

Demurrer to Cross-Complaint (Judge Dan Thomas Oki)

Case Number: KC068183 **Hearing Date:** August 29, 2016
Dept: J

Re: Hector Cortez v. Luz A. Lopez, etc., et al. (KC068183)

DEMURRER TO CROSS-COMPLAINT

Moving Party: Cross-Defendant Anna Elias Hernandez dba Anna's Court Services Inc.

Respondent: Cross-Complainant Luz A. Lopez

POS: Moving OK; Opposing OK; Reply served by regular mail contrary to CCP § 1005(c)

In this action to quiet title, Plaintiff alleges that Defendant Luz Lopez's grant deed is false and that Plaintiff never understood what he was signing due to his lack of understanding of the English language, whether written or spoken. Plaintiff commenced this action on 1/22/16, asserting causes of action for:

1. Quiet Title
2. Cancellation of Instrument
3. Fraud by Concealment
4. Declaratory Relief

On 2/22/16 Defendant Lopez filed a Cross-Complaint against Plaintiff, Anna's Court Services, Inc. and Anna E. Hernandez, asserting causes of action for declaratory relief and professional negligence.

The Case Management Conference is set for 8/29/16.

Cross-Defendant Anna Elias Hernandez (erroneously sued as Anna

E. Hernandez) now demurs to the second cause of action for professional negligence in Cross-Complainant Luz A. Lopez ("cross-complainant")'s cross-complaint, on the basis that it fails to state facts sufficient to constitute a cause of action. The cause of action is allegedly time-barred. Additionally, there is no private right of action for violation of Business & Professions Code §§ 6125 and 6450(b)(1)&(3).

REQUEST FOR JUDICIAL NOTICE:

Cross-Complainant Luz A. Lopez ("Lopez")'s request for judicial notice is granted.

SECOND CAUSE OF ACTION (PROFESSIONAL NEGLIGENCE):

The elements of a professional negligence cause of action are as follows: "(1) the duty of the professional to use such skill, prudence, and diligence as to other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional negligence." *Budd v. Nixen* (1971) 6 Cal.3d 195, 200.

In or about January 2006, Lopez began a romantic relationship with Cross-Defendant Hector Cortez ("Cortez"). (Cross-Complaint, ¶ 3). During the relationship, Lopez contributed \$60,000.00 for the purpose of remodeling and constructing additions and improvements to the real property located at 5341 N. Calera Avenue in Covina ("property"), in exchange for Cortez's promise to convey an ownership interest in the property to her. (Id.). The romantic relationship soured in 2007. (Id., ¶ 5). Cortez and Lopez subsequently agreed that Lopez would accept \$60,000 from Cortez in full settlement of their above agreement and that payment of same would be secured through the execution of a promissory note and

deed of trust. (Id., ¶¶ 5 & 6).

On/about 11/29/07, Cortez executed a document entitled Quitclaim Deed and an attachment thereto entitled Promissory Note and Personal Guaranty, which were prepared for him by Cross-Defendant Anna Elias

Hernandez (erroneously sued as Anna E. Hernandez) ("Hernandez"). Lopez claims that Hernandez "breached the...duty of due care owed to [her] by recommending and preparing the aforementioned Quitclaim Deed and Promissory Note and Personal Guaranty for use and recordation as the proper legal documents to effectuate the transaction between Cross-Complainant and Cross-Defendant Hector Cortez, instead of a promissory note secured by deed of trust; by failing to include language in the subject documents to confer independent and non-judicial powers of sale upon Cross-Complainant in the event of non-payment by Cross-

Defendant, Hector Cortez; by violating the provisions of California Business and Professions Code § 6125 and § 6450(b)(1) and (3) by providing legal advice to Cross-Complainant and Cross-Defendant, Hector Cortez, and by performing the aforesaid acts and providing the aforesaid services...without the direct supervision of an attorney licensed to practice in the State of California." (Id., ¶ 20).

At the outset, Lopez has not adequately alleged the element of damages. Exhibit "A" to the cross-complaint reflects that the property was partially quitclaimed to her. "'A quitclaim deed transfers whatever present right or interest the grantor has in the property. [Citation.]' (Westlake v. Silva (1942) 49 Cal.App.2d 476, 478; Rosenthal v. Landau (1949) 90 Cal.App.2d 310, 313; see also 2 Miller & Starr, Current Law of Cal. Real Estate (2d ed. 1989) § 6:12, pp. 503-505; Black's Law Dict. (4th ed. 1968) p. 1417, col. 1 [quitclaim 'intended to pass any title, interest, or claim which the grantor may have in the premises'].) More specifically, '...a quitclaim deed conveys the absolute fee-simple title if the party executing it had

such title [citations]; and therefore such deed does not imply any precedent interest or easement in the releasee, or any admission of the releasor to that effect. (Spaulding v. Bradley (1889) 79 Cal. 449, 456).” City of Manhattan Beach v. Superior Court (1996) 13 Cal.4th 232, 239.

