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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

BRYAN J. ROBERTS,

Plaintiff and Appellant,

v.

SECURE STONE, LLC,

Defendant and Respondent.

B285549

(Los Angeles County
Super. Ct. No. BC603331)

APPEAL from an order of the Superior Court of Los Angeles County. Richard E. Rico, Judge. Reversed with directions.

Skiermont Derby, Paul B. Derby, John J. O'Kane IV and Drew E. Anderson for Plaintiff and Appellant.

Kinsella Weitzman Iser Kump & Aldisert, Michael J. Kump, Chad R. Fitzgerald and Daniela M. Spencer for Defendant and Respondent.

Bryan Roberts appeals from an order sustaining a demurrer to his second amended complaint (SAC) by respondent Secure Stone, LLC (Secure Stone) without leave to amend. The SAC asserts a single cause of action for declaratory relief against Secure Stone based on allegations that defendant Eric Swallow transferred software licensing revenues to Secure Stone (an entity that Swallow allegedly controlled) rather than giving Roberts what he was owed from those revenues.[1]

Roberts developed software that Swallow used in his own casinos and also licensed to others. Roberts alleges that he and Swallow entered into an oral contract to split the licensing revenues equally and that, instead of paying him, Swallow hid the licensing revenues from him and falsely told him that there were no revenues to share.

The trial court granted the demurrer on the grounds that: (1) the allegations about an oral contract in the SAC were barred

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[1] In addition to Swallow and Secure Stone, the SAC names another entity allegedly controlled by Swallow, Profitable Casino LLP (Profitable). Roberts's claims against Swallow and Profitable include causes of action for breach of contract, breach of fiduciary and partnership duties, and various theories of fraud and conversion. The trial court sustained the demurrers of all three defendants without leave to amend. However, there was no final order with respect to Swallow and Profitable Casino because they have a pending cross-complaint. Roberts therefore filed a notice of appeal only with respect to Secure Stone. This court previously exercised its discretion to treat the trial court's order sustaining Secure Stone's demurrer without leave to amend as a final appealable order incorporating a judgment of dismissal. (See Order dated July 18, 2018.)

under the sham pleading doctrine because Roberts had previously based his claims on a written contract for software services rather than an oral agreement; and (2) an integration clause in the written software services agreement precluded a claim based on a prior oral agreement. On appeal, Secure Stone argues the same grounds in defense of the order sustaining the demurrer, and also argues that the demurrer could have been sustained on the alternative ground that Roberts's claim is barred by the statute of limitations.

We reject all three arguments. The sham pleading doctrine does not apply here because Roberts's oral contract claim is based on the same general facts as he alleged in prior versions of the complaint. The integration clause in the written software services agreement also does not bar Roberts's oral contract claim because the software services agreement is consistent with the oral contract that Roberts alleges. And the statute of limitations argument raises factual issues concerning when Roberts should have discovered his claim that cannot be resolved on demurrer.

We therefore reverse and remand for further proceedings on Roberts's declaratory relief claim against Secure Stone and on the other claims that remain pending.

BACKGROUND

1. Roberts's Initial Complaint

Roberts filed his initial complaint (Complaint) on December 4, 2015. The Complaint alleged that Roberts developed software he called the Orisis Content Management System (OCMS) that could be "customized to fit the needs of any type of business." Swallow, who was in the casino business, allegedly asked Roberts to use this OCMS software to develop a "business-management software solution" specifically tailored for casinos.

According to the Complaint, Swallow initially offered to pay Roberts $45,000 to create this software, which Swallow would then own. However, following negotiations and exchanges of draft agreements in June 2007, Swallow provided Roberts with the draft of a new software services agreement (the Services Agreement), which Swallow had already signed.

Early in July 2007, Swallow explained to Roberts that Swallow had drafted the Services Agreement "to give [Roberts] an equity stake in the project to entice [Roberts] to be fully invested in the success of the project." Swallow represented that he would market the software and related services to generate licensing revenues and that "Swallow and [Roberts] would split any licensing revenues 50/50." However, Swallow's casino—Casino M8trix—would use the software without paying licensing fees because Casino M8trix's use of the software would serve as a " 'proof of concept' " to assist in marketing the software to others.

Roberts executed the Services Agreement on July 16, 2007. The Complaint attached the Services Agreement as an exhibit.

