PUBLIC MATTER—DESIGNATED FOR PUBLICATION

Filed June 26, 2020

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	17-O-01259
	)	
BRET MERRICK SAXON,	)	OPINION AND ORDER
	)	
State Bar No. 205100.	)	
	)	

A hearing judge dismissed this matter with prejudice, finding that the Notice of Disciplinary Charges (NDC) was filed beyond the five-year rule of limitations. (Rules Proc. of State Bar, rule 5.21(A).)[1] The Office of Chief Trial Counsel of the State Bar (OCTC) appealed, contending that the hearing judge erred in finding the limitations period had expired because it should be tolled (1) while the complaining witness pursued civil remedies against Bret Saxon and (2) during Saxon's continued breach of his fiduciary duties.

In reviewing this order of dismissal, we look only to the operative NDC and we deem all allegations in the NDC and the Amended NDC (ANDC) to be true. (*In the Matter of McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364, 377–378; *In the Matter of Tady* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 121, 124.) We also may rely on any judicially noticed facts for the limited purpose of assessing the sufficiency of the operative NDC. (See Code Civ. Proc., § 430.30, subd. (a) [ground of objection "appears on the face [of the complaint], or from any matter of which the court is required to or may take judicial notice"]; see also 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 948, pp. 362-364.) Further, we independently review the entire record de novo. (Rules Proc. of State Bar, rule 5.155.)

[1] All further references to rule(s) are to this source, unless otherwise noted.

We disagree with the hearing judge's ultimate dismissal with prejudice. The ANDC and documents judicially noticed satisfactorily plead that the single charge of moral turpitude by misappropriation occurred within five years of the filing of the original NDC, as tolled by the continuing fiduciary duty Saxon owed his client. We emphasize that the rule of limitations is tolled during the period of time that the attorney acts in a fiduciary relationship, even if it is other than an attorney-client relationship. Accordingly, we remand this case to the Hearing Department for further proceedings consistent with this opinion and order.

I. PROCEDURAL BACKGROUND

On December 19, 2018, OCTC filed the NDC in this matter. On January 30, 2019, Saxon filed a motion to dismiss on the grounds that the alleged misconduct (moral turpitude—misappropriation) occurred more than five years prior to the NDC's filing, and was therefore barred by rule 5.21. OCTC opposed the motion. On April 3, the hearing judge granted the motion and filed an order dismissing the case without prejudice.

On May 30, 2019, OCTC filed the ANDC, which alleged more facts regarding the relationship between the complaining witness, Jon Yarborough, and Saxon. On June 12, Saxon filed a second motion to dismiss on the same grounds, adding argument to address issues raised in OCTC's opposition to the first motion. On July 2, OCTC filed a request for judicial notice of many documents from a Tennessee civil proceeding.[2] The Tennessee Action was brought by Yarborough against Saxon, alleging, among other things, that Saxon committed fraud in his use of funds Yarborough provided to him in trust. Yarborough prevailed and was awarded $2.25 million in damages. OCTC requested judicial notice of a related sister-state proceeding in

[2] *Yarborough Production Company LLC v. Bret Saxon et al.*, February 9, 2010, Chancery Court of Tennessee, case no. 37602 (the Tennessee Action.)

California,[3] and an adversary proceeding in bankruptcy court in the Central District of California.[4] Also on July 2, OCTC filed its opposition to the second motion referencing the dates of the above proceedings, arguing that, together, they tolled the rule of limitations in sufficient time to render the filing of the initial NDC timely. On July 17, 2019, the hearing judge again granted the motion to dismiss without prejudice.

The hearing judge conducted a status conference on July 17, 2019.[5] Thereafter, the hearing judge filed another order on July 31, 2019, granting Saxon's motion to dismiss, this time *with* prejudice. She found that the alleged misappropriation would have been complete when the money was taken, and absent tolling, the five-year period would begin immediately. As to tolling, she found that the five-year period elapsed despite being tolled during the Tennessee Action. She did not find OCTC's arguments persuasive that the period should be tolled during the pendency of the California Action and the Bankruptcy Action. She also found that Saxon's conduct was not a continuing violation under rule 5.21(B). The hearing judge did not address Saxon's fiduciary duty.

On August 20, 2019, OCTC filed its request for review. On November 12, OCTC filed its opening brief in this appeal. Saxon filed his responsive brief on January 15, 2020, and OCTC filed its rebuttal brief on January 30. At the close of oral arguments, the Review Department offered the parties an opportunity to brief certain issues regarding the rule of limitations, and the parties agreed to do so. The Review Department issued an order on March 13, 2020, specifying

[3] *Yarborough Production Company LLC v. Bret Saxon, et al.*, November 9, 2012, Los Angeles County Superior Court, case no. BS140169 (the California Action).

