Filed 6/11/19 Metoyer v. Farahan CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

DAMICUS METOYER, Plaintiff and Appellant, v. BABAK "BOB" FARAHAN, Defendant and Respondent.	B286079 (Los Angeles County Super. Ct. No. BC664575)

APPEAL from a judgment of the Superior Court of Los Angeles County. John P. Doyle, Judge. Affirmed.

Damicus Metoyer, in pro. per., for Plaintiff and Appellant.

Babak "Bob" Farahan, in pro. per., for Defendant and Respondent.

SUMMARY

This is an appeal from a judgment of dismissal after the trial court sustained a demurrer without leave to amend. Plaintiff contends the trial court erred in doing so.

Our role on appeal is to determine as a matter of law whether the complaint alleged facts sufficient to state a cause of action – or whether plaintiff has shown a reasonable possibility the complaint could be amended to do so. The Supreme Court told us how to achieve that end in *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074 (*Schifando*). We must assume the truth of the properly pleaded or implied factual allegations in the complaint. We give the complaint a reasonable interpretation, and read it in context. If we find an amendment would cure the defect in the complaint, we conclude the trial court abused its discretion and we reverse; if not, there was no abuse of discretion and we affirm. The plaintiff has the burden of proving that an amendment would cure the defect. (*Id.* at p. 1081.)

The trial court found the complaint was barred by the applicable statutes of limitation. Plaintiff did not request leave to amend his complaint in the trial court. On appeal, he has not sought leave to amend nor said how he might amend the complaint to cure its defects. We affirm the judgment.

FACTS

The appellate record did not include the operative complaint. It also did not include defendant's demurrer, and it did not include plaintiff's response to the demurrer. The only document from which we could glean any facts was the trial court's minute order of August 23, 2017, explaining the

background and stating the court's reasons for sustaining the demurrer without leave to amend.[1]

The trial court explained in its minute order that the lawsuit, filed October 17, 2016, involved legal malpractice claims based on defendant's alleged improper handling of plaintiff's federal habeas corpus petition, resulting in dismissal of the petition on October 1, 2012, for failure to exhaust state remedies. The minute order tells us the operative complaint alleged causes of action for breach of contract, fraud by intentional misrepresentation and concealment, and common counts. The trial court explained the gravamen of the breach of contract and common counts causes of action was legal malpractice, and those claims were time-barred by section 340.6 of the Code of Civil Procedure[2] (one year from the date the plaintiff discovers or should have discovered the attorney's wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first), and the fraud claim was time-barred by section 338, subdivision (d) (three years). Plaintiff appeared in propria persona at the hearing via Court Call.

On September 19, 2017, the trial court entered a judgment of dismissal. Plaintiff did not move for reconsideration of the

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[1] The record also contains the superior court case summary; a notice of entry of the August 23, 2017 order; a notice of entry of the judgment; the September 19, 2017 judgment of dismissal; the notice of appeal; the notice designating the record on appeal; and an untimely document filed by plaintiff on September 27, 2017 (after the judgment), captioned "response to the tentative ruling entered 08/23/2017" (capitalization omitted).

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

demurrer ruling during the weeks between the hearing on August 23, 2017, and the entry of judgment on September 19, 2017.

More than a week after judgment was entered, plaintiff filed a document captioned "Response to the Tentative Ruling Entered 8/23/2017." (The reference to "the Tentative Ruling" is, as the minute order clearly shows, a mischaracterization.) In this untimely document, plaintiff contended his action was tolled under section 340.6 because defendant continued to represent him until February 2016, and because defendant willfully concealed the facts from plaintiff. The postjudgment filing also stated plaintiff has been incarcerated "for the entire time of the issue at hand," and that the time for an incarcerated person to file a lawsuit is extended for two extra years under section 352.1.

Plaintiff did not move to set aside the judgment.

