S220775

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

NANCY F. LEE
Plaintiff and Appellant

v.

WILLIAM B. HANLEY
Defendant and Respondent

On Review From The Court of Appeal For The Fourth Appellate District,
Division Three, Case No. G048501

After An Appeal from the Superior Court For The State of California,
County of Orange, Case Number 30-2011-00532352,
Hon. Robert J. Moss

RESPONDENT'S OPPOSITION TO APPELLANT'S MOTION FOR JUDICIAL NOTICE

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I.

INTRODUCTION

Appellant Nancy Lee's ("Lee") motion for judicial notice should be denied as to Exhibit 4.[1]

First, Exhibit 4 (State Bar documents) is irrelevant to the single issue before this Court, i.e., does the one-year statute of limitations for actions against attorneys in California Code of Civil Procedure section 340.6[2] apply to a former client's claim against an attorney for reimbursement of unearned attorneys' fees advanced in connection with a lawsuit?

Second, Exhibit 4 is not a proper matter for Judicial Notice. (*Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325 ("*Brosterhous*") [records of State Bar arbitration proceedings are not subject to judicial notice as acts of either a legislative or executive department].)

Respondent William B. Hanley ("Hanley") has no objection to the legislative history in Exhibits 1-3.

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[1] Lee's motion fails to insert an Exhibit 4 page separator. All documents identified as pages 66-80 (apparently Exhibit 4) relating to State Bar documents are irrelevant and not properly a matter for judicial notice.

[2] All statutory references will be to the Code of Civil Procedure unless otherwise specifically stated.

II.

BACKGROUND

Lee's lawsuit was filed more than one year after Lee discovered her claims, resulting in her lawsuit being barred by one statute in section 340.6. Lee was given numerous opportunities to amend the complaint to state a cause of action against Hanley, but failed to do so.

After the demurrer to the second amended complaint was sustained with leave to amend Lee chose to appeal the trial court's ruling that Lee's lawsuit was untimely.

The Court of Appeal, Fourth Appellate District, Division Three, reversed the trial court's ruling. In the opinion, the Court of Appeal denied Lee's similar Request for Judicial Notice of State Bar documents, Exhibit 4, as irrelevant to the issues before that court. It should be denied again.

This Court granted Hanley's petition for review on October 1, 2014.

Hanley has no objection to Exhibits 1-3 (legislative history) being considered by this Court. However, Exhibit 4 (State Bar documents) is not subject to judicial notice and is not relevant to the issue before this Court.

III.

LEE FAILS TO MEET THE REQUIREMENTS FOR A MOTION FOR JUDICIAL NOTICE

To support a motion for judicial notice, the moving papers must state (i) why the matter to be noticed is relevant to the appeal; (ii) whether the matter was presented to the trial court (and, if so, whether the trial court took judicial notice of the matter); (iii) if the trial court did not take judicial notice, why it is subject to judicial notice under Evidence Code sections 451, 452, or 453; and (iv) whether the matter relates to proceedings occurring after the order or judgment that is the subject of the appeal. (*CRC, Rule 8.252 subd. (a)(2)*).

Lee's motion for judicial notice relating to Exhibit 4 should be denied because: (1) Lee failed to request judicial notice of the documents in the trial court in connection with multiple demurrers to the complaint; (2) the documents are irrelevant and play no role in resolution of the single issue before this Court; and (3) Exhibit 4 is not the proper subject of judicial notice.

IV.

THE MATERIALS IN EXHIBIT 4 REGARDING STATE BAR PROCEEDINGS ARE IRRELEVANT, AND ARE NOT THE PROPER SUBJECT OF JUDICIAL NOTICE

Documents in Exhibit 4 to the Request for Judicial Notice (pp. 66-80) are not proper matters of judicial notice as they are not official acts of a legislature or executive branch and are irrelevant to the single issue before this Court.

Lee filed the underlying lawsuit after the statute of limitations in section 340.6 expired. To direct attention away from this fact, Lee attempts to highlight efforts to force the State Bar to take action. None of the documents in Exhibit 4 are official records of a legislative or executive branch and are not relevant to the single issue before this Court, and should not be judicially noticed.

A. Exhibit 4 was not presented to the trial court

Lee acknowledges that the materials in Exhibit 4 were not presented to the trial court, yet fails to explain why they were not presented.

