

CALIFORNIA COURT OF APPEAL, SECOND DISTRICT, EIGHTH DIVISION

Barkett v. Malcoun

Barkett v. Malcoun, B318270 (Cal. App. Nov 13, 2023) · No. B318270

SUMMARY

Barkett v. Malcoun, B318270 (Cal. App. Nov 13, 2023) – A cross-complainant sister sued her sibling and brother-in-law for breach of contract, breach of fiduciary duty, aiding and abetting, and accounting related to a family trust and caregiving agreement. The Court of Appeal affirmed the trial court's sustaining of demurrers without leave to amend, holding that (1) the breach of contract claim failed because the allegations of an oral agreement were directly contradicted by the written mediation agreement attached to the complaint, which takes precedence under the "exhibits control" rule; (2) the breach of fiduciary duty claim failed because Margaret's written ratification of the trustee's acts in probate court records was final and conclusive on beneficiaries per the trust terms, and the claim was time-barred under Probate Code § 16460's three-year statute of limitations; (3) the aiding and abetting claim failed due to no underlying breach; and (4) no accounting was owed because the defendant was no longer trustee and no fiduciary relationship existed with the plaintiff. Key legal topics include judicial notice of court records, the effect of contradictory exhibits on pleading allegations, limitations periods for trust and fiduciary claims, and the standard for demurrer review.

CASE DETAILS

COURT	California Court of Appeal, Second District, Eighth Division
WRITING FOR THE COURT	GRIMES, J.; STRATTON, P. J.; WILEY, J.
JURISDICTION	California
DOCKET	B318270
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from a judgment of the Superior Court of Los Angeles County sustaining demurrers without leave to amend and dismissing cross-complaint.
STANDARD OF REVIEW	A demurrer tests the legal sufficiency of the complaint. We review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action. For purposes of review, we accept as true all material facts alleged in the complaint, but not contentions, deductions or conclusions of fact or law. We also consider matters that may be judicially noticed. When a demurrer is sustained without leave to amend, we decide whether there is a reasonable possibility that the

	defect can be cured by amendment; if it can be, the trial court abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. Plaintiff has the burden to show a reasonable possibility the complaint can be amended to state a cause of action.
PRECEDENTIAL VALUE	unpublished
PARTIES	Lisa Ann Barkett v. Diane Malcoun, Steven Malcoun

TOPICS

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[trusts](#)
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QUESTIONS PRESENTED

1. Whether the breach of contract claim was properly dismissed because the allegations of an oral agreement were directly contrary to the written mediation agreement attached to the complaint.
2. Whether the breach of fiduciary duty claim was properly dismissed for failure to allege facts showing a fiduciary duty owed by Diane to Lisa, and whether the claim was barred by Margaret's ratification and the three-year statute of limitations under Probate Code section 16460.
3. Whether the claim for an accounting was properly dismissed because no relationship requiring an accounting existed between Lisa and Diane.
4. Whether the aiding and abetting claim against Steven was properly dismissed because no primary violation by Diane was stated.
5. Whether the trial court abused its discretion in denying leave to amend.

HOLDINGS

1. The breach of contract claim fails because the allegations of an oral agreement are directly contrary to the terms of the written mediation agreement, which takes precedence over inconsistent allegations.
2. The breach of fiduciary duty claim fails because plaintiff did not allege facts showing a fiduciary duty owed by Diane to Lisa, and the claim is barred by Margaret's ratification and the three-year statute of limitations under Probate Code section 16460.
3. The accounting claim fails because no relationship requiring an accounting exists between plaintiff and Diane; Diane is no longer trustee and has no duty to account for nontrust assets.
4. The aiding and abetting claim fails because plaintiff has not stated a claim against Diane for breach of fiduciary duty, so there is no primary violation for Steven to have aided and abetted.

5. The trial court did not abuse its discretion because plaintiff failed to show a reasonable possibility the complaint could be amended to state a cause of action.