Since this appeal is from a judgment of dismissal based on a demurrer ruling, review is not possible without the operative complaint. This is because the appeal presents a legal question about that very complaint: did the factual allegations in the complaint state a cause of action? If they did not, another legal question is presented: has plaintiff shown, to the trial court or in the opening brief on appeal, a reasonable possibility the complaint could be amended to state a cause of action?

We therefore augmented the record on our own motion to include the operative first amended complaint pursuant to California Rules of Court, rule 8.155(a)(1)(A), by order dated March 11, 2019. That same day, we sent a letter pursuant to Government Code section 68081, asking the parties to address the effect, if any, of adding the first amended complaint to the record on appeal. Defendant responded on March 14, 2019 that it

had no effect on defendant or the positions defendant took in this appeal. Plaintiff responded on March 18, 2019, not directly responding to the question we posed.

DISCUSSION

Plaintiff, still self-represented on appeal, contends the trial court's ruling was "incorrect" because the trial court "never reviewed the Plaintiff's argument or the record." He contends defendant continued to represent him until February 2016, and "willfully concealed" his wrongful acts, thus tolling the statute under section 340.6. He mistakenly characterizes the judgment of dismissal as having been entered "too early" and without prior notice to plaintiff. He concludes by requesting reversal of the judgment and remand "with instructions to hear [his] timely filed suit in its entirety." He does not ask for leave to amend his complaint.[3] We find his contentions lack merit.

The trial court fully considered the merits of plaintiff's demurrer and found plaintiff ought to have become aware of any wrongs committed by defendant on October 3, 2012, when defendant sent plaintiff a letter stating his habeas petition had

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[3] Plaintiff attached, as exhibits to his brief, two documents he did not designate for the record. One of these is a copy of his August 4, 2017 response to defendant's demurrer. In that document, he concluded by asking the court, if it were to dismiss the action for any reason, to do so "[without] prejudice, and opportunity to Amend without timeline penalties." (He did not suggest how he could amend his complaint.) A party may attach to his brief "copies of exhibits or other materials *in the appellate record*" or copies of citable materials such as regulations that are not readily accessible. (Cal. Rules of Court, rule 8.204(d), italics added.) Plaintiff's exhibits are not a part of the designated appellate record, and thus not properly considered here.

been dismissed. The court relied on exhibit 6 to the first amended complaint, which includes four letters from defendant to plaintiff, all of which advised that the federal habeas petition could be dismissed for failure to exhaust state remedies if plaintiff did not first seek habeas relief in state court. The last letter, dated October 3, 2012, enclosed a copy of the federal court order dismissing the habeas petition. Therefore, the court reasoned, the breach of contract and common counts causes of action were required to be filed by October 2, 2013, pursuant to section 340.6. The court found the fraud cause of action was required to be filed by October 2015. The court found all the causes of action were time-barred since the complaint was filed in October 2016. We see no abuse of discretion in the trial court's analysis.

In addition, we find the fraud cause of action is not pled with the requisite specificity. (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 878; 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 711, p. 127.) The so-called fraud cause of action alleges only legal malpractice, not facts that would support a fraud claim. Plaintiff alleged defendant contracted to represent him in filing a federal writ of habeas corpus but abandoned his duties by failing to communicate, review the record, research and properly prepare the writ, including showing plaintiff had exhausted state remedies.

The trial court did not address the adequacy of the fraud claims because it disposed of the case based on the statutes of limitation. We point this out because the inadequacy of the fraud claims is an alternative basis for affirming the trial court's judgment. (*D'Amico v. Board of Medical Examiners* (1974)

11 Cal.3d 1, 19 [“ ‘If right upon any theory of the law applicable to the case, [a judgment] must be sustained regardless of the considerations which may have moved the trial court to its conclusion.’ [Citation.]”].)