[4] *Yarborough Production Company LLC v. Bret Merrick Saxon*, United States Bankruptcy Court for the Central District of California, November 30, 2013, case no. 2:13-ap-02141-SK (the Bankruptcy Action).

[5] The record is unclear as to whether the July 17, 2019 status conference was conducted before or after the order of the same date granting the motion to dismiss.

the issues to be addressed, and OCTC and Saxon filed supplemental briefs on April 15 and 17, 2020, respectively (Supplemental Brief(s)).

II. RELEVANT ALLEGATIONS IN THE ANDC

Recognizing that we are limited to the "four corners" of the ANDC, plus any judicially noticed documents, we now look to the ANDC to determine the facts that are alleged to show a misappropriation. The following is a summary of the relevant allegations:

Saxon is a movie producer who sought investments to fund a movie called "Fandango." One investor was Jon Yarborough, a resident of Tennessee. On or about October 6, 2009, Saxon and Yarborough entered into a Financing Agreement, whereby Yarborough and Saxon would invest $1.5 million and $3.5 million, respectively (the Combined Financing). The Financing Agreement also stated that all funds would be placed in a certain account defined as the "Picture Account," or another account approved by Yarborough and Saxon. The funds were to be segregated and used only for production costs, and the Financing Agreement provided that "[a]ny funds advanced to the Picture Account shall be held in trust." Under the Financing Agreement, Saxon was required to maintain the funds in the Picture Account until receipt of 100 percent of the Combined Financing. He could not withdraw money from the account until it was fully funded with the Combined Financing.

Yarborough wired $1.5 million to the Picture Account on October 21, 2009. Saxon never contributed his $3.5 million share. Instead, it is alleged that the day that Yarborough's funds were wired to the Picture Account, Saxon transferred the entire $1.5 million to a different account, not approved by the parties.

Yarborough filed a complaint on February 9, 2010, in the Tennessee Action for, among other things, Saxon's fraudulent misuse of the funds. That lawsuit continued to judgment on

October 27, 2010. Saxon was found liable for breach of contract and fraud, and Yarborough was awarded $2.25 million in damages.

Yarborough sought to collect these damages by filing the California Action, a sister-state proceeding in California, on November 9, 2012. On June 28, 2013, he was successful in obtaining a California judgment against Saxon of over $2 million.

On September 5, 2013, Saxon filed a Chapter 7 bankruptcy petition. Yarborough filed the Bankruptcy Action, an adversary proceeding, claiming that the judgments obtained were not dischargeable by the bankruptcy. The bankruptcy court determined that Saxon defalcated the $1.5 million when he fraudulently transferred the funds from the Picture Account without having first deposited his own $3.5 million in that account. The Bankruptcy Action terminated on December 5, 2016. Finally, it is alleged that, as a result of the above, Saxon willfully and intentionally misappropriated $1.5 million, thereby committing an act involving moral turpitude, dishonesty, or corruption, in willful violation of Business and Professions Code, section 6106.[6]

III. DISCUSSION

A. The Rule of Limitations

Rule 5.21(A) states: "If a disciplinary proceeding is based solely on a complainant's allegations of a violation of the State Bar Act or Rules of Professional Conduct, the proceeding must begin within five years from the date of the violation." The parties do not dispute that this proceeding was based solely on a complainant's allegation of a violation. A statute or rule is violated "when every element of a violation has occurred. But if the violation is a continuing offense, the violation occurs when the offensive conduct ends." (Rules Proc. of State Bar, rule 5.21(B).)

[6] All further references to sections are to this source, unless otherwise noted.

The rule of limitations provides for various situations where the five-year limit is tolled, including: "[W]hile the attorney represents the complainant, the complainant's family member, or the complainant's business or employer" (Rules Proc. of State Bar, rule 5.21(C)(1)), and "while civil, criminal, or administrative investigations or proceedings based on the same acts or circumstances as the violation are pending with any governmental agency, court, or tribunal." (Rules Proc. of State Bar, rule 5.21(C)(3).)

B. The Five-Year Period Did Not Commence Until the Conclusion of Saxon's Fiduciary Obligations

Under the Financing Agreement, as alleged in the ANDC, Saxon agreed to hold Yarborough's funds in a segregated account and use them only to "fund production costs." The money was to be held in trust, and Saxon was required to maintain the funds in the Picture Account until receipt of all of the Combined Financing. According to the allegations, Saxon did not comply with these terms, but rather removed the funds without placing them in another account approved by the parties.