The Services Agreement stated that Roberts was to be paid $15,000 for "Basic Services" in connection with the OCMS-based software he was to provide (the Software). The Services Agreement also stated that Roberts was to provide 320 hours of software maintenance services during the first year "in consideration of the payment of license fees pursuant to the Agreement." Another provision of the Services Agreement, set forth in paragraph 8, explained that Swallow and Roberts "shall own any and all documentation used in connection with the provision of Services, together with any computer source and object code developed in conjunction with the provision of Services."

The Services Agreement contained an integration clause labeled "Entire Agreement." It stated that the Services Agreement "sets forth the entire Agreement regarding the provision of Services between the parties and supersedes any and all prior proposals, agreements, and representations between them, whether written or oral. This Services Agreement may be changed only by mutual agreement of the parties in writing."

The recital section of the Services Agreement contained a "whereas" clause stating that Swallow "has entered into a Software License Agreement of even date herewith (the 'Agreement'), pursuant to which [Swallow] has agreed to license certain software from [Roberts]." In fact, Swallow and Roberts never entered into such a separate written licensing agreement.

The Complaint alleged that "[a]s a result of the [Services] Agreement, [Roberts] and Swallow entered into a partnership and joint venture for the purpose of exploiting the Software." It alleged that Swallow breached the Services Agreement by failing to pay Roberts his portion of licensing fees that Swallow received for the Software. Swallow allegedly falsely represented that there were no fees to distribute.

2. Roberts's Attachment Application

On February 26, 2016, Roberts filed an application for a writ of attachment based on the Complaint and the Services Agreement. In a declaration in support of the application (the Attachment Declaration), Roberts stated that at "some point" during the course of his negotiations with Swallow, Swallow proposed that "we become 50/50 owners of the Software." Consistent with the allegations in the Complaint, Roberts explained that Swallow "stated he knew that I had other projects and ventures, but wanted me to dedicate myself to this new venture, and thus changed the terms of the contract to give me an equity stake in the project to entice me to be fully invested in the success of the project." Roberts stated that Swallow "explicitly represented that [Swallow] and I would split any licensing profits 50/50." He explained that he "believed the language regarding co-ownership" of intellectual property in paragraph 8 of the Services Agreement "sufficiently implied any revenues generated by licensing the Software belonged to both of the parties."

The trial court denied the attachment application, finding that the Services Agreement "concerns [Roberts's] installation and maintenance of the Software, and there is no provision for licensing the Software or sharing the revenue from doing so."

3. Roberts's First Amended Complaint

Secure Stone demurred to Roberts's Complaint. Rather than oppose the demurrer, Roberts filed a First Amended Complaint (FAC).

The FAC repeated many of the facts concerning the parties' contractual relationship alleged in the Complaint but alleged a slightly different theory of breach. The FAC alleged that the co-ownership provision in paragraph 8 of the Services Agreement meant that Roberts and Swallow were "tenants in common of the copyright in the . . . Software, owing each other fiduciary duties and a duty to account for profits."

Swallow and Profitable demurred to the FAC, and the trial court sustained the demurrer with leave to amend.

4. Roberts's Second Amended Complaint

Although the details are somewhat different, like the previous complaints Roberts's Second Amended Complaint (SAC) alleges that Swallow promised that he and Roberts would split licensing fees from the Software equally. The SAC alleges that "[a] few days after he initially approached Roberts, Swallow proposed that the two become partners in a business to develop, prove, market, and sell casino management software, with the goal of earning profits, which profits they would split evenly among them." In telephone conversations during June and July 2007, Swallow allegedly repeated his promise that licensing fees would be split equally.

The SAC differs from the Complaint and the FAC in alleging that these communications resulted in an oral agreement separate from the Services Agreement. The SAC alleges that "at the beginning of June 2007, Swallow and Roberts formed a legal partnership" to market the Software and split the profits. The SAC acknowledges that the Services Agreement "is silent with respect to the manner or method of paying, receiving, or disbursing licensing fees for the . . . Software." It claims that Swallow and Roberts "expressly agreed, orally, by implication, and by operation of law as co-owners/co-tenants of copyrights, to equally share (50/50) in any and all fees, profits, monies, or other benefits derived or relating to the . . . Software."

The SAC alleges that Swallow lied in saying that he intended to split the licensing fees with Roberts. According to the SAC, Swallow incorporated Profitable to license and market the Software, and Profitable in fact received licensing fees from Swallow's own businesses and from third parties. However, Swallow did not share these fees with Roberts and instead falsely told Roberts that there were no fees to share.

