

**DEPARTMENT TWENTY-THREE - JUDGE JOHN ELLIS  
TENTATIVE RULINGS SCHEDULED FOR  
TUESDAY, FEBRUARY 22, 2011**

**EMSHA v. DUNN, et al.  
Case No. FCS036523**

Demurrer to First Amended Complaint filed by Defendants Dunn and Rogaski,  
Preovolos, Weber & Patterson

TENTATIVE RULING

The demurrer to the first amended complaint filed by defendants Dunn and the Rogaski law firm is sustained without leave to amend.

CCP Section 340.6 provides that the statute of limitations for an action for legal malpractice is either (1) one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or (2) four years from the date of the wrongful act or omission, *whichever occurs first*.

The first amended complaint alleges that plaintiff and attorney Dunn had a conversation regarding the statute of limitations while Dunn was still representing him. (See attachment for cause of action for general negligence against Dunn and the Rogaski firm). This allegation indicates that plaintiff was aware of an issue regarding the statute of limitations by the time he retained a new attorney in 2006. It further indicates that plaintiff discovered, or in the exercise of reasonable diligence, should have discovered in 2006 that the statute of limitations for an action against his realtor had expired, and that, in failing to file a legal action against the realtor by that time, Dunn and the Rogaski firm had committed "a wrongful act or omission," causing the one-year statute of limitations of CCP Section 340.6 to begin to run.

The original complaint in the present action was not filed until September 7, 2010, which is well over one year from 2006. Therefore, according to the allegations on the face of the first amended complaint, the present action is barred by the one-year statute of limitations of CCP Section 340.6.

Even if the present action were not barred by the one-year statute of limitations of CCP Section 340.6, the action would be barred by the four-year statute of limitations of CCP Section 340.6.

The first amended complaint alleges that plaintiff discovered that his realtor sold his property for less than its value "a few days" after the sale in 2000. (See attachment to first amended complaint, letter of October 9, 2007, from Mott-Smith to Hass).

Therefore, plaintiff's causes of action against his realtor accrued at that time, and any cause of action that may have been stated against the realtor would have expired in 2004 at the latest. (A cause of action for breach of a written contract is four years under CCP Section 337; a cause of action for fraud is three years under CCP Section 338; and a cause of action for negligence against a realtor is two years under CCP Section 339; all of which accrue on the date of discovery, and any one of which may have applied in an action against plaintiff's realtor). The alleged wrongful act or omission of defendants Dunn and the Rogaski firm occurred when they allegedly failed to file an action against plaintiff's realtor before the statute of limitations expired. Therefore, the alleged wrongful act or omission occurred in 2004 at the latest, causing the four-year statute of limitations of CCP Section 340.6 to begin to run at that time.

As noted, the original complaint in the present action was not filed until September 7, 2010, which is well over four years from 2004. Therefore, regardless of when plaintiff discovered or should have discovered the alleged legal malpractice, according to the allegations on the face of the first amended complaint, the present action is barred by the four-year statute of limitations of CCP Section 340.6.