The dissent disagrees with our finding that the fraud cause of action is not adequately pled. The dissent finds the complaint “clearly and specifically alleged that [defendant] committed fraud when he promised to perform legal services which he had no intention of performing.” (Dis. opn., *post,* at pp. 6-7.) We do not agree those allegations are sufficient because long standing case law holds otherwise. (See *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 30 [“ ‘something more than nonperformance is required to prove the defendant’s intent not to perform his promise’ ”]; *U.S. v. D’Amato* (2d Cir. 1994) 39 F.3d 1249, 1261, fn. 8 [“To infer fraudulent intent from mere nonperformance . . . would eviscerate the distinction between a breach of contract and fraud.”]; *Cordova v. Convergys Corp.* (N.D. Cal., May 9, 2011, No. C 11-033 RS) 2011 U.S. Dist. Lexis 49499, p. 12 [“[the plaintiff] has pleaded no facts from which any inference could be drawn that [the defendant] lacked the intent to perform any promises it made to [the plaintiff] at the time such promises were made,” citing *Tenzer,* at p. 30].)

As we have noted, plaintiff has not requested leave to amend in his appellate brief. The burden is squarely on the plaintiff to demonstrate in his opening brief on appeal how he can amend his complaint to state a legal claim. (*Schifando, supra,* 31 Cal.4th at p. 1081; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [“The burden of proving such reasonable possibility is squarely on the plaintiff.”]; *Banis Restaurant Design, Inc. v. Serrano* (2005) 134 Cal.App.4th 1035, 1039 [“This showing may be made for the

first time in the appellate court, but it must be made."].) Plaintiff here did not make that showing, either before the trial court or in his appellate brief. Appellate courts have no discretion to suggest further facts or formulate legal theories that might assist the plaintiff in curing a defective complaint. To do so would surely undercut the due process to which all parties are entitled in appellate as in any other proceedings.

The dissent concludes plaintiff could allege facts that would make his fraud cause of action (but not his breach of contract or common counts causes of action) timely, and finds the trial court abused its discretion by not granting leave to amend to allege facts showing the statute of limitation was tolled by section 352.1. But plaintiff himself did not seek leave to amend on that basis. The only mention in the appellate record of section 352.1 appears in a document plaintiff filed in the trial court *after* the judgment was entered. Plaintiff does not rely on or refer to section 352.1 in his opening brief on appeal, nor does he ask for leave to amend on that ground (or any other). (See, e.g., *Brown v. Deutsche Bank National Trust Co.* (2016) 247 Cal.App.4th 275, 282 ["cursory request" for leave to amend, where the plaintiff did not address how she could amend to assert a valid cause of action, "forfeited any argument that the trial court abused its discretion in sustaining the demurrer without leave to amend"].)

The dissent believes it is "just and fair" to relieve plaintiff of the burden of proving in his brief that an amendment would cure the defect because he is unfamiliar with the basic rules of appellate procedure. (Dis. opn., *post,* at p. 13.) The dissent relies on the "simple arithmetic" of an agreed date of accrual (October 2, 2012) and the two additional years section 352.1 allows for

prisoners to file a lawsuit. That might have been compelling, if plaintiff had actually raised it on appeal, and if defendant had had an opportunity to respond. But neither of those things happened. (Cf. *People ex rel. Dept. of Transportation v. Superior Court* (1992) 5 Cal.App.4th 1480, 1485 ["It is true that the allegations in a complaint must be liberally construed. [Citation.] It is also true that ' ". . . the essence is fairness in pleading in order to give the defendant sufficient notice of the cause of action stated against him so that he will be able to prepare his case [citations]. . . ." ' [Citation.] Therefore, we must not so liberally construe the allegations of the complaint so as to deny the defendant adequate notice to defend the case."].)

The dissent cites *Aubry v. Tri-City Hospital Dist*. (1992) 2 Cal.4th 962, 971 and *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 746 for the proposition that plaintiff has no burden on appeal to show that he can amend the complaint to cure any deficiency. We do not read either case as supporting that contention under the circumstances here. *Aubry* cites section 472c, which states the question of leave to amend is open on appeal even if no request to amend was made in the trial court, and *Stockton* cites *Aubry* for that point. Neither case purports to overrule *Schifando* or *Blank v. Kirwan,* both of which clearly state the burden is on plaintiff to prove an amendment would cure a defect. When a plaintiff has not asked for leave to amend his complaint in his opening brief on appeal and has not stated how he would do so, an appellate court cannot do that for him.