Swallow told Roberts that Casino M8trix would be the testing ground for the Software, and that it would therefore pay no licensing fees for its use. However, Casino M8trix did pay fees.

Swallow also received license fees from a third party, The 101 Casino (the 101), but falsely told Roberts that the costs of the installation and maintenance for the 101 exceeded the fees it had paid. In reality, Swallow received significant licensing fees from the 101 that he distributed to Profitable and to Secure Stone but not to Roberts.

At Swallow's request, Roberts also tailored his OCMS software to be used by third party casino "bankers."[2] Swallow told Roberts that one such banker, Team View Player Services (Team View), had licensed this version of the Software, and the fees due to Roberts from this license were $3,000 per month. The SAC alleges that the fees Team View paid were actually closer to $100,000 per month.

Roberts also tailored the Software for the Hollywood Park casino, which Swallow was acquiring. Swallow did not disclose to Roberts that Hollywood Park paid licensing fees. Instead of his portion of those fees, Roberts received only "salary-like payments for the specific acts of installing and maintaining, and training others on" the software Roberts developed for Hollywood Park.

The SAC alleges that Roberts earned a salary for his "day-to-day labor as an IT professional working at various casinos where the . . . Software was installed, which salary was competitive within the industry, [and] at times was as high as $15,000.00 per month." In addition, Swallow paid Roberts between $150,000 and $200,000 for his share of fees from licensing the banker version of the Software. However, Swallow

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[2] The SAC explains that " '[b]ankers,' in California casinos, play the traditional role of the house, in that the banker is the individual or entity responsible for paying bets when the dealer loses, or conversely paying out player wins. Table games could not exist in state-licensed casinos in California without someone playing the role of 'banker.' "

actually received more than $19 million in licensing fees from the Software.

The SAC alleges that Roberts did not learn of Swallow's failure to pay him the fees he was owed until the California Attorney General began an administrative proceeding against Swallow. On May 2, 2014, the Attorney General filed an accusation with the California Gambling Control Commission (the Commission), seeking to revoke Swallow's gaming license (the Administrative Proceeding). The SAC alleges that Roberts first became aware of the Administrative Proceeding in mid-summer 2014. According to the SAC, during the proceeding "the Attorney General presented compelling evidence" that: (1) Casino M8trix paid Profitable $13,950,000 to license the Software; (2) the 101 paid Swallow more than $36,000 per month to license the Software, amounting to a total of $1,764,735; and (3) Team View paid Secure Stone nearly $3.6 million to license the Software. As a result of the Administrative Proceeding, Swallow's gaming license was revoked, and the Commission imposed a fine of $14 million.

The SAC alleges one cause of action for declaratory relief against all defendants (including Secure Stone). It also alleges causes of action against Swallow for: (1) fraud; (2) breach of fiduciary duty; (3) constructive fraud; (4) conversion; and (5) breach of oral contract.

5. The Trial Court's Order

Swallow and Profitable filed a demurrer to the SAC, in which Secure Stone joined. The trial court sustained the demurrers without leave to amend in an order dated September 8, 2017.

With respect to Roberts's declaratory relief cause of action, the trial court concluded that the cause of action was barred by the sham pleading doctrine and the integration clause in the Services Agreement. The court observed that, in the prior versions of Roberts's complaint, the Services Agreement "provided the basis for the existence of any purported partnership agreement between [Roberts] and Swallow and [Roberts's] entitlement, if any, to licensing profits." The court stated that "the SAC fails to explain [Roberts's] previous allegations based on the [Services] Agreement and/or failure to plead the oral agreement."

The court also concluded that the language of the integration clause precludes Roberts's declaratory relief claim as a matter of law. The court stated that the clause "clearly states that it sets forth the entire agreement between the parties" and supersedes all prior written or oral representations.

Finally, the trial court concluded that, "to the extent that [Roberts] contends that the issue of licensing fees/profit-sharing is outside the scope of the [Services] Agreement, this is not persuasive and inconsistent with the straight-forward and broad terms of the [Services] Agreement."

DISCUSSION

1. Standard of Review

An order sustaining a demurrer is reviewed de novo to determine whether the complaint states a cause of action. (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1501.) On appeal, we " 'treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.' " (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*).)