KEY QUOTATIONS

“While the allegations of a complaint must be accepted as true for purposes of demurrer, the facts appearing in exhibits attached to the complaint will also be accepted as true and, if contrary to the allegations in the pleading, will be given precedence.” (at 10)

“all of the material terms of the settlement are set forth herein” (at 11)

“A defendant is liable for aiding and abetting another in the commission of an intentional tort, including a breach of fiduciary duty, if the defendant knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act.” (at 18)

FACTUAL BACKGROUND

Three sisters, Lisa Barkett, Diane Malcoun, and Debra Stephan, are beneficiaries of a trust created by their parents, Sylvester and Margaret Denton. Diane was named successor trustee. After Sylvester's death in 2013, Diane filed a first accounting in 2014. Lisa objected, alleging missing assets and misuse of trust funds. Margaret consented to Diane's accounting and rejected Lisa's objections. The probate court approved the accounting and discharged Diane as trustee in 2015 after a final accounting. In 2015, Margaret and the three sisters entered into a mediation agreement regarding Margaret's care and living arrangements, which stated all material terms were set forth in writing. Margaret died in 2019. In 2020, Lisa filed a cross-complaint against Diane and Steven, alleging breach of contract (based on an alleged oral agreement supplementing the mediation agreement), breach of fiduciary duty, accounting, and aiding and abetting.

PROCEDURAL HISTORY

Plaintiff Lisa Barkett filed a cross-complaint against her sister Diane Malcoun and brother-in-law Steven Malcoun alleging breach of contract, breach of fiduciary duty, accounting, and aiding and abetting. The trial court sustained demurrers without leave to amend, concluding the breach of contract claim was contradicted by the written mediation agreement, the breach of fiduciary duty claim was barred by ratification and statute of limitations, the accounting claim failed for lack of relationship, and the aiding and abetting claim failed because no primary violation existed. The court entered judgment of dismissal, and plaintiff appealed.

DISPOSITION

affirmed

CASES CITED

- Blank v. Kirwan, 39 Cal.3d 311 (1985)
- Moran v. Prime Healthcare Management, Inc., 3 Cal.App.5th 1131 (2016)
- Alphonzo E. Bell Corp. v. Bell View Oil Syndicate, 46 Cal.App.2d 684 (1941)
- Pellegrini v. Weiss, 165 Cal.App.4th 515 (2008)

- City of Hope National Medical Center v. Genentech, Inc., 43 Cal.4th 375 (2008)
- Zumbrun v. University of Southern California, 25 Cal.App.3d 1 (1972)
- Harnedy v. Whitty, 110 Cal.App.4th 1333 (2003)
- Estate of Giralдин, 55 Cal.4th 1058 (2012)
- ZF Micro Devices, Inc. v. TAT Capital Partners, Ltd., 5 Cal.App.5th 69 (2016)
- Nasrawi v. Buck Consultants LLC, 231 Cal.App.4th 328 (2014)
- Teselle v. McLoughlin, 173 Cal.App.4th 156 (2009)

OPINION

Barkett v. Malcoun, B318270 (Cal. App. Nov 13, 2023) 1 of contract allegations were contradicted by the contract attached to the operative pleading; court LISA ANN BARKETT, Cross-complainant records of which the court took judicial notice and Appellant, showed plaintiff could not state a claim for breach Vv. of fiduciary duty, and in addition, the statute of DIANE MALCOUN et al., Cross-defendants limitations barred that claim; the aiding and Respondents. abetting claim necessarily failed as well; and no relationship existed requiring an accounting.

B318270 We affirm the judgment of dismissal. California Court of Appeals, Second District, Eighth Division FACTS November 13, 2023 1. The Operative Pleading and Related Documents NOT TO BE PUBLISHED |. This case involves only the allegations in a APPEAL from a judgment of the Superior cross-complaint filed by Lisa Barkett against her Court of Los Angeles County, No. 18STCV08722 sister and brother-in-law, Diane and Steven Elaine Lu, Judge.

Affirmed. Malcoun. The third sister, Debra Stephan, and her. A husband George started this litigation by suing Gilmore Magness Janisse and David M. Ms. Barkett. The Stephens are cross-defendants Gilmore for Cross-complainant and Appellant. but are not parties in this appeal.