We do not believe plaintiff has been denied access to justice. In fact, we took the unusual step of augmenting the record with the operative complaint on our own motion to ensure

this case was thoroughly reviewed. We are not required to review all exhibits improperly appended to an appellate brief to search for a means to salvage a complaint, or to review a myriad of filings to cull a trial court's standard legal terminology and discern how a plaintiff might have been misled by it based on the timing of his filings. Instead, an appellant is required to raise each point upon which he seeks appellate review in a separate heading or subheading (Cal. Rules of Court, rule 8.204(a)(1)(B)), lest the issue be forfeited. (*Roe v. McDonald's Corp*. (2005) 129 Cal.App.4th 1107, 1114; *Roberts v. Lomanto* (2003) 112 Cal.App.4th 1553, 1562.) We have exhaustively researched the case law applicable here, including the issue of when leave to amend should be granted on appeal and tried to apply it fairly to both plaintiff and defendant. We have scrutinized the record on appeal. We believe the law binds us to affirm the trial court without regard to plaintiff's status as an incarcerated self-represented litigant.

DISPOSITION

The judgment is affirmed. No costs are awarded.

GRIMES, J.

I CONCUR:

BIGELOW, P. J.

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Stratton, J., concurring and dissenting:

This appeal brings to the fore the uncomfortable challenges California courts confront when dealing with individuals who ineptly represent themselves in civil litigation. It also implicates access to justice issues: forfeiting an entire lawsuit because a self-represented plaintiff misunderstands the court's "shorthand" or uses the wrong format on appeal brings about inaccessibility.

Intending to challenge his state court criminal conviction, appellant Damicus Metoyer retained respondent Bob Farahan to file a petition for writ of habeas corpus in U.S. District Court. Respondent had represented appellant in his state court proceedings. The U.S. District Court dismissed the petition for failure to exhaust state remedies, a common and fixable defect. Rather than fixing the defect in his pleading, respondent told appellant he had done what he had been retained to do – file a petition in federal court – and appellant was now on his own with respect to exhausting the claims respondent had drafted. Appellant in pro se then brought this action against respondent for legal malpractice and fraud. Finding the superior court action time-barred, the trial court sustained respondent's demurrer to the First Amended Complaint (FAC) without leave to amend and dismissed the action.

Appellant sought to respond to what he viewed as the trial court's tentative ruling on the demurrer and to show error in that ruling. He pointed out that Code of Civil Procedure section 352.1 would toll the statute of limitations for two of the years appellant

had been incarcerated, making his fraud cause of action timely. Appellant was unfamiliar with the basic rules of civil litigation and confused by legal shorthand in the trial court's ruling on the demurrer. His response to what he thought was the trial court's tentative decision was untimely. The trial court did not change its ruling.

Appellant now appeals from the judgment of dismissal, contending the trial court erred in deciding the demurrer without considering his response to the court's tentative decision and abused its discretion in refusing to grant him leave to amend.

Although the trial court did not address the sufficiency of appellant's cause of action for fraud, the majority would affirm the dismissal of that cause of action on the ground appellant did not adequately allege fraud. And although it is undisputed that the application of Code of Civil Procedure section 352.1, subdivision (a) raises a reasonable possibility that appellant's fraud claim is timely, the majority would affirm the dismissal without leave to amend because appellant neither formally requested leave to amend nor specifically referred to Code of Civil Procedure section 352.1 in the "text" of his opening brief.