An exception to this principle applies when a plaintiff alleges facts that contradict an earlier version of a complaint in an effort to avoid defects in his or her claim. In that case, under the so-called "sham pleading doctrine," a reviewing court may take judicial notice of the prior pleading and disregard the inconsistent allegations in the amended complaint unless the plaintiff provides a satisfactory explanation for the change. (*Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 425–426 (*Deveny*).)

The parties agree that the trial court's decision to apply the sham pleading doctrine here should be reviewed under the abuse of discretion standard. However, the cases describing the standard of review are not so clear.

The sham pleading doctrine often arises in cases involving a trial court's ruling denying leave to file an amended complaint. Appellate opinions reviewing such rulings therefore employ the abuse of discretion standard, which applies to a trial court's decision whether to permit amendment of a pleading. (See, e.g., *Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 946–947; *Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945–946 (*Berman*).) In such cases, the policy in favor of " 'great liberality in permitting amendments to the pleadings' " must be weighed against the deference given to the trial court's discretionary decision. (*Berman,* at p. 945.) In weighing these conflicting policies, " 'the right of a party to amend to correct inadvertent misstatements of facts or erroneous allegations of terms cannot be denied.' " (*Ibid.*, quoting *Blakey v. Superior Court* (1984) 153 Cal.App.3d 101, 107.)

Other cases, such as this one, consider the sham pleading doctrine in connection with the review of a trial court's decision sustaining a demurrer without leave to amend. Such cases employ the de novo standard of review applicable to the review of an order sustaining a demurrer but apply an exception to that standard that permits the reviewing court to disregard a sham allegation. (See *Deveny, supra,* 139 Cal.App.4th at pp. 425–426;

Amid v. Hawthorne Community Medical Group, Inc. (1989) 212 Cal.App.3d 1383, 1390–1391 (*Amid*); *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 383–384 (*Owens*).)

It is immaterial to our decision whether one analyzes the trial court's ruling under an abuse of discretion standard or by considering an exception to the usual rule requiring us to " 'treat the demurrer as admitting all material facts properly pleaded.' " (*Blank, supra,* 39 Cal.3d at p. 318.) In either case we conclude that the sham pleading doctrine does not apply.

2. The Sham Pleading Doctrine Does Not Apply to Roberts's Oral Contract Allegations

Secure Stone argues that the sham pleading doctrine applies here because the SAC pleads an oral contract and the prior versions of Roberts's complaint "were both premised on allegations that Roberts' alleged rights to co-ownership of the Software and to share in license fees arose from the parties' written [Services] Agreement." We disagree.

The sham pleading doctrine is intended to prevent plaintiffs from pleading around incurable defects by ignoring them or by making allegations that contradict earlier admissions. (See *Berman, supra,* 56 Cal.App.4th at p. 946.) It is "not ' "intended to prevent honest complainants from correcting erroneous allegations . . . or to prevent correction of ambiguous facts." ' " (*Deveny, supra,* 139 Cal.App.4th at p. 426, quoting 5 Witkin, Cal. Procedure (4th ed. 1997) Amendment of Pleadings, § 1122, pp. 577–578.) Nor is it intended to prevent the assertion of "different legal theories based on the same set of general facts as set out in the superseded pleadings." (*Berman, supra,* 56 Cal.App.4th at p. 946.) Accordingly, the sham pleading exception is reserved for "the extreme case," and " 'must be taken together with its purpose, which is to prevent amended pleading which is only a sham, when it is apparent that no cause of action can be stated truthfully.' " (*Amarel v. Connell* (1988) 202 Cal.App.3d 137, 144, quoting *McGee v. McNally* (1981) 119 Cal.App.3d 891, 896–897.)

Whether or not they can be proved, the oral contract allegations in the SAC are not a sham. They do not conceal any fundamental flaw in Roberts's case. Rather, the basic factual background for Roberts's claims has remained consistent.