For simplicity's I 1 a 1 f sake, we refer to Ms. Barkett as plaintiff, and to Mayall Hurley and Steven A. Malcoun for Diane and Steven Malcoun as defendants or the Cross-defendant and Respondent Diane Malcoun. Malcouns (or by their first names for sake of ineditst, Barll M. Pot, Robert M. (oll Ee ong Shaughnessy and Amara S. Barbara for Cross- Co pa © compia s 47 page 8 and attaches 15 exhibits. defendant and Respondent Steven Malcoun.

Sylvester and Margaret Denton were parents GRIMES, J. of the three sisters, who are the beneficiaries of a » trust created by their parents (the Denton trust). The parents were the original SUMMARY 3 This case involves three sisters who are. ios. trustees, and Diane was named as a successor beneficiaries of a trust created by their parents. N i N co Bs trustee.

Defendant Steven, Diane's husband, is a One sister (plaintiff) complains that another n.. licensed attorney, and he prepared the trust sister, as successor trustee of the trust and in a ts and th ents'

will other capacities, breached her fiduciary duties documents and the parents wits. and breached a contract among their mother and Sylvester Denton died on April 1, 2013.

Upon the three sisters. Plaintiff alleges her brother-in- By. FH Sylvester's death, the Denton trust was to be law aided and abetted her sister's breaches of Lo N co fiduciary d 4 all he i titled t divided into three separate trusts: a survivor's } a uty, and alleges she is entitled to an trust for Margaret, a residual trust, and an accounting. election trust.

The trusts involved in this case are The trial court sustained demurrers without De survivors trust and the residual trust. leave to amend. The court concluded the breach ylvester's community and separate property was x) —X --- Page Break --- Barkett v. Malcoun, B318270 (Cal. App. Nov 13, 2023) to be placed in the residual trust which then Margaret Denton did not agree with her became irrevocable.

"The other half of the daughter Lisa's allegations against her daughter community and separate property assets were to Diane and son-in-law Steven. On August 21, 2014, go into the Survivor's Trust for Margaret Denton." Margaret consented in writing to Diane's first She retained the power to make changes to the accounting and joined in the request that all acts survivor's trust and was entitled to the income and transactions of Diane be ratified and from both trusts.

Under Margaret's will, most of approved. Margaret's written and verified her assets were to "pour over" into the Denton approval of Diane's first accounting specifically trust. The beneficiaries of Margaret's will responded to and rejected plaintiff's objections included the Denton trust and the three sisters. concerning allegedly missing bank accounts and Diane was designated as executrix. improper use of trust assets.

Following is a chronology of events after On May 12, 2015, the probate court held that, Sylvester's death in 2013, events before under the terms of the trust and applicable law, Margaret's death in 2019, and events after plaintiff had no standing to object to the Margaret's death, as alleged in the complaint or accounting. Paragraph 16 of the Denton trust demonstrated by the judicially noticed provided: "During the lifetime of either Settlor documents. and while both Settlers are acting as Trustees, the Trustees shall account only to the Settlers and On May 27, 2014, Diane filed a petition their written approval shall be final and seeking approval of a first accounting and report conclusive in respect to the transactions disclosed of administration of the Denton trust (including a in the account as to all beneficiaries of the Trust, request for appointment of Wells Fargo Bank, including unborn and contingent beneficiaries." N.A. or an alternate bank as successor trustee).

According to the complaint, the petition failed to The probate court's order was served on disclose several assets that should have passed plaintiff and was not appealed. into the Denton trust on Sylvester's death via his will. Shortly before Sylvester died, defendants On July 3, 2015 Margaret

executed a "got Margaret Denton to sign a power of attorney declaration, attached as an exhibit to the granting [Diane] a general power of attorney over complaint.

The complaint characterized Margaret Denton's affairs." "Once [Diane] had the Margaret's declaration as making clear that her power of attorney she proceeded to use that intent was to power of attorney to take over all of the non-Trust accounts and to begin to 5 4 keep her three daughters informed about the status of the trust and her accounts, "to make sure drain those accounts and move money around to that the division was equal on her passing," and various accounts." not to allow any of them to use her money or her property.