I agree we should affirm the judgment sustaining the demurrer as to the legal malpractice causes of action. However, as to the fraud cause of action, I would find appellant has shown a reasonable possibility that the time bar can be cured and he should be granted leave to amend. The record establishes he can allege additional facts to support tolling the statute of limitations for two years pursuant to Code of Civil Procedure section 352.1, subdivision (a), rendering the cause of action for fraud timely filed.

BACKGROUND

The minute order for the unreported August 23, 2017 hearing on the demurrer reflects the court sustained the demurrer without leave to amend and ruled as follows:

> A copy of the court's tentative ruling is given to counsel appearing in court this date and is read in open court for plaintiff in pro per appearing via Court Call.
>
> Demurrer is argued. Over plaintiff's oral objection, the court adopts its written tentative as the final ruling of the court incorporated herein.
>
> The demurrer is sustained as to the entirety of the First Amended complaint without leave to amend.
>
> The Motion to Strike is denied as moot.
>
> This is an action involving legal malpractice claims. Defendant is alleged to have failed to adequately review Plaintiff's state court records prior to filing Plaintiff's petition for writ of habeas corpus in federal district court. Therefore, Defendant failed to identify which issues have been exhausted in state court such that the federal petition for habeas corpus was dismissed for failure to exhaust. Plaintiff filed this action on October 17, 2016, and filed the operative First Amended Complaint ("FAC") on June 21, 2017, alleging causes of action for (1) breach of contract, (2) fraud by intentional misrepresentation and concealment, and (3) common counts.
>
> DEMURRER
>
> The Demurrer must be sustained as all claims in the FAC are time-barred. The gravamen of the first and

third cause of action is attorney malpractice and therefore such claims are subject to Code Civ. Proc. Section 340.6. (See Carter v. Prime Healthcare Paradise Valley LLC (2011) 198 Cal.App.4th 396, 412.) Code Civ. Proc. Section 240.6 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 after the plaintiff discover, 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 of omission, whichever occurs first. . . . Except for a claim for which the plaintiff is required to establish his or her factual innocence, 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 any of the following exist: (1) The plaintiff has not sustained actual injury. (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred. (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation. (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action." Further, Plaintiff's fraud -based claims

> are subject to a three year statute of limitations. (See Code Civ. Proc. Section 338(d).)
> Here, damages accrued when Plaintiff's habeas petition was dismissed for failure to exhaust on October 1, 2012. Moreover, Plaintiff ought to have become aware of any wrongs committed by the Defendant on October 2, 2012, when Defendant sent Plaintiff a letter conveying that his habeas petition has been dismissed. (See FAC, Exhibit 6, p. 11.)
> Therefore, under Code Civ. Proc. Section 240.6 Plaintiff's first and third causes of action were required to be filed by October 2, 2013, and the fraud-based claims were to be filed by October 2015. However, as to the instant action was filed in October 2016, all cause of action are time-barred. The Demurrer is sustained without leave to amend.
> Counsel for defendant is to lodge a proposed judgment of dismissal on or before 09/08/17.
> Order to show cause re dismissal/entry of judgment is set for 09/25/17 at 8:30 a.m. in this department.

Respondent lodged a proposed judgment, which the court signed and filed on September 19, 2017.

After the court signed and filed the judgment, appellant filed a "Response to the Tentative Ruling Entered 8/23/2017." (Response.)[1] In that Response, appellant wrote that he "was

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[1] Appellant contends this document was filed on September 20, 2017. The document in the record entitled "Response to the Tentative Ruling Entered 08/23/2017" was signed on September 19, 2017 and file stamped September 27,

instructed to show the court how the tentative ruling was wrong" and he pointed out that he was an incarcerated person who was entitled to "2 extra years" of tolling under Code of Civil Procedure section 352.1. Appellant then filed a document which he describes as an ex parte motion to have the court "re-visit his early ruling and the Timely Response that was filed on 9-20-2017."[2]

The trial court did not change the September 19, 2017 judgment after receiving these two documents. It issued a minute order on October 15, 2017, which states in its entirety: "The court has read and considered the correspondence from Plaintiff filed on October 4, 2017. No action is taken. The court's original order stands." This appeal followed.