All versions of Roberts's claims have alleged that Roberts developed the Software; Swallow promised that he and Roberts would split any licensing fees for the Software evenly between them; Roberts and Swallow agreed to a partnership for that purpose; and Swallow then received licensing revenues that he concealed from Roberts. Roberts's Attachment Declaration similarly explained that Swallow proposed that he and Roberts "become 50/50 owners of the Software"; that Swallow "explicitly represented" that he and Roberts would split any licensing profits equally; and that Swallow later concealed licensing fees that he had received.[3]

Each version of the complaint also alleged that paragraph 8 of the Services Agreement reflected the parties' agreement to split licensing profits. The major difference between the SAC and

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[3] Secure Stone also claims that statements Roberts made in a July 9, 2015 declaration that he submitted to the Commission contradict the SAC. However, in that declaration Roberts similarly explained that Swallow proposed that he and Roberts work as " 'partners' " and evenly split the profits generated from the software. He stated that Swallow "put the language in paragraph 8 [of the Service Agreement] to set forth our partnership."

the two prior versions of the complaint is that the prior versions alleged that paragraph 8 *established* the terms of the partnership concerning licensing fees, whereas the SAC alleges that paragraph 8 was a *result* of that partnership.

The Complaint alleged that, "[a]s a result of the [Services] Agreement, [Roberts] and Swallow entered into a partnership and joint venture for the purpose of exploiting the Software." The FAC elaborated on that allegation by claiming that, "[b]y vesting co-ownership of the . . . Software in both Roberts and Swallow, the [Services] Agreement created a tenancy-in-common of the copyright in the . . . Software as between Roberts and Swallow." In contrast, the SAC acknowledges that "the manner or method of paying, receiving, or disbursing licensing fees" for the Software was "outside the scope" of the Services Agreement. However, it also alleges that Roberts would not have given half of his intellectual property to Swallow in paragraph 8 of the agreement "but for Swallow's promises to split licensing profits, and Roberts's understanding that co-ownership meant an equal entitlement to licensing profits."[4] Thus, according to the SAC, paragraph 8 did not establish an agreement to split licensing profits, but it confirmed that one existed.

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[4] This allegation is consistent with the allegation in the FAC that Roberts believed the language in section 8 "established that the parties would jointly own the software he created and would jointly share in the profits." It is also consistent with Roberts's statement in his Attachment Declaration that he "believed the language regarding co-ownership [in section 8] sufficiently implied any revenues generated by licensing the Software belonged to both of the parties."

The different contract allegations in the various iterations of the complaint reflect different legal theories, not the creation of sham factual allegations. Whether given facts support a particular theory of recovery is a legal judgment. And of course, the same facts might support different legal theories. Thus, a decision to change the legal theory in an amended pleading based on the same general set of facts does not mean that the amended pleading must be a sham.

Berman is illustrative. In that case, the plaintiff acquired an interest in a limited partnership for $200,000 and later accepted a check for $30,000 that purported to be for the purpose of repurchasing that interest. (*Berman, supra,* 56 Cal.App.4th at pp. 940–941.) The plaintiff initially alleged that he did not intend to surrender his interest in the partnership despite the $30,000 transaction. (*Id.* at p. 947.) In a later amended complaint he alleged that he *did* sell his partnership interest, but the sale violated the securities laws. (*Ibid.*)

The court held that the amended complaint was not a sham, as it simply asserted a new legal theory based on the "same general set of underlying material facts." (*Berman, supra,* 56 Cal.App.4th. at pp. 947–948.) The prior allegation that the plaintiff did not *intend* to sell his partnership interest did not contradict the contention that a sale in fact occurred and was irrelevant to the new theory. (*Ibid.*) The court also explained that whether a sale of a security had occurred was a conclusion of law. The court held that the sham pleading rule should not apply where a plaintiff seeks to "change his legal theory of recovery and the legal conclusions he seeks to draw from underlying factual events" and merely omits irrelevant factual allegations. (*Id.* at pp. 948–949.)

The same principle applies here. Roberts's legal theory changed from a claim for breach of written contract to breach of an oral contract based on the same general factual allegations. The change in legal theory was not a sham.

The SAC does contain a slightly different version of the events leading to the parties' alleged understanding that licensing fees would be split equally. In his initial Complaint, Roberts alleged that he and Swallow first exchanged drafts of the Services Agreement in June 2007, and then discussed the creation of a partnership to split licensing fees during the first two days of July after Swallow had prepared the final version of the agreement. In the SAC, Roberts alleges that he and Swallow discussed forming a business to split licensing fees beginning in June 2007, "including without limitation on telephone calls that occurred on or about June 5, 11, and 18, 2007, and July 10, 2007."

