

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 07/26/2010

TIME: 01:46:00 PM

DEPT: C-71

JUDICIAL OFFICER PRESIDING: Ronald S. Prager

CLERK: Lee Ryan

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT:

CASE NO: 37-2010-00086284-CU-PN-CTL CASE INIT.DATE: 02/24/2010

CASE TITLE: **Ellis vs. Jackson DeMarco Tidus & Peckenpaugh**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Professional Negligence

EVENT TYPE: Demurrer / Motion to Strike

APPEARANCES

The Court, having taken the above-entitled matter under submission on 7/23/10 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

The Court rules on defendant Gregory Glenn Petersen's ("Petersen") demurrer as follows:

After taking the matter under submission, the Court affirms its tentative ruling.

As a preliminary matter, the Court grants Petersen's request for judicial notice.

The demurrer on grounds of statute of limitations and attorney-client privilege is overruled for the reasons stated below.

It is well settled that a court may only consider defects on the face of the Complaint or matters that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Statute of Limitations. Generally, where as here, the Complaint contains no dates, a demurrer is improper. (*Union Carbide Corp. v. Super. Ct.* (1984) 36 Cal.3d 15, 25.)

Petersen's demurrer attacks the Complaint by introducing documents which the Court has judicially noticed. He presented the documents to show that plaintiffs Christopher Ellis, Bradley D. Elow, Robert Finch, and Howard LaBore's (collectively "Plaintiffs") were actually injured when the federal district court in *Aaron et al. v. Aguirre et al.* on September 3, 2008 issued a ruling adverse to Plaintiffs. As a result, he contends that Plaintiffs' claims are time-barred under Code of Civil Procedure section 340.6 ("section 340.6").

Plaintiffs do not contest the applicability of section 340.6 to this action. However, they correctly note that it cannot be determined from the face of the Complaint when the actual injury occurred. More specifically, the Complaint contains no dates by which a determination can be made on this ground.

In *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751, the California Supreme Court stated that "the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury." It went on to state that "determining when actual injury occurred is predominantly a factual inquiry." (*Ibid.*) Furthermore, only when the material facts are undisputed can the court resolve the question as a matter of law. (*Id.* at p. 764.) Here, Plaintiffs do not concede that the date upon which the federal district court in the Aaron action issued its ruling is the date that they were actually injured. In addition, given the long and complicated history that has led the parties to this point, the Court is reluctant to make a dispositive determination at this juncture.

Attorney-Client Privilege. Petersen failed to discuss or make a sufficient showing as to how the factors set forth in *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 794 (hereafter "*Dietz*"), have been met for the Court to take the step of dismissing Plaintiffs' action on this ground. The four factors set forth in *Dietz* were as follows: (1) the evidence at issue must be the client's confidential information, and the client must be insisting that the information remain confidential, (2) the confidential information at issue must be highly material to the defendants' defenses, (3) whether the court is able to effectively use "ad hoc measures from [its] equitable arsenal," so as to permit the action to proceed, and (4) whether it would be "fundamentally unfair" to allow the action to proceed. The information necessary to address these elements is not contained within the four corners of the Complaint or the judicially noticed facts.

Petersen is directed to file and serve his Answer by August 6, 2010.

IT IS SO ORDERED.



Judge Linda B. Quinn

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Central
330 West Broadway
San Diego, CA 92101

SHORT TITLE: Ellis vs. Jackson DeMarco Tidus & Peckenpaugh

CLERK'S CERTIFICATE OF SERVICE BY MAIL

CASE NUMBER:
37-2010-00086284-CU-PN-CTL

I certify that I am not a party to this cause. I certify that a true copy of the attached minute order was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at San Diego, California, on 07/27/2010.

Clerk of the Court, by: , Deputy

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