, newlyweds Fritzi and Ernie Benesch opened a small clothing operation in San Francisco, which in time grew into Fritzi of California (the 'Company'). [P] 2. Fritzi and Ernie had two daughters: Valli, born in 1951, and Connie, born in 1953. [P] 3. Valli attended Stanford University and the University of Chicago Law School, practiced law at Brobeck, Phleger & Harrison, joined the Company in 1978, and became the Company's President in 1983. [P] 4. Connie worked as a freelance journalist and suffered from medical problems. . . . [P] 6. Bill Hoisington was an Orrick partner from January 1, 1970, to March 31, 1999, when he retired from the firm. [P] 7. Fritzi seeks damages from Bill Hoisington and Orrick for alleged malpractice relating to gifts of Company stock by Fritzi and Ernie to Valli, [her husband] Bob and their daughters in 1992, and a series of sales of Company stock in 1998. [P] 8. On August 8, 2000, Fritzi filed this action against Ernie, Valli, Bob, Bill Hoisington, and Orrick." The following additional facts were listed in connection with defendants' assertion that the statute of limitations was not tolled beyond March 31, 1999, when Hoisington retired from Orrick: "51. Orrick performed no legal services for Fritzi after Bill Hoisington retired from the firm on March 31, 1999. [P] 52. After retiring from Orrick, Bill Hoisington opened his own practice in Lafayette. [P] 53. Bill Hoisington's only work for Fritzi in his own practice involved preparing a will codicil pertaining to several pieces of jewelry."

[*12]

By the time the stock transactions at issue took place, the parties had been engaged in estate planning for fifteen years or more. Respondents did not claim to have been separately retained to conduct the stock transactions, nor did they claim to have opened a separate file or to have billed separately for those services. n5 Viewing the evidence and inferences reasonably drawn therefrom in the light most favorable to appellant, the dispute over the subject matter on which respondents provided representation is a question for the trier of fact. (See *Alexander v. Codemasters Group Limited, supra, 104 Cal.App.4th at pp. 139, 147;* see also 1 Cal. Transactions Forms: Estate Planning (West 1999) § 2:8, p. 13 ["For the estate planning attorney, the 'specific subject matter' [triggering continuous representation tolling] will usually be the estate plan itself"].) n6 Thus, the trial court applied the continuous representation rule too narrowly by concluding, as a matter of law, that the August 1999 drafting of a will codicil "disposing of a few pieces of jewelry" fell outside the scope of respondents' representation.

n5 For example, Orrick's June 1998 bill for legal services rendered in connection with the March 1998 stock sales was headed "Estate Planning." Mary Brewer, the person most knowledgeable, was asked what the Fritzi Benesch estate planning file consisted of, and how the firm drew a distinction between that and other files pertaining to Benesch family members. She replied: "There is a file set that is recorded in our records department that

has Fritzi and Ernest Benesch's name on it. And it is indicated with the title Estate Planning." Appellant's husband also testified that all of Hoisington's work for the couple involved estate planning.

[*13]

n6 The practitioner's guide further advises: "Consequently, in the attorney-client relationship concerning the estate plan, there should be a specific beginning, the implementation of the plan, and a termination of the representation. . . . [P] . . . The best way to terminate the representation of the client is to send a letter stating that the estate planning job is complete, and have the client acknowledge receipt that it is complete and that the representation has ended." (1 Cal.Transactions Forms: Estate Planning (West 1999) § 2:8, p. 13.)

The parties also differ on the question of when respondents' representation ended. Appellant maintains respondents continued to represent her until mid-August 1999, when Hoisington drafted the will codicil and Orrick sent copies of appellant's file to her new attorney. Respondents argue that their representation ended in March 1999, when Hoisington retired from Orrick.

"Determining continuity of representation starts with analyzing the attorney's engagement. The usual starting point is a written engagement agreement. . . . If there was no written agreement, **[*14]** a preliminary issue may be to resolve a factual dispute of what were the terms of the oral agreement." (3 Mallen & Smith, Legal Malpractice (5th ed. 2000) Statutes of Limitations, § 22.13, p. 440.) "The continuous representation rule applies to litigation and non-litigation matters. Unlike litigation, which usually involves a specific subject matter of limited duration, advice is more likely to occur in a continuing attorney-client relationship that may make it difficult to ascertain exactly when the attorney's representation is complete." (*Ibid*.) "The issue of when representation ended can present a question of fact." (*Id*. at pp. 440-441, fn. omitted.)

"Unlike services rendered in the litigation context, estate planning services are often performed over many years, and it may be difficult to identify when they begin or end. The relationship between the estate planning attorney and client is usually open- ended, and, unless the engagement letter or some other document makes it clear when the relationship will end, the question of ongoing representation can continue until the client's death (and sometimes beyond)." (1 Cal. Estate Planning: Ethical Considerations (Cont.Ed. **[*15]** Bar 2005) § 2.32, p. 94.)