B. Exhibit 4 is not relevant

Exhibit 4 is not relevant to the single issue before this Court, i.e., whether a former client's claim against an attorney for reimbursement of unearned attorneys' fees advanced in connection with a lawsuit is subject to the one year statute of limitations in section 340.6. Lee makes no valid argument why the

documents relating to proceedings with the State Bar are relevant to whether section 340.6 applies to a fee dispute.

Lee alleges she hired Hanley pursuant to a written fee agreement to represent her in a lawsuit, she advanced money to be used for fees and costs in the litigation, and after the litigation was over Hanley failed to return unearned fees.

Section 340.6 subdivision (a) provides: "(a) 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 . . . ." Section 340.6 is the exclusive statute of limitations governing a client's claim against an attorney for acts or omissions arising in the performance of professional services to the client. *Levin v. Graham & James* (1995) 37 Cal.App.4th 798, 805; *Vafi v. McCloskey* (2011) 193 Cal.App.4th 874, 880 [disagreed with on other grounds in *Roger Cleveland Golf Co., Inc. v. Krane & Smith, APC* (2014) 225 Cal.App.4th 660, 668.]) The State Bar documents cannot prove or resolve the issue connected with this case.

C. Exhibit 4 is not a proper matter for Judicial Notice

Lee's argument that the materials in Exhibit 4 are official acts (Motion pp. 3), is contrary to the law.

While Lee fails to even cite this Court's ruling in *Brosterhous*, the authority she cites does not support Lee's motion to take judicial notice of Exhibit 4 or its contents. Both decisions support denial of the motion.

Lee states in the motion that Exhibit 4 contains "official acts of the State Bar." (Motion pp. 3, 4) The law is these State Bar documents are not subject to Judicial Notice.

Stevens v. Superior Court (1999) 75 Cal.App.4th 594, 607-608, cited by Lee, is a decision which supports Hanley, not Lee. The court in *Stevens* refused to take judicial notice because the "filings" were not "official acts" but were (as here) "materials prepared by private parties and merely on file with state agencies." *Stevens* states:

> Defendants have requested we take judicial notice of the various filings they submitted in 1995, to the Department of Insurance for approval of the 'Creditors Installment Sales Program.' These filings are important, Guaranty National and API argue, because they show that the insurance program at issue does not actually involve the 'transaction of insurance,' as defined in section 35, with the result that API and the automobile dealers were not required by section 1631 or title 10, section 2110 et seq. to hold licenses. If licenses were not required for this type of insurance program, defendants continue, either they have not violated section 1631 or title 10, or they are specifically exempted from the licensing requirements of section 1631. (§ 1635, subd. (d).) Without a predicate law violation, they argue Stevens cannot maintain his UCA action. Defendants, along with amici curiae, have hinged their arguments on the filings before the Department of Insurance, not only in their attempt to factually 'clarify' the nature of the insurance program at issue, but also to make these substantive arguments.
>
> We granted defendants' request to take judicial notice and take notice of those items which are properly noticeable. (*Evid. Code, §*

459, subd. (a)). Subdivision (c) of section 452 of the Evidence Code permits the trial court and this court to take judicial notice of '*Official acts of the legislative, executive, and judicial departments* of the United States and of any state of the United States.' To the degree that the filings in defendants' request for judicial notice are the 'official acts' *of the Department of Insurance*, they are noticeable.

However, the bulk of the filing in defendants' request for judicial notice consists of *Guaranty National's* application and supporting documents themselves, which are not 'official acts' *of the Department of Insurance*. Papers filed with state and federal agencies, including the Department of Insurance, do not fall within the ambit of subdivision (c) of section 452 of the Evidence Code. 'We have found no authority and none has been cited for the proposition that materials prepared by private parties and merely on file with state agencies may be judicially noticed pursuant to subdivision (c).' [Citations.]' (*Hughes v. Blue Cross of Northern California* (1989) 215 Cal.App.3d 832, 856, fn. 2; *Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063-1064 [describing scope of subdivision (c)].)