In opposing the demurrers to the SAC, Roberts submitted a declaration from his attorney explaining these different versions of the facts. Roberts's counsel, Jon Atabek, explained that he prepared the initial Complaint and the FAC to emphasize the written Services Agreement. After the FAC was filed, Roberts retained his current counsel, Skiermont Derby (Skiermont), who, along with Atabek, met with Roberts and obtained additional facts. Atabek testified that, "[a]lthough all of the facts [Roberts] disclosed during that meeting were consistent with my understanding of the case, several new facts were revealed, particularly involving discussions and negotiations during the time period May and June 2007." Skiermont put those new facts in the SAC.

The new facts presented a different timeline but did not alter the substance of the communications in any material way. Both versions alleged that Roberts and Swallow discussed a partnership to market the Software and split the licensing proceeds equally. Because the substance of the allegations was not contradictory, and Roberts offered a plausible explanation for the factual differences, the revisions in the SAC do not support a finding that the revised version was a sham. (See *Deveny*, *supra*, 139 Cal.App.4th at pp. 426–427 [amended pleading was not a sham where plaintiff's counsel offered a "plausible explanation for the amendment" and the thrust of the original and amended complaints was the same].)

The trial court did not mention the Atabek declaration. Secure Stone argues that this court should similarly disregard the declaration because it was filed in opposition to the demurrer rather than with the SAC. Secure Stone provides no authority for the proposition that an explanatory declaration may be considered only if filed at the same time as the amended pleading, and we see no justification for such a rule.

Nor are we persuaded by Secure Stone's argument that the requirements of Code of Civil Procedure section 473, subdivision (b) apply here.[5] That subdivision applies to a plaintiff's request for relief from a "judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." Atabek's declaration was not offered in support of a request for relief from an order, but in opposition to a demurrer to an amended complaint that the trial court had previously granted leave to file. Section 473, subdivision (a) applies to amended pleadings.

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[5] Subsequent undesignated statutory references are to the Code of Civil Procedure.

Roberts was not required to meet the standard for attorney mistakes described in subdivision (b) in explaining the reasons for the differences in the SAC.

The cases on which Secure Stone relies for its argument that the sham pleading doctrine applies are distinguishable. In *Owens*, *supra*, 198 Cal.App.3d 379, the plaintiff alleged a completely different, and contradictory, version of events concerning where an accident had occurred in a transparent effort to avoid a defense to his claim. (*Id.* at p. 384.) Similarly, in *Baris Restaurant Design, Inc. v. Serrano* (2005) 134 Cal.App.4th 1035, the plaintiff sought leave to amend its complaint to allege facts that directly contradicted an earlier complaint concerning the nature of the services it had provided. Again, the amendment was an obvious effort to avoid a defense—in that case, a defense based on the law that precludes an unlicensed contractor from collecting compensation for contract work. (*Id.* at pp. 1043–1045.) And in *Amid*, *supra*, 212 Cal.App.3d 1383, the plaintiff's fifth version of his complaint alleged a breach of an express contract that he had denied existed in his prior four complaints. (*Id.* at p. 1390.)

None of those factors is present here. The SAC did not allege contradictory facts and did not assert the existence of a contract that prior complaints had expressly denied. Rather, as discussed above, the SAC's oral contract claim is based on the same general facts as alleged in prior complaints and simply applies a different legal theory to those facts.

3. The Services Agreement Integration Clause Does Not Preclude Roberts's Oral Contract Claim

Our Supreme Court has instructed that an integration clause in a written contract is only one factor to consider in determining “whether the parties intended their writing to serve as the exclusive embodiment of their agreement.” (*Masterson v. Sine* (1968) 68 Cal.2d 222, 225 (*Masterson*).) While the “instrument itself may help to resolve that issue,” the alleged collateral agreement itself must be examined “to determine whether the parties intended the subjects of negotiation it deals with to be included in, excluded from, or otherwise affected by the writing.” (*Id.* at pp. 225–226.) In addition, “[c]ircumstances at the time of the writing may also aid in the determination of such integration.” (*Id.* at p. 226.)[6]

Parol evidence of an alleged collateral oral agreement should not be considered if that evidence *contradicts* an express provision of the written agreement. (*Gerdlund*, *supra*, 190 Cal.App.3d at pp. 270–271.) But that is not the case here.