(Margaret also expressed her On July 31, 2014, plaintiff filed objections to expectation that Wells Fargo Bank would become Diane's accounting, asserting the same claims she the trustee of all her accounts, whether in the repeated and expanded in the complaint she filed trust or not.) six years later. Her objections included allegations that the accounting did not identify assets and The complaint alleged that on August 26, accounts that should be in the Denton trust, and 2015, Margaret and the three sisters met with a that defendants were using income from the trust mediator and negotiated a resolution of some of for their personal expenses. the issues in Diane's May 2014 accounting to which Lisa objected and Margaret had consented. —d --- Page Break --
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App. Nov 13, 2023) The complaint alleged Margaret and her Within a month of these orders, Diane daughters "reduced some of that to a written petitioned for approval of a second and final agreement." Plaintiff attached the mediation accounting.

On November 25, 2015, the probate agreement as an exhibit to the complaint, and court approved the final accounting and alleged it "does not include all of the provisions discharged Diane as a trustee. The court's order agreed to and it was agreed that there would be states that counsel for Margaret approved of the further discussions although those never took petition and accounting, and all amendments and place." The complaint characterized the supplemental reports and accounts. mediation agreement as "[making] clear that there were further issues to discuss and agree on Four years later, on November 20, 2019, at a future date."

Margaret died. Plaintiff filed her complaint on June 9, 2020. The complaint alleged causes of The August 27, 2015 mediation agreement action against Diane for breach of contract, contradicts the allegation that the parties agreed breach of fiduciary duty, and an accounting; and there were further issues to be decided: "[A]ll of causes of action against both the Malcouns for the material terms of the settlement are set forth elder abuse and aiding and abetting breaches of herein." fiduciary duty.

(Plaintiff has abandoned the elder abuse claim.) The remaining provisions of the mediation agreement (other than provisions on its The complaint alleged Diane was "in breach admissibility

and enforceability) concern matters of the agreement" among Margaret and the three relating to Margaret's stays with the daughters on sisters in that she used Margaret's assets for her a rotating basis and their related communications and her family's personal benefit, failed to turn with each other, their telephone access to over the assets to Wells Fargo Bank, refused to Margaret, her medical records, and that if account for the nontrust assets, concealed Margaret "is taken for medical care, the other information about assets, failed to provide daughters will be notified immediately." The only information about Margaret's health and physical mention of the Denton trust is a provision that in condition, and manipulated accounts to the the event Margaret needs a caregiver while in a exclusion of plaintiff. daughter's care, "the daughter shall be reimbursed by the trust." 7 6 The complaint alleged that "[t]o date [May 3, 2021] Wells Fargo Bank has not provided an On August 31, 2015, the probate court issued accounting or closed the Trust although it is an order approving Diane's first account and anticipated such an accounting will be provided report.

Also on August 31, 2015, the probate court when it is time to close the Trust." The complaint entered an order accepting Diane's tender of continued, alleging "that when the accounting is resignation and appointing Wells Fargo Bank as provided it will confirm that money was taken by successor trustee upon the satisfaction of several [defendants] for their own personal benefit or the conditions.

These included transfer of the benefit of their families." "Despite being the remaining assets of the survivor's trust and Executrix of the Last Will, Diane Malcoun has not residual trust to Wells Fargo Bank and filing of accounted for the assets to be disposed of via that proper receipts with the court, and the court's Last Will whether as to Sylvester or Margaret.

She entry of an order regarding a second and final has sent no notices relating thereto and has not account and report for the survivor's trust and the opened or completed a probate. She has not residual trust. accounted to Wells Fargo Bank or the beneficiaries for the items that were to be divided —d --- Page Break --- Barkett v. Malcoun, B318270 (Cal. App.

Nov 13, 2023) among the children or those items that should thus irrelevant whether the alleged oral have poured over into the Trust." agreement was time-barred or a sham pleading. 2. The Demurrers The breach of fiduciary duty claim failed on two grounds.

First, Margaret's ratification of The Malcouns each filed demurrers to the Diane's actions and accounting in judicially operative complaint. They also filed requests for noticed probate court records was conclusive and judicial notice of numerous court records, some of binding on plaintiff under the express terms of which we have just described.

The court granted the trust instrument. Second, the claim was these unopposed requests, while observing the barred by the three-year statute of limitations court cannot take judicial notice of the

truth of under Probate Code section 16460.