Under section 6106, the Legislature made an attorney's commission of any act involving moral turpitude, dishonesty, or corruption a cause for disbarment "whether the act is committed in the course of his relations as an attorney *or otherwise*." (Italics added.) "'An attorney who accepts the responsibility of a fiduciary nature is held to the high standards of the legal profession whether or not he acts in his capacity of an attorney.'" (*In the Matter of McCarthy*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 373, quoting *Worth v. State Bar* (1976) 17 Cal.3d 337, 341.)

As noted above, rule 5.21(C)(1) tolls the five-year limit "while the attorney *represents* the complainant, the complainant's family member, or the complainant's business or employer." (Italics added.) Appellate courts have used the word "represents" to describe the limited agency of an escrow relationship, stating that the agent "only *represents* his principal insofar as he carries out the escrow instructions." (*Hannon v. Western Title Insurance Co.* (1989)

211 Cal.App.3d 1122, 1127 (italics added); see *Lee v. Escrow Consultants, Inc*. (1989) 210 Cal.App.3d 915, 920–921, citing *Kirby v. Palos Verdes Escrow Co*. (1986) 183 Cal.App.3d 57, 64.) Further, rule 5.4(15) defines "complainant" as "a person who alleges misconduct by a State Bar attorney" and does not require that the complainant be a client or former client. Thus, neither the Rules of Procedure of the State Bar nor case law requires us to limit the tolling provision in rule 5.21 to attorney-client relationships. To do so would subvert long-established Supreme Court and legislative authority regarding the regulation of attorneys who commit misconduct while acting as fiduciaries.

Based on the facts as alleged, we find that Saxon was acting as a fiduciary by holding funds in escrow, having been given precise instructions by the Financing Agreement. He remained in the capacity of a fiduciary with an obligation to hold the escrowed funds "in trust" until the Fandango production was completed and the purpose of the escrow fulfilled. As such, contrary to Saxon's argument, the extension of the period of limitations was not endless—it ended when its purpose ended, and its purpose was the production. The ANDC states that the film was released in 2014, which would indicate that Saxon's escrow responsibilities would be terminated at that time.[7]

[7] The ANDC does not state the date the "production" ended, but rather the date that the film was "released" which, by logical reasoning, would be after the date production ceased. But, for purposes of determining whether the ANDC states a cause of action within the period of limitations, this is sufficient to allege that the production was completed in 2014. However, we note that Saxon's Pretrial Statement filed in the Hearing Department on March 26, 2019, clarifies at page five that ". . . the movie cost $3,000,000.00 to produce, *and was produced in 2014*." (Italics added.) This document is part of the record on appeal and can be judicially noticed by the Hearing Department. It would be Saxon's burden on remand to prove the facts to show a rule of limitation applies. (Evid. Code, § 500; *In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 8–9; see also *Guardian North Bay, Inc. v. Superior Court* (2001) 94 Cal.App.4th 963, 971–972 [in demurrer based on statute of limitations, defect must clearly and affirmatively appear on face of complaint; not enough that complaint shows that action *may* be barred].)

C. The Rule of Limitations Was Not Sufficiently Tolled as a Result of the Pending Civil or Administrative Actions

As noted above, rule 5.21(C)(3) requires that pending civil, criminal, or administrative investigations or proceedings must be "based on the same acts or circumstances as the violation" in order to toll the running of the five-year limitations period. The Tennessee Action met this criterion since it directly found that Yarborough had been defrauded by Saxon and was entitled to damages. But the California Action and the Bankruptcy Action were derivative actions to the Tennessee Action—only filed to collect an outstanding debt (the Tennessee judgment). As such, they were not based on the same acts or circumstances as the violation. While it is true that the court in the Bankruptcy Action found that "Saxon defalcated the $1.5 million when he fraudulently transferred the funds," it did so only to determine if the debt was dischargeable in bankruptcy. Therefore, we agree with the hearing judge's finding that the rule of limitations was only tolled during the Tennessee Action and that period of time was insufficient to avoid the bar of the rule.

D. Saxon's Arguments in his Supplemental Brief Lack Merit

Though Saxon did not seek review, he raised several arguments in his Supplemental Brief filed on April 17, 2020. We find that none has merit. We summarize his arguments below.[8]

1. *Rule 5.21(C)(1) tolling does not apply and this issue was not raised by the parties*

As discussed above, a complainant need not be a client, and an attorney can commit acts of moral turpitude under section 6106 whether the misconduct occurred in the course of his relations as an attorney "*or otherwise*." Further, if an attorney accepts a relationship of trust, he or she is held to the high standards of a fiduciary. Common usage of the term *represents*

[8] Arguments raised and addressed earlier in this opinion will not be discussed again. Other arguments that Saxon has raised, and we have not specifically discussed, have been considered and rejected as without merit.

additionally contemplates relationships other than those of attorney and client, including receiving funds as an escrow holder.