DISCUSSION

A. *The Cause of Action for Fraud Is Sufficient.*

I find no deficiencies in how appellant pled his cause of action for fraud.[3] The majority describes appellant's fraud cause of action as alleging only that respondent "abandoned his duties" to appellant, and on that basis concludes appellant has only alleged legal malpractice. I disagree. Appellant clearly and

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2017. Presumably this is the document appellant refers to in his brief.

[2] Appellant has attached as Exhibit 1 to his opening brief a letter to the court which meets this description.

[3] The trial court found the gravamen of appellant's first cause of action for breach of contract and his third cause of action for common counts was legal malpractice. The court did not make this finding as to the fraud cause of action.

specifically alleged that respondent committed fraud when he promised to perform legal services which he had no intention of performing.

In his breach of contract cause of action at BC-1.a of the form complaint, appellant alleged respondent agreed to "read, review, and evaluate client's record at the Trial and Appellate level" and to "determine the potential and reasonableness of any issue that may be raised via Writ of Habeas Corpus."

In his negligent and intentional cause of action at FR.2.a of the form complaint, appellant alleged respondent "intentionally misrepresented his intended actions within the Contract *knowing he had no intention of reviewing the record* and to file issues that would be exhausted in the State Court. . . ." Appellant also alleged respondent knew he "was incarcerated and untrained in the law . . . Defendant was just planning to go through the motions and to leave the Plaintiff . . . in the dark until it was too late to do anything."

Similarly, in his promise without intent to perform, appellant alleged "Defendant made a promise about a material matter without any intention of performing it . . . as follows: Defendant contracted to do the items listed in the Cause of Action-Breach of Contract section BC-1.a and did not do so."

These allegations clearly and specifically allege that respondent promised to review the record, determine the reasonableness of issues and file a writ with issues that had been exhausted, but that respondent had no intention of doing that work of review and analysis. He just planned to "go through the motions." Appellant alleged facts showing that respondent had been his state court counsel (so he would have known what issues were and were not exhausted) and that appellant was untrained

in the law. These facts allege fraud with specificity.[4] While abandoning a client may be legal malpractice, making misrepresentations and false promises to induce a client to enter a contract would be fraud.

B. *The Cause of Action for Fraud May Not Be Time-Barred.*

The trial court accurately computed the expiration date of the statutes, based on a date of discovery the trial court derived from an exhibit to the complaint. (See, e.g., *Lee v. Los Angeles County Metropolitan Transportation Authority* (2003) 107 Cal.App.4th 848, 854 [general demurrer on statute of limitations grounds must be based on dates alleged in the complaint].) The trial court correctly identified and applied the three-year statute of limitations in Code of Civil Procedure section 338, subdivision (d) to the fraud claim. Thus, the fraud claim was required to be filed by October 2, 2015. Appellant filed his original complaint on October 17, 2016, and his FAC on June 21, 2017.

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[4] Appellant did not just allege that respondent failed to fulfill a promise; he alleged that respondent intentionally decided not to do the work necessary to file a non-defective federal petition. Interestingly, it appears respondent wrote the retainer agreement that obliges him to appear on the petition only in federal court. This took him off the hook from appearing in state court to fix the non-exhaustion defect. It did not, however, prevent him from filing an amended federal petition with only exhausted claims. Moreover, whether respondent wrote the retainer agreement excluding more state court work as part of the alleged plan to "take the money and run" is part of what appellant would have to prove at trial in this action.

Nevertheless, while the causes of action as pled are time-barred under the discovery date established by the trial court, appellant, in his belated Response in the trial court, identified a tolling provision which would render his cause of action for fraud timely: Code of Civil Procedure section 352.1, subdivision (a), which provides a two-year disability tolling period for persons "imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life." Appellant pointed to the undisputed fact of his imprisonment since his conviction in his criminal case. There is a reasonable possibility that section 352.1 therefore applies to appellant's claims. (*Austin v. Medicis* (2018) 21 Cal.App.5th 577, 589 [§ 352.1 tolling applies to legal malpractice and fraud causes of action].)