The alleged oral agreement to split licensing revenues is consistent with paragraph 8 of the Services Agreement, which stated that Roberts and Swallow were *both* to own “any computer source and object code developed in conjunction with the provision of Services.” It is also consistent with the parties' expressed intention to enter into a separate “Software License

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6 The Services Agreement provides that it “shall be governed by the laws of the State of TX, USA.” Neither party has argued that Texas law applies to interpretation of the Services Agreement or identified any way in which Texas law differs from California law with respect to the relevant principles of interpretation. We therefore consider the choice of law issue waived and analyze the Services Agreement under California law. (See *Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1514, fn. 17; *Gerdlund v. Electronic Dispensers International* (1987) 190 Cal.App.3d 263, 269–270 (*Gerdlund*).)

Agreement" concerning Swallow's agreement "to license certain software from [Roberts]." While the parties never actually executed any such separate written agreement, their stated intention to do so supports the conclusion that they did not intend the Services Agreement to foreclose a separate agreement on licensing terms.

Secure Stone claims that the alleged oral agreement to split licensing fees is inconsistent with the express compensation provision in the Services Agreement stating that Roberts was entitled to $15,000 for "the Basic Services." However, the Services Agreement also stated that Roberts was to provide "up to 320 hours of Software Maintenance Services during the first year of the term of the Agreement *in consideration of the payment of license fees* pursuant to the Agreement." (Italics added.) This appears to refer to the contemplated separate licensing agreement.[7] The Services Agreement itself therefore suggests that Roberts's compensation was not limited to the $15,000.

Secure Stone also relies on the absence of any provision in the Services Agreement for licensing the Software. But silence is

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[7] "Agreement" is a defined term in the Services Agreement referring to the separate licensing agreement. However, the Services Agreement occasionally uses the term "Agreement" to refer to the Services Agreement itself. The Services Agreement is confusing in other respects as well. For example, Roberts was to be paid $15,000 for the "Basic Services," which the Services Agreement states are defined in exhibit C. However, exhibit C identifies the "Basic Services" as "None." The lack of clarity in the written Services Agreement is a further reason not to dismiss Roberts's claims on demurrer based on the language of the written agreement alone.

not the same as contradiction, particularly where, as here, the agreement itself suggests that it was not intended to cover the term on which it is silent. (See *Masterson, supra,* 68 Cal.2d at p. 226 [citing cases permitting parol evidence to prove the existence of a separate oral agreement as to any matter on which a written agreement is silent and which is not inconsistent with its terms].)

The language of the integration clause itself is also consistent with the existence of a separate oral agreement. An integration may be partial rather than complete. (See *Cione v. Foresters Equity Services, Inc.* (1997) 58 Cal.App.4th 625, 637–638 [the terms of an integration clause limited the clause to the subject matter of the written employment agreement in which it appeared].) The integration clause here states that "[t]his Services Agreement sets forth the entire Agreement regarding the *provision of Services between the parties* and supersedes any and all prior proposals, agreements, and representations between them, whether written or oral." (Italics added.) That the clause was limited to an agreement regarding the "provision of Services" suggests that the parties did not intend the clause to apply to a separate agreement on *licensing*. That interpretation is further supported by the fact that the parties expressly stated their intention to enter into such a separate licensing agreement.

The language of the Services Agreement does not foreclose the possibility of a separate oral agreement governing software licensing. Indeed, it suggests that the parties intended *some* separate agreement on licensing. The complaint alleges that such a separate oral agreement existed, and those allegations of course must be credited on demurrer. The integration clause in the Services Agreement was therefore not a sufficient basis to sustain Secure Stone's demurrer.

4. The SAC Does Not Show that the Statute of Limitations Bars Roberts's Claim

Secure Stone argues that the SAC shows Roberts was on "inquiry notice" at least by 2009 that Swallow had breached the alleged oral agreement to split licensing revenues. This was more than two years before Roberts filed his action in December 2015, and Secure Stone therefore claims that the SAC shows on its face that the two-year statute of limitations for an action on an oral contract bars Roberts's claim. (§ 339, subd. (1).)[8]

In response, Roberts argues that the SAC specifically pleads that he did not become aware of Swallow's misconduct until mid-summer 2014. At that time, he learned of the Attorney General's Administrative Proceeding alleging that Swallow and entities that he controlled (including Secure Stone) possessed millions of dollars in licensing fees. If that allegation is credited, Roberts's claim against Secure Stone was timely. As Secure Stone acknowledges, under the "discovery rule" the two-year statutory period did not begin to run until Roberts discovered, or had reason to discover, his claim. (See *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807 (*Fox*).)