The trial court matters asserted in the documents. stated plaintiff was "plainly on notice of the alleged improprieties and defects that form the Diane demurred on several grounds. She pass of her breach of fiduciary duty claim as she contended the breach of contract claim failed filed objections on July 31, 2014 to [Diane's] first because the allegations of an oral agreement were accounting." "Three years from the final time-barred, the operative complaint was a sham accounting by [Diane] being mailed to [plaintiff] pleading, and there was no alleged breach of the would be November 18, 2018."

Plaintiff's cross- mediation agreement. The breach of fiduciary complaint was filed June 9, 2020, well after the duty claim failed to state a fiduciary duty as to one three-year deadline. trust and was barred by res judicata as to the other trust, and the claim was barred by the The court sustained the demurrer to the statute of limitations.

The cause of action for an claim for an accounting on the ground the accounting failed because Diane was no longer complaint did not allege a relationship between trustee of the trust. plaintiff and defendant that requires an accounting. Steven demurred to the aiding and abetting claim on the ground, among others, that it was The court sustained Steven's demurrer to time-barred. plaintiff's cause of action for aiding and abetting breach of fiduciary duty, holding 8 9 3.

The Trial Court's Rulings that because the complaint failed to allege a In a detailed 44-page opinion, the trial court breach of fiduciary duty by Diane, there was "no sustained both demurrers without leave to primary violation for [Steven] to have knowingly amend. aided and abetted."

The trial court also sustained Steven's demurrer on statute of limitation The breach of contract claim failed because grounds, relying on the one-year statute of the allegations were contrary to the mediation limitations for wrongful acts in performance of agreement attached to the complaint and legal services. executed by the three sisters and Margaret on August 27, 2015.

The court concluded: "to the The court entered a judgment of dismissal extent that [plaintiff] contends that there were and plaintiff filed a timely appeal. additional terms to the Mediation Agreement not memorialized in writing, these allegations are DISCUSSION directly contrary to the exhibit, and thus, the allegations in the exhibit take precedence." It was A demurrer tests the legal sufficiency of the complaint.

We review the complaint de novo to —d --- Page Break --- Barkett v. Malcoun, B318270 (Cal. App. Nov 13, 2023) determine whether it alleges facts sufficient to The allegations of oral agreements are directly state a cause of action.

For purposes of review, we contrary to the terms of the mediation agreement. accept as true all material facts alleged in the complaint, but not contentions, deductions or We have described the

provisions of the conclusions of fact or law.

We also consider mediation agreement (ante, at pp. 5-6). Those matters that may be judicially noticed. (Blank v. provisions directly conflict with the complaints Kirwan (1985) 39 Cal.3d 311, 318.) allegations that on August 26, 2015, the parties "reached an agreement that was partly written When a demurrer is sustained without leave and partly oral," and that the written agreement to amend, "we decide whether there is a "made clear that there were further issues to reasonable possibility that the defect can be cured discuss and agree on at a future date."

The by amendment: if it can be, the trial court has agreement expressly states that "all of the abused its discretion and we reverse; if not, there material terms of the settlement are set forth has been no abuse of discretion and we affirm." herein." This is directly contrary to the (Blank v. Kirwan, supra, 39 Cal.3d at p. 318.) complaint's allegation that the mediation Plaintiff has the burden to show a reasonable agreement "does not include all of the provisions possibility the complaint can be amended to state agreed to."

Moreover, the complaint itself alleged a cause of action. (Ibid.) that further discussions "never took place." "We preface our discussion with the Plaintiff contends and the complaint alleged observation that plaintiff's briefing repeatedly that Diane "breached the agreement by not refers to matters not alleged in her complaint, turning over all of the assets of Marg[a]ret to the some of which are belied by facts that are alleged Trust and failing to provide full disclosure and by in the complaint.

For example, plaintiff's brief using Margaret's funds for their own benefit." But contends Margaret was diagnosed with the mediation agreement contains no terms Alzheimer's and was prescribed an Alzheimer's relating to the trust or other assets (except that medication in March 2013, a few days before she the trust would reimburse costs for a caregiver if gave Diane her power of attorney, and that the needed).

Malcouns "took steps to gain and exercise control over Margaret Denton's affairs un 10 Plaintiff tries to fill this void by relying on Margaret's July 3, 2015 declaration. The even in light of her Alzheimer's diagnosis and complaint alleged that a "key component[] to the knowledge that she was taking medication for agreement" was Diane's resignation and treatment of Alzheimer's."

