



Alerts

Awkward or not, Former Client Waited Too Long to Sue Attorney

October 29, 2019

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Sharon v. Porter, California Fourth Appellate District Case No. G056706 (September 18, 2019)

Brief Summary

The *Sharon* case is a cautionary tale that absent a tolling agreement or continued representation, the statute of limitations for legal malpractice might commence once an attorney's malfeasance causes the client to face a weakened negotiating position against her opponent. In this statute of limitations case, the California Fourth Appellate District recognized the "awkward" position a former client may face when learning of her attorney's malfeasance before verifying whether she has sustained actual injury. Does she sue the attorney within a year of discovering the alleged negligence—even though she believes the error may not have caused harm or may be easily remedied? Or, does she wait and risk having the statute of limitations expire while the underlying dispute plays out?

Complete Summary

In 2008, attorney Peter Porter obtained a default judgment in favor of his client, Elise Sharon, against mechanic Pierre Perot; Sharon apparently waited until 2014 to try to enforce the judgment. In October 2015, Perot's attorney wrote to Sharon's new attorney (Martin Goldman), arguing that the judgment was void because the complaint against Perot did not specify the amount of alleged damages, as is necessary under California Code of Civil Procedure section 580. At the time, Goldman was representing Sharon on a contingency fee basis, and his efforts to enforce the judgment continued. When Perot filed a motion to vacate the judgment in September 2016, Sharon agreed to pay Goldman an hourly fee to oppose the motion. In October 2016, the trial court granted Perot's motion to vacate the judgment. Then, in May 2017, Sharon sued Porter for legal malpractice. The trial court denied Porter's motion for summary judgment, finding there was a triable issue of material fact as to when Sharon sustained actual damage. After trial, the court found that the Perot judgment became invalid only when the judgment was vacated and that Sharon suffered actual injury in September 2016 when she incurred hourly attorney fees "to directly address the consequences of Porter's legal malpractice." Judgment for Sharon was entered.

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On appeal to the Fourth Appellate District, the appellate court began its discussion by reciting basic statute of limitations principles, focusing on the provision tolling the period during the time that "the plaintiff has not sustained actual injury." Code Civ. Proc. §340.6(a)(1). Citing to *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison*, 18 Cal.4th 739 (1998), the appellate court explained that "[t]he mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence" (Id. at 749-450), but the "first injury of any kind" caused by the attorney "should suffice." *Radovich v. Locke-Paddon*, 35 Cal. App.4th 946, 971 (1995). While determining when the actual injury occurred is typically a question of fact, summary judgment may resolve the issue if the material facts are undisputed, as they were in this case. See *Jordache, supra*, 18 Cal.4th at 751. Depending on the facts and circumstances, "incurring of attorney fees necessary to address the underlying malpractice marks the 'actual injury'" or "[t]he loss or diminution of a right or remedy constitutes injury or damage." *Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP*, 195 Cal.App.4th 265, 275-276 (2011). In sum, "we must distinguish between an actual, existing injury that might be *remedied or reduced* in the future, and a speculative or contingent injury that might or might not *arise* in the future." *Jordache*, at 754 (italics in original).

Applying these principles, the appellate court found that Sharon's actual injury occurred no later than November 2015. "By that point, the judgment was already void, as acknowledged by Goldman, and Sharon's remedy against Perot had been sufficiently diminished as a result." This was the case "independent of when the superior court confirmed it was so." Thus, the appellate court rejected Sharon's theory that her incurring attorney fees in September 2016 was the date of actual injury because it was not the "first instance of actual injury." (emphasis in original). Rather, once Perot's attorney warned Goldman in November 2015 that Sharon faced legal liability if she continued to try to enforce the void judgment, Sharon's "negotiating position against Perot had been weakened," resulting in actual injury. See *Village Nurseries v. Greenbaum*, 101 Cal.App.4th 26, 41-42 (2002). Finding that the tolling provision ceased as of November 2015, the appellate court further concluded that the statute of limitations commenced running at that time because Sharon had discovered "the facts constituting the wrongful act or omission," based upon her attorney's receipt of written communication from Perot's attorney. Code Civ. Proc. § 340.6(a); see also *Santillan v. Roman Catholic Bishop of Fresno*, 163 Cal.App.4th 4, 10-11 (2008) (facts used to determine accrual of a statute of limitations imputed from agent to principal).

Ultimately, the appellate court reversed the judgment and instructed the trial court to enter judgment in favor of Porter. Before doing so, the appellate court recognized the "awkward" position Sharon would be in to be forced to file a malpractice lawsuit before the trial court confirmed the judgment was void. "However, such a situation did not justify tolling based upon any of the exclusive grounds under section 340.6." The appellate court also noted that its findings were consistent with the "well-recognized policy interest of section 340.6 'to require diligent prosecution of known claims so that legal affairs can have their necessary finality and predictability and so that claims can be resolved while evidence remains reasonably available and fresh.'" *Jordache, supra*, 18 Cal.4th at pp. 755-756, citing *Laird v. Blacker*, 2 Cal.4th 606, 614-18 (1992).

Significance of Opinion

Awkward or not, a former client who learns of her attorney's malfeasance may be forced to sue the attorney, even when there is a question of whether the attorney's action or inaction caused actual harm. The former client facing a weakened negotiating position against her opponent may be sufficient to trigger the statute of limitations. This presents a catch-22 not only for the former client, but also the attorney, who should consider whether to enter a tolling agreement while the former client attempts to remedy or mitigate her damages.

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