The claim that the arguments regarding rule 5.21(C)(1) were not raised by the parties is both factually and legally incorrect. OCTC did raise Saxon's fiduciary relationship in its pretrial statement in the Hearing Department (citing *In the Matter of McCarthy*, *supra*, 4 Cal. State Bar Ct. Rptr. 364) and in both its opening and rebuttal briefs on review. Regardless of whether the issue was fully developed at the Hearing Department, the Review Department is required to "independently review the record and may make any findings, conclusions, or a decision or recommendation different from those of the hearing judge." (Rules Proc. of State Bar, rule 5.155(A).) Further, the Review Department may take action on an issue not raised in the request for review, provided the parties have an opportunity to brief that matter, which they did in their post-oral argument briefs. (Rules Proc. of State Bar, rule 5.155(C).)

2. *No fiduciary relationship exists between lender and borrower* and *Saxon was not a party to the Financing Agreement*

Saxon argues that no fiduciary relationship exists between a lender and a borrower. But the ANDC does not allege a relationship of lender and borrower. In fact, the ANDC refers to the payments contemplated by Saxon and Yarborough as "equity investments." Discussing a relationship of lender and borrower goes beyond the factual allegations in the ANDC, something we are not permitted to do in this procedural setting. The same reasoning applies to Saxon's argument that he was not a party to the Financing Agreement. This fact was not alleged in the ANDC.

3. *The fiduciary relationship between Saxon and Yarborough terminated upon misappropriation of the funds*

The ANDC alleges that Saxon was required to hold Yarborough's funds in trust. OCTC correctly points out that this fiduciary relationship would terminate, but only upon the

completion of its purpose. As such, the misappropriation of the $1.5 million was an ongoing violation through the completion and production of the movie in 2014, the objective of the agreement between Yarborough and Saxon. (See, e.g., *In the Matter of Dyson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 280, 286 [attorney had ongoing fiduciary duty to client to hold in trust settlement funds subject to medical liens; attorney's duty to clients lasted until debt paid].)

Saxon refers to *In the Matter of McCarthy*, *supra*, 4 Cal. State Bar Ct. Rptr. at pp. 377-378, for the proposition that the rule of limitations started to run when every element of the alleged violation occurred. He failed to note the language of the opinion immediately surrounding his reference. While the general rule is usually applied, the court noted that it does not apply where the violation is a "continuing offense, in which case the violation is deemed to have been committed at the termination of the entire course of conduct." (*Ibid*.) Similarly, the court found that where the charge is based on a fiduciary relationship, the breach is "not only from his initial failure [to maintain the funds], but from his ultimate failure to distribute" them. (*Ibid*.) Here, it is alleged that Saxon breached his fiduciary duty under the Financing Agreement to hold the funds in escrow until the close of production, which created a continuing violation beyond the time when he withdrew Yarborough's money from the escrow account.

4. *The ANDC cannot be cured by amendment*

Saxon further asserts that the allegations of the ANDC cannot be amended to cure the defect. But it is not clear that there is a defect in the pleading that needs a cure. While not a model of draftsmanship, the ANDC alleged sufficient facts to provide notice to Saxon of the charges against him and to overcome a motion to dismiss.

IV. THE ANDC RELATED BACK TO THE FILING DATE OF THE ORIGINAL NDC, SO THE ANDC WAS TIMELY FILED

As the ANDC alleges and the record shows, the movie was produced in 2014, which marked the date the escrow ended. Therefore, the purpose of the Financing Agreement under

which Saxon had a fiduciary duty to hold Yarborough's funds in trust also ceased to exist in 2014. When Saxon no longer *represented* Yarborough within the meaning of rule 5.21(C)(1), the five-year limit was no longer tolled, and began to run. But since we calculate the limitations period from the date of the filing of the original NDC, which was December 19, 2018, we find it was timely filed within five years from the 2014 completion of the escrow arrangement alleged in the ANDC. (See 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 1188, pp. 619–620 [despite amended complaint, time of filing original complaint is date of commencement of action for purposes of statute of limitations].)

V. ORDER

This case is remanded to the Hearing Department for further proceedings consistent with this opinion.

HONN, J.

WE CONCUR:

PURCELL, P. J.

McGILL, J.

No. 17-O-01259

In the Matter of

BRET MERRICK SAXON

Hearing Judge
Hon. Yvette D. Roland

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