The filings, which defendants would have us notice, are factual allegations and are neither properly noticeable nor reviewable on appeal from, or on a petition for writ from, an order sustaining a demurrer. A demurrer tests the legal sufficiency of the complaint's allegations; not their truth or the plaintiff's ability to prove them. (*Saunders v. Superior Court, supra,* 27 Cal.App.4th at p. 840.) These filings, which involve factual assertions and which are submitted as evidence of the nature of the insurance program at issue, are more properly considered on a motion for summary judgment. (*Code Civ. Proc., § 437c.*)

The only 'official acts' that are contained in the request for judicial notice and which are properly noticeable under Evidence Code section 452, subdivision (c), are two letters in which the department issued its approval of the insurance program defined in the filings. We find nothing in the approval letters which influences our holding here. The Department of Insurance merely approved the program of insurance. The approval contains *no finding* that the participants are transacting insurance or hold the necessary licenses to engage in the program. Indeed, in those letters, the department simply *assumed* that the proposer, Guaranty

> National, was properly licensed. The absence of a finding on an issue which was not before the department cannot be construed as an approval of that issue or an interpretation of any statute it is charged with enforcing. (*Samura v. Kaiser Foundation Health Plan, Inc., supra*, 17 Cal.App.4th at pp. 1248, 1294).'

Lee also cites *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal. 1057, 1063-1064 ("*Mangini*") (overruled on other grounds) see *In Re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1262. However, *Mangini* also supports the fact that this Court should not take judicial notice of the State Bar documents.

The court in *Mangini* took judicial notice of 1994 Report of United States Surgeon General, but refused to take judicial notice of the truth of the matters asserted in the documents. The *Mangini* court also refused to take judicial notice of a 1992 letter from several state attorneys general to United States Senators. (*See also Wolski v. Fremont Investment & Loan* (2005) 127 Cal.App.4th 347, 356 [appellate Court will not take judicial notice of a fax transmittal of letter from attorney or other letters to the Department of Real Estate].)

The *Mangini* court stated:

> 'Although a court may judicially notice a variety of matters (citation omitted), only *relevant* material may be noticed. But judicial notice, since it is a substitute for proof [citation], is always confined to those matters which are relevant to the issue at hand.' (Citation omitted). While Evidence Code, section 451, provides in mandatory terms that certain matters designated therein must be judicially noticed, the provisions contained therein are subject to the qualification that the matter to be judicially noticed must be relevant (*Evid. Code, §§ 350, 450)*, as well as 'qualified by

> Evidence Code, section 352 ....' (citations omitted; 2 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) § 47.1, p. 1749 ['Matters otherwise subject to judicial notice must be relevant to an issue in the action.'].) We therefore 'decline' to judicially notice material that 'has no bearing on the limited legal question at hand.' (citation omitted).

Finally, this Court has held that records of the State Bar are not to be judicially noticed. (*Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325 [records of State Bar arbitration proceedings are not subject to judicial notice as acts of either a legislative or executive department].)

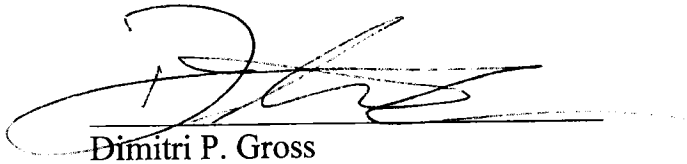
V.

CONCLUSION

For the above reasons, the motion for judicial notice should be denied as to Exhibit 4. Exhibit 4 was not presented to the trial court, it is not a proper matter for judicial notice, and it has no bearing on whether Lee's claims are barred by Section 340.6.

Dated: December 19, 2014

LAW OFFICES OF DIMITRI P. GROSS



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PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is: 19200 Von Karman Avenue, Suite 900, Irvine, California 92612. Facsimile: (888) 788-1045; Email address: dgross@dimitrigross.com.

On December 19, 2014, I served the foregoing document described as **RESPONDENT'S OPPOSITION TO APPELLANT'S MOTION FOR JUDICIAL NOTICE** on the interested parties in this action as follows:

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☒ BY PLACING ☐ the original ☒ a true copy thereof enclosed in sealed envelope(s) to the notification address(es) of record and transmitting via:

☒ OVERNIGHT DELIVERY: I caused such envelope(s) to be delivered by overnight delivery by close of business of the next business day. I am "readily familiar" with the firm's practice of collection and processing parcels for overnight carrier. It is deposited with the overnight carrier or at a location authorized to receive parcels on behalf of the overnight carrier on the same day, fully prepaid at Irvine, California in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed December 19, 2014, at Irvine, California.

NAME: Dimitri P. Gross

(Signature)