However, the August replacement as trustee, including that she would 27, 2015 mediation agreement provides: "All turn over all Margaret's assets to Wells Fargo three daughters agree Margaret presently has Bank. The complaint alleged "[t]his was later capacity and is not in need of a Guardian ad made clear in Margaret's Declaration as to her Litem." Plaintiff's unfounded assertions, and understanding of what the agreement was." others without basis in or citation to the record, Similarly, the complaint alleged that "[t]he oral have no place in appellate briefing. parts of the subsequent oral agreement were in effect memorialized by Margaret Denton in her 1.

The Breach of Contract Claim Declaration” attached to the complaint. Plaintiff contends she properly alleged, in However, Margaret's July 3, 2015 addition to the written mediation agreement, oral declaration predates the August 27, 2015 agreements among Margaret and her daughters. mediation agreement, and does not state or imply any agreement among the sisters, but rather —d --- Page Break --- Barkett v. Malcoun, B318270 (Cal.

App. Nov 13, 2023) merely expresses Margaret's intentions. (These defendants assumed a fiduciary relationship” is a include her desire for her daughters to have conclusion of law and there" 'is not a fiduciary "equal and free access to the accountings and relation between the promisor or promisee and other records relating to the Trusts," and "to be as the beneficiary of a contract."

(Zumbrun vv. transparent as possible with each of them," and University of Southern California (1972) 25 her expectation that Wells Fargo Bank would Cal.App.3d 1,13.) replace Diane as trustee and be the trustee for all her accounts, whether in the trust or not.) Here, the complaint alleged Diane undertook fiduciary duties as successor trustee; as executrix In short, plaintiff's allegations of an oral of Margaret's will; as holder of Margaret's power agreement to additional terms are directly of attorney; as cosigner on Margaret's accounts; contradicted by the terms of the written and under the mediation agreement and "an agreement.

And, as the trial court concluded, the agreement with Margaret Denton regarding her written agreement takes precedence.” "While the care and living arrangements, health care and "allegations [of a complaint] must be accepted as financial well being."

However, except for her true for purposes of demurrer," the "facts fiduciary duties as successor trustee, the appearing in exhibits attached to the complaint documents and relationships cited do not give rise will also be accepted as true and, if contrary to the to a fiduciary duty that Diane owed to plaintiff. allegations in the pleading, will be given precedence." TM (Moran v. Prime Healthcare The complaint alleged that Margaret's will Management, Inc. (2016) 3 Cal App.5th 1131, designated Diane as executrix, and that Diane's 1145- 1146; see Alphonzo E. Bell Corp. v. Bell "position as the Executrix" imposed fiduciary View Oil Syndicate (1941) 46 Cal. App.2d 684, 691 duties on Diane to the estate and its beneficiaries. [treating "conclusions of the pleader...

Of course, an executor of an estate, acting as 12 13 contrary to the express terms of the instrument executor, does have such fiduciary duties. creating the trust which is... made a part of the However, a designation in a will, standing alone, complaint” as "surplusage”).) does not give the person designated as the executor the authority to administer the estate.

2. The Breach of Fiduciary Duty Claim That requires appointment by the probate court. The complaint did not allege that the probate To plead a cause of action for breach of court ever

appointed Diane to act as executrix of fiduciary duty, plaintiff must allege facts showing Margaret's will.

In fact, the complaint alleged the existence of a fiduciary duty, breach of that Diane "has not opened or completed a probate." duty, and resulting damage. (*Pellegrini v. Weiss* "A person has no power to administer the estate (2008) 165 Cal.App.4th 515, 524.) Plaintiff has until the person is appointed personal not done so. representative and the appointment becomes effective." (Prob.