As a matter of simple arithmetic, tolling the statute of limitations for two years pursuant to Code of Civil Procedure section 352.1 renders the legal malpractice claims still untimely and the fraud claim timely. Tolling, if applied, would afford appellant five years from the October 2, 2012 accrual date to file his fraud claim, that is, until October 2, 2017. Both appellant's original complaint and his FAC were filed before that date.

May we even do this arithmetic, given appellant's inept presentation of his claims in the trial court and on appeal? I conclude that we may.

C. *Appellant Raised the Tolling Provision in the Trial Court and on Appeal.*

There is no dispute that appellant has been incarcerated since the inception of his lawsuit. There is no dispute that application of the tolling provisions of Code of Civil Procedure section 352.1 presents a reasonable possibility that appellant's

cause of action for fraud is timely. There is no dispute that appellant identified section 352.1 in his Response filed after judgment was entered and untimely sought reconsideration of the trial court's ruling in part on the basis of that provision. And, importantly, there can be no dispute that appellant argues on appeal that the trial court erred in failing to consider the arguments raised in his Response.

The majority nevertheless find appellant is not entitled to relief on appeal because in his opening brief, he did not formally request leave to amend and did not make a specific reference to Code of Civil Procedure section 352.1. I find the record before us more than adequate to find the issue raised on appeal.

It is plain appellant is a self-represented litigant who does not understand the basic rules of civil litigation. As we have previously noted, such litigants present challenges to conscientious trial judges. (*Petrosyan v. Prince Corp*. (2013) 223 Cal.App.4th 587, 594 (*Petrosyan*).) This challenge is only heightened where, as here, the litigant is also incarcerated. (*Holloway v. Quetal* (2015) 242 Cal.App.4th 1425, 1433-1434.) A trial court cannot simply suggest that such a litigant visit the self-help centers at the courthouse. (*Id*. at p. 1435.)

At a minimum in such circumstances, "the trial court 'should monitor to ensure the in propria persona litigant is not inadvertently misled, either by the represented party or by the court. . . . [S]pecial care should be used to make sure that verbal instructions given in court and written notices are clear and understandable by a layperson. This is the essence of equal and fair treatment, and it is not only important to serve the ends of justice, but to maintain public confidence in the judicial system.' " (*Petrosyan, supra*, 223 Cal.App.4th at p. 594.) "Even though self-

represented litigants get no special treatment, trial judges should not be 'wholly indifferent to their lack of formal training. Clarity is important when parties are represented by counsel. How much more important is it when one party may not be familiar with the legal shorthand which is so often bandied around the courtroom or put into minute orders?' " (*Ibid.*)

Here the trial court may not have provided the needed clarity for a self-represented incarcerated litigant like appellant. The court's thoughtful tentative ruling on the demurrer was four pages long. The ruling contains a case citation and lengthy quotes from two sections of the Code of Civil Procedure. But the tentative ruling cryptically concludes by stating: "Order to show cause re dismissal/entry of judgment is set for 09/25/17 at 8:30 a.m. in this department."

What does that concluding sentence mean? Lawyers practicing regularly in the Los Angeles Superior Court know that concluding sentence is setting a "control date" at which time the trial court will make sure a proposed judgment has been lodged. But appellant mistakenly believed that the trial court was giving him an additional opportunity to address the tentative ruling. How do we know that? Appellant argues vociferously in his brief on appeal that he had until September 25, 2017 to show cause why the tentative ruling was incorrect. In accordance with that belief, appellant did indeed submit a document in the trial court entitled "Response to the Tentative Ruling Entered 08/23/2017" dated September 19, 2017. In this document, he wrote: "Plaintiff was instructed to show the court how the tentative ruling was wrong." In that Response, appellant pointed specifically to Code of Civil Procedure section 352.1's tolling provision.