The record here does not contain a written retainer agreement, n7 and the evidence of the terms on which respondents were originally retained is less than completely clear. In light of the triable issue of material fact arising from the possible inference that the specific subject matter of the representation constituted estate planning, however, Hoisington's drafting of the August 1999 will codicil precludes a grant of summary judgment in his favor.

n7 Orrick's designated agent testified at his deposition that the firm's representation of appellant and her husband lasted from January 1977 through March 31, 1999. He did not know how those dates had been determined, however, nor whether any retainer agreement existed.

By the same token, Orrick has failed to make the required showing regarding the date on which its representation ended. Orrick contends that event occurred in March 1999, when Hoisington retired. n8 Orrick did not dispute, however, that the codicil to appellant's will, **[*16]** newly-drafted by Hoisington, was among the estate planning documents sent by the firm to appellant's new lawyer on August 17, 1999. Respondents cite *Crouse, supra, 67 Cal.App.4th 1509* for the proposition that the firm's retention of a client's files, standing alone, may not be sufficient to support continuous representation tolling. Here, however, the inclusion of the codicil drafted after Hoisington's retirement from the firm raises additional possible inferences, particularly viewed together with the other evidence in the record. Appellant also testified she never received notice that the firm was terminating its attorney-client relationship with her, and had not learned that Hoisington was no longer with Orrick before she met with him in August 1999. n9

n8 We note Orrick did not contend its representation concluded before Hoisington's retirement, at some time related to the occurrence of the stock transactions at issue. For example, respondents assert in their brief: "Moreover, we do not premise our continuous-representation arguments on a 'lull in file activity,' but rather, on a complete cessation of activity, after March 31, 1999, in the 'specific subject matter' of the inter vivos stock transfers." Respondents also dispute appellant's assertion that Orrick failed to "nail down the date of Hoisington's retirement." We need not resolve this dispute, as we conclude material issues of fact precluded summary judgment even assuming Hoisington retired from Orrick in March 1999.

[*17]

n9 Respondents contend appellant's declaration regarding the date she learned of Hoisington's retirement contradicts her own deposition testimony. Appellant maintains her declaration explains rather than contradicts her deposition testimony. In any event, whether appellant learned of Hoisington's retirement in mid-August or September of 1999 does not affect the outcome here.

While formal notice of withdrawal may not necessarily be required to terminate legal representation, to prevail on their summary judgment motion respondents must show no triable issue of material fact exists regarding the date they no longer represented appellant on the specific subject matter giving rise to her legal malpractice claim. This they have failed to do. Orrick did not claim to have notified appellant of Hoisington's retirement, nor, for that matter, did Orrick produce evidence that the parties had agreed representation would terminate on Hoisington's retirement, or after some particular lapse of time. Thus, respondents' assertion that Orrick "performed no legal services for [appellant after Hoisington's retirement]" **[*18]** is not determinative here. n10 (AA 39)

n10 Respondents also contend application of continuous representation tolling does not serve the doctrine's purpose of enabling the attorney to correct or minimize an apparent error, because the stock transfers were irrevocable when made. Additional measures could presumably have been taken to undo or minimize their effects, however, during the subsequent years of respondents' representation. We note that appellant also alleged respondents

had injured her by representing conflicting interests without disclosure or waiver. Nor have respondents addressed the additional policy embodied in the continuous representation rule, "to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired." (*Laird v. Blacker, supra, 2 Cal.4th at p. 618.)*

On the record before us, it cannot be said that respondents have demonstrated an absence of issues of material fact with regard to the date **[*19]** they concluded their representation of appellant on the specific subject matter with respect to which the alleged malpractice occurred. n11 Summary judgment on the statute of limitations grounds was therefore improper. n12

n11 "*Foxborough* [, *supra, 26 Cal.App.4th at p. 229],* relied upon by [respondents], does not change our analysis. There, the Court of Appeal held that when the attorney's role changed from acting as legal counsel to a retained consultant and expert witness hired by the client's new law firm, he no longer represented the client in the same specific subject matter in which the malpractice occurred. Here, in contrast, [respondents'] status did not morph:" they continued to act as appellant's estate planning attorneys throughout the proceedings. (*Gold v. Weissman (2004) 114 Cal.App.4th 1195, 1201.)* Respondents' citation of *Greene v. Morgan, Theeler, Cogley & Petersen (S.D. 1998) 1998 SD 16, 575 N.W.2d 457* is similarly unavailing. That out-of-state case involved a separate antenuptial agreement, unlike the case here at issue.

[*20]

n12 We therefore do not address the parties' additional arguments regarding the date of appellant's discovery of respondents' alleged negligence.

Disposition

The judgment is reversed.

Corrigan,J.

We concur:

McGuiness, P.J.

Parrilli, J.