Code, § 8400, subd. (a).) That " '[B]efore a person can be charged with a provision applies "whether or not the person is fiduciary obligation, he must either knowingly named executor in the decedent's will...." (Id, undertake to act on behalf and for the benefit of subd. (b).} Consequently, Diane had no fiduciary another, or must enter into a relationship which duty based solely on her designation as executor imposes that undertaking as a matter of law." in Margaret's will, as she has not been appointed (*City of Hope National Medical Center v. by the court to act as the decedent's personal Genentech, Inc. (2008) 43 Cal.4th 375, 386.) representative (ie, as the executor or Plaintiff must plead facts giving rise to a administrator of her estate). confidential relationship; "[a] bare allegation that ———d --- Page Break --- Barkett v. Malcoun, B318270 (Cal.*

App. Nov 13, 2023) Any duty under the mediation agreement or These court records permit only one legal other agreement with Margaret concerning her conclusion: Margaret's approval of Diane's care and financial wellbeing was owed to accounting was final and conclusive under the Margaret, not plaintiff. Plaintiff contends the terms of the Denton trust, and plaintiff cannot complaint alleges that "the relationship among now relitigate her claims of missing assets and the parties" to those agreements "creates assets used for the trustee's benefit. additional duties on Diane Malcoun," and "specifically alleges that it [the agreement] Plaintiff cites *Estate of Giralдин* (2012) 55 created a fiduciary relationship." She cites inapt Cal.4th 1058, 1076 (*Giralдин*) as support for her cases that involve principal-agent and partnership contention that she may pursue her breach of relationships.

Plaintiff asserts we must accept her fiduciary duty claims against Diane. *Giralдин* is "relationship" allegations as true, but that is not starkly distinguishable and does not apply to the the case. We accept as true only the material facts entirely different facts in this case. alleged, not conclusions of fact or law. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.)

Plaintiff has *Giralдин* held that "after the settlor's death, not alleged facts giving rise to a fiduciary the beneficiaries have standing to assert a breach relationship between Diane and plaintiff. of the fiduciary Similarly, the power of attorney over Margaret's affairs gives rise to a fiduciary duty to Margaret, 15 not to plaintiff. duty the trustee owed to the settlor to the extent 14 that breach harmed the beneficiaries."

(Giraldin, supra, 55 Cal.4th at p. 1076.) In Giraldin, the That leaves the trusts of which Diane was beneficiaries alleged the trustee squandered the successor trustee until her discharge upon settlor's life savings for the trustee's own benefit approval of her accounting (on November 25, and that of his brother, making a series of bad 2015) and filing of receipts for delivery of the investments in a company his brother started and trust assets to Wells Fargo Bank (dated the trustee partially owned.

(Id. at p. 1064.) There September 1, 2016, and October 3, 2016), as were trial court findings that the settlor did not reflected in court records judicially noticed. As authorize any of the trustee's actions in writing as trustee, Diane owed fiduciary duties to the trust required, and that the settlor" 'was not beneficiaries of the trust. (Harnedy v. Whitty sufficiently mentally competent™ to analyze or (2003) 110 Cal. App.4th 1333, 1340.)

These duties authorize the trustee to make the investments at existed as to the trust assets, and until Diane was issue. (Ibid.) discharged as trustee. In Giraldin, there was no accounting by the The court records that were either attached trustee and therefore no express approval of any to the complaint or judicially noticed include accounting by the settlor.

Here there was: Diane's first and later-filed final accountings; Margaret expressly ratified Diane's actions by plaintiff's objections to Diane's first accounting; approving her accountings and rejecting Margaret's written consent to Diane's objections plaintiff raised, including plaintiff's accountings, including her rejection of plaintiff's claim of improper use of Margaret's credit cards objections; trust provisions requiring the trustee and her claim of bank accounts not included in to account only to the settlors while they were the accounting.

Margaret confirmed the bank alive and making a settlor's written approval final accounts were her separate property and not and conclusive; and a court order approving property of the trust, and expressed her belief Diane's final accounting, including the court's there was no factual basis for plaintiff's criticism statement that counsel for Margaret approved of of Diane's actions as successor trustee. the petition and accounting. — nd --- Page Break --- Barkett v. Malcoun, B318270 (Cal.

App. Nov 13, 2023) In short, we find no error in the trial court's complaint against the Malcouns. She cites ZF conclusion that the cause of action for breach of Micro Devices, Inc. v. TAT Capital Partners, Ltd. fiduciary duty is barred by Margaret's ratification (2016) 5 Cal. App.5th 69, 84-85, 92-93, but does of Diane's actions in judicially noticed court not describe the case or explain why or how it records, "made conclusive and binding" on applies to this case.