Appellant's understanding of his options was not unreasonable. "Until entry of judgment, a ruling on a demurrer is not res judicata and may be reconsidered and changed by the trial court." (*Valvo v. University of Southern California* (1977) 67 Cal.App.3d 887, 892, fn. 3.) Appellant's difficulties arose because he did not understand the time constraints for a motion for reconsideration,[5] and appears to have been confused by the "legal shorthand" used in the minute order for monitoring entry of judgment. Appellant signed his Response on September 19, 2017, well before his perceived deadline of September 25, 2017 set out in the trial court's minute order. However, the trial court entered judgment on September 19, 2017, before appellant's Response reached the court.

On appeal, we are faced with a challenge similar to the one faced by the trial court: appellant is no more familiar with the basic rules of appellate procedure than he was with the rules of civil procedure. On appeal, appellant filed a second "notice of appeal" which had numerous documents attached to it. Exhibit 6 was his response to the demurrer in which he asked that if the court dismissed the complaint, it be done without prejudice and with an opportunity to amend "without timeline penalties." The clerk of court received the document on May 25, 2017 and returned it to appellant as an opening brief that was prematurely filed. Appellant then filed a document entitled "Opening Brief"

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[5] Even if appellant's September 19, 2017 letter is deemed a motion for reconsideration, it was untimely as it was filed more than 10 days after the August 23, 2017 ruling. (Code Civ. Proc., § 1008, subd. (a).) Accordingly, under section 1008, the trial court did not err in failing to consider appellant's late filed Response.

with one exhibit attached, his letter to the trial court dated September 27, 2017 where he advised the court that he had filed a timely "Response" to the tentative ruling. He asked the trial court to "revisit the ruling made, prior to plaintiff's timely response of September 20, 2017." It is just and fair to say appellant raised the issue on appeal, albeit not in the body of his opening brief, but through the exhibit attached to the brief. To declare a forfeiture of his entire action because the information we needed is included in an exhibit and not in the body of the brief's text elevates form over substance. If the courts of the State of California are going to allow civil litigants to represent themselves, we should be prepared to cut them some slack. Appellant raised the tolling issue below and he has raised it again on appeal. He should be allowed to benefit from our Supreme Court jurisprudence which liberally grants leave to amend defective complaints – jurisprudence that allows for such slack.

D. *Appellant Has Shown a Reasonable Possibility He Can Amend His Cause of Action for Fraud to Make It Timely*.

"Where the complaint is defective, '[i]n the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his complaint, and it ordinarily constitutes an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that the defect can be cured by amendment. [Citations.]' " (*Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 549; see also Code Civ. Proc., § 472c, subd. (a) ["When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal

even though no request to amend such pleading was made.”].) “This abuse of discretion is reviewable on appeal ‘even in the absence of a request for leave to amend’ [citation], and even if the plaintiff does not claim on appeal that the trial court abused its discretion in sustaining a demurrer without leave to amend.” (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 971; *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 746 [“The issue of leave to amend is always open on appeal, even if not raised by the plaintiff.”].)

There is no dispute that appellant has been imprisoned at all relevant times. The trial court was aware of appellant’s status, as was respondent. (Indeed, the minute order of August 23, 2017 was sent to appellant at his place of imprisonment.) On these facts, there is a reasonable possibility appellant is entitled to the benefit of the tolling provisions of Code of Civil Procedure section 352.1. Appellant has met his burden to show that there is a reasonable possibility an amendment would cure the statute of limitations issue as to the fraud cause of action. I find he has adequately raised it on appeal, but even if he has not, *City of Stockton v. Superior Court, supra,* 42 Cal.4th 730, would allow him leave to amend. Therefore, I would reverse the trial court’s order denying appellant leave to amend the cause of action for fraud and remand with instructions to grant appellant leave to amend the cause of action for fraud.

STRATTON, J.