As Hernandez points out, “the documents allegedly wrongly drafted by [her] actually secure for Lopez a windfall in the form of getting title to the...property rather than just rights to recover \$60,000.00 after a non-judicial foreclosure sale.” (Demurrer, 7:10-12).

Hernandez’s contention that Lopez has no private right of action under Business and Professions Code § 6450 appears to be conceded by Lopez. “If the Legislature intended a private right of action, that usually ends the inquiry. If the Legislature intended there be no private right of action, that usually ends the inquiry. If we determine the Legislature expressed no intent on the matter either way, directly or impliedly, there is no private right of action (Moradi-Shalal v. Fireman’s Fund Ins. Companies (1988) 46 Cal.3d 287, 305), with the possible exception that compelling reasons of public policy might require judicial recognition of such a right.” Animal League Defense Fund v. Mendes (2008) 160 Cal.App.4th 136, 142.

Additionally, Lopez does not have a private right of action under of Business and Professions Code § 6125 . However, The Office of the Attorney General has advised that “a violation of section 6125 may form the basis for a cause of action under some other statute or legal theory...[a] private cause of action based on a violation of section 6125 has been recognized where negligent work by the unlicensed practitioner has caused a private party to suffer loss. In Biakanja v. Irving (1958) 49 Cal.2d 647, a notary public who, in violation of section 6125, prepared a will for a client and negligently failed to have it properly attested was found liable to the beneficiary for the

resulting damage sustained. The court found the defendant liable for damages even though there was no privity of contract between the litigants...Section 6125 was applied in a similar fashion in McKay v. Longworth (1989) 211 Cal.App.3d 1592, where a physician sought damages from an unlicensed person who had filed an unfair competition suit against her on behalf of another physician. The court accepted the trial court's finding that the monetary damages suffered by the plaintiff were a proximate result of the defendant's unauthorized practice of law and held that the defendant was liable for treble damages pursuant to Code of Civil Procedure section 1029.8, subdivision (a). (Id. at p. 1595). Relying on Biakanja, the court found the policy considerations which largely shield licensed attorneys from third party lawsuits to be inapposite. Such considerations, the court stated, should not 'protect those who intentionally violate the very laws which seek to protect the public by requiring the testing and licensing of those who would practice law.' (Id., at p. 1596)...we conclude that monetary damages may be collected for personal injuries sustained as a result of a person practicing law who is not an active member of the State Bar." See 76 Ops. Cal. Atty. Gen. 193 (Cal.A.G.).

"The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." Biakanja, supra, 49 Cal.2d at 650. These factors are present here.

With that said, it appears that Lopez's cause of action is time-barred. The parties agree that the controlling provision

is Code Civ. Proc. § 340.6, which provides in relevant part that “[a]n action against an attorney for a wrongful act or omission...arising from the performance of professional services shall be commenced within one year after the plaintiff discovers or through 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. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that...(1) The plaintiff has not sustained actual injury...”

“The statute of limitations, a legislatively prescribed time period to bring a cause of action, ‘exists to promote the diligent assertion of [the] claim[], ensure defendants the opportunity to collect evidence while still fresh, and provide repose and protection from dilatory suits once excess time has passed.’ (Aryeh[v. Canon Business Solutions, Inc. (2013)] 55 Cal.4th [1185,] at p. 1191; accord, Shively v. Bozanich (2003) 31 C.4th 1230, 1246)...Traditionally, a claim accrues ‘”when [it] is complete with all of its elements’ – those elements being wrongdoing [or breach], harm, and causation.”’ (Aryeh, at p. 1191; accord, Howard Jarvis Taxpayers Assn. v. City of La Habra (2001) 25 Cal.4th 809...].)” Gilkyson v. Disney Enterprises, Inc. (2016) 244 Cal.App.4th 1336, 1341.

Lopez claims that she only first suffered an “actual injury” on or about 1/31/16, “when she was sued and served by Plaintiff in this action...” (Opposition, 4:17-19; see also Cross-Complaint, ¶¶ 22 & 23). Not so. “Actual 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, 743

(citations omitted). “[T]he statutory scheme does not depend on the plaintiff’s recognizing actual injury. Actual injury must be noticeable, but the language of the tolling provision does not require that it be noticed.” (Foxborough v. Van Atta (1994) 26 Cal.App.4th 217, 226-227).” Croucier v. Chavos (2012) 207 Cal.App.4th 1138, 1148. The Promissory Note attached as part of Exhibit “A” to the cross-complaint states in relevant part, “CORTEZ and LOPEZ, have agreed to a buy out amount of SIXTY THOUSAND DOLLARS (\$60,000.00). CORTEZ shall pay this amount to LOPEZ by or before April 1, 2008.” It is clear, from the allegations of the cross-complaint, that Cortez did not repay the loan “by or before” April 1, 2008. Lopez’s cause of action, then, accrued at that time.

Cross-Defendant Anna Elias Hernandez’s demurrer to Cross-Complainant Luz A. Lopez’s cross-complaint is sustained. The court will hear from cross-complainant as to whether leave to amend is requested, and will require an offer of proof if so. Otherwise the moving party has 10 days to answer the first cause of action of the cross-complaint.