On that basis alone, she has plaintiff by the express terms of the trust forfeited the argument. In any event, ZF held that instrument. Nothing in Giraldin changes this the filing of a complaint tolled the statute of analysis. limitations for a defendant's permissive cross- complaint against the plaintiff. (Id. at p. 92; id. at The trial court also found plaintiff's breach of p. 73.)

The ZF holding does not apply here fiduciary duty claim was barred by the three-year because the statute of limitations under Probate Code section 16460. Section 16460 includes this provision: "If 17 a beneficiary has received an interim or final Malcouns were not plaintiffs in the Stephans' 16 lawsuit against plaintiff. Plaintiff makes no argument for applying ZF's holding to a cross- account in writing, or other written report, that complaint against a third party, and we find it adequately discloses the existence of a claim does not apply here. against the trustee for breach of trust, the claim is barred as to that beneficiary unless a proceeding 3.

The Claim for an Accounting to assert the claim is commenced within three years after receipt of the account or report. An "[A] fiduciary relationship between the account or report adequately discloses existence parties is not required to state a cause of action of a claim if it provides sufficient information so for accounting. All that is required is that some that the beneficiary knows of the claim or relationship exists that requires an accounting. reasonably should have inquired into the [Citation.]

The right to an accounting can arise existence of the claim." (Id., subd. (a)(1).) from the possession by the defendant of money or property which, because of the defendant's 'We also find plaintiff's claim is time-barred. relationship with the plaintiff, the defendant is The objections plaintiff filed on July 31, 2014, to obliged to surrender." (Teselle v. McLoughlin Diane's first accounting show that plaintiff was (2009) 173 Cal. App.4th 156, 179-180.) then on notice of allegedly missing assets and alleged misuse of trust assets for personal benefit.

Here, plaintiff maintains Diane must account Plaintiff was served with Diane's final accounting to her for assets of Margaret and Sylvester Denton in November 2015, so the three-year statute that were never in the trust and/or were taken by expired not later than November 2018. Plaintiff the Malcouns. She repeatedly refers to Diane as a did not file her cross-complaint for breach of fiduciary, and she claims it "does not appear that fiduciary duty until June 9, 2020, well beyond the Diane Malcoun ever prepared a full or complete three-year limit specified in Probate Code section accounting."

This argument is belied by the 16460. accountings prepared and filed by Diane while she was successor trustee and consented to by Plaintiff contends her claims are not time- Margaret. Diane is no longer the trustee, and she barred, but her arguments are either not has not been the trustee since October 2016; she developed, not comprehensible, or simply has no relationship with the trust to account for. mistaken.

For example, she states the pertinent And, so far as nontrust assets are concerned (and date is the date of the complaint that George and as previously mentioned), Diane is not the Debra Stephan filed against her on December 14, personal representative of the estates of Sylvester 2018, not the date of her June 2020 cross- or Margaret, and so has no duty to account or —Z --- Page Break --
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App. Nov 13, 2023) power to act on behalf of the estates. Plaintiff has not and cannot allege a relationship that requires an accounting. 4. The Aiding and Abetting Claim "A defendant is liable for aiding and abetting another in the commission of an intentional tort, including a breach of fiduciary 18 duty, if the defendant TM 'knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act.'" TM (Nasrawi v. Buck Consultants LLC (2014) 231 Cal.App.4th 328, 343.)

Because plaintiff has not stated a claim against Diane for breach of fiduciary duty, her claim against Steven for aiding abetting the alleged breach of fiduciary duty necessarily fails as well. 5. Leave to Amend Plaintiff contends that if the trial court believed the allegations of the complaint lacked clarity, leave to amend should have been granted. She says she can "allege evidentiary facts that support the allegations with even more detail," but does not tell us what those facts are.

Consequently, she has not met her burden to show a reasonable possibility the complaint can be amended to state a cause of action. (Blank v. Kirwan, supra, 39 Cal.3d at p. 318.) DISPOSITION The judgment is affirmed. Diane and Steven Malcoun shall recover their costs on appeal. WE CONCUR: STRATTON, P. J., WILEY, J. ix) ——d