To "adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead that, despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of

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[8] As Secure Stone points out, the statute of limitations applicable to a declaratory relief claim is generally the statute that would govern a cause of action based on the same underlying rights and obligations. (See *Ginsberg v. Gamson* (2012) 205 Cal.App.4th 873, 883.)

action within the applicable statute of limitations period." (*Fox, supra,* 35 Cal.4th at p. 809.) Roberts has met that burden here by alleging that Swallow fraudulently represented that he had received no licensing fees that he was required to split with Roberts.

The SAC alleges that Swallow falsely told Roberts: (1) Casino M8trix would not pay a licensing fee; (2) installation and maintenance costs for the Software in the 101 exceeded licensing revenues, "leaving nothing to be split"; (3) the Hollywood Park casino was not paying licensing fees; and (4) the $3,000 per month that Swallow was paying Roberts for the Software tailored for casino bankers "represented the entirety of Roberts's fifty percent (50%) of licensing fees derived from the Banking Software." In addition to these specific allegations, the SAC alleges that Swallow had "complete, unfettered control of all efforts to profit from the . . . Software licensing," and Roberts relied on Swallow's statements because Swallow was his partner and had "deep experience in business, and connections throughout the casino business, an industry wholly outside the scope of Roberts's own knowledge and experience."

Secure Stone argues that, despite these allegations, the SAC shows that Roberts was on inquiry notice. Secure Stone claims that Roberts should have been aware of Swallow's breach of the alleged oral agreement because: (1) Swallow's disclosure that the 101 was paying licensing fees showed that Swallow was withholding fees allegedly owed to Roberts regardless of any costs, because the SAC alleges that Roberts was entitled to half of "*gross revenue*"; (2) Roberts never received any stock in Profitable, which Swallow represented to be " 'our company' "; and (3) the parties never executed the separate written licensing agreement referenced in the Services Agreement. None of these arguments is persuasive.

First, the SAC does not allege that Roberts was entitled to 50 percent of "gross revenue." Secure Stone cites paragraph 86 in the SAC, which asks, among other things, for a declaration that Roberts is "entitled to at least half (50%) of the licensing fees, profits, funds, monies, and/or other benefits obtained by Defendants in any way relating to the . . . Software." Such broad and open-ended pleading language in a request for relief cannot fairly be read to describe a specific term in the alleged oral agreement entitling Roberts to half of all gross revenues regardless of costs. Such a reading is particularly problematic in view of other allegations in the SAC claiming that the parties agreed to split partnership *profits*. Moreover, Swallow's alleged statement to Roberts explaining that costs exceeded revenues from licensing to the 101 implicitly acknowledged that Roberts was entitled to a portion of the profits, which actually affirmed the existence of an agreement to split at least some portion of the licensing fees. Roberts does not allege that Swallow breached their oral agreement by paying only half of the profits instead of gross revenues, but by fraudulently representing what fees Swallow had received and by paying Roberts only a small fraction of what he was due.

Second, Swallow's failure to provide stock in Profitable to Roberts is not a sufficient basis to disregard Roberts's allegation that he trusted Swallow because of their relationship as partners and because of Swallow's vastly superior experience in the casino business. While Roberts might have expected that he would be given some official ownership right in a company formed for a business in which he was a partner, he might also have reasonably expected that Swallow would simply cause Profitable to pay Roberts the portion of the fees that Roberts was due. This is an issue of fact that should not be resolved on demurrer. (See *Fox, supra,* 35 Cal.4th at p. 810 ["Resolution of the statute of limitations issue is normally a question of fact"].)

Third, the fact that the parties never executed the separate written licensing agreement referenced in the Services Agreement did not put Roberts on notice that Swallow intended to breach the *oral* agreement to split licensing fees alleged in the SAC. The SAC specifically alleges such an oral agreement, along with subsequent statements by Swallow acknowledging its existence. Moreover, as discussed above, the Services Agreement itself contains a provision for co-ownership of intellectual property that is consistent with the oral agreement.

The SAC adequately alleges facts showing that Roberts was not on inquiry notice of his claim until he learned of the Administrative Proceeding, less than two years before he filed this action. The statute of limitations therefore does not provide an alternative ground to support the trial court's ruling sustaining the demurrer.

DISPOSITION

The trial court's order sustaining Secure Stone's demurrer is reversed. The case is remanded for further proceedings on Roberts's claims against Secure Stone as well as other pending claims. Roberts is entitled to his costs on appeal.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.