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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WANG & WANG LLP, a California
Limited Liability Partnership,

Plaintiff,

v.

BANCO DO BRASIL, S.A., a
Brazilian business entity;
RUBENS VIEIRA DO AMARAL, an
Individual; DOES 1 through 10,
inclusive,

Defendants.

Civil No. 2:06-CV-00761-JAM-KJM

ORDER GRANTING DEFENDANT RUBENS
AMARAL'S MOTION TO DISMISS
THIRD AMENDED COMPLAINT

This matter is before the Court on Defendant Rubens
Amaral's ("Amaral") motion to dismiss Plaintiff Wang & Wang
LLP's ("Wang") complaint for failure to state a claim pursuant

1 to Federal Rule of Civil Procedure 12(b)(6). For the reasons
2 set forth below¹, Defendant's motion is GRANTED.

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4 I. FACTUAL AND PROCEDURAL BACKGROUND

5 On February 4, 2004, Banco initiated arbitration before the
6 Bar Association of San Francisco ("BASF") to resolve an
7 attorney-client fee dispute between attorney Wang and client
8 Banco. After the BASF arbitration was initiated, Plaintiff
9 filed its Original Complaint in this matter on September 4,
10 2004, in the Superior Court of Sacramento County for breach of
11 contract, fraud, and common counts, naming Rubens Amaral and
12 Banco do Brasil, S.A. ("Banco") as defendants. The case was
13 removed to this Court, on April 7, 2006, under the Foreign
14 Sovereign Immunities Act. Docket ("Doc.") # 1.
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17 On April 27, 2006, Plaintiff dropped Amaral as a defendant
18 from its First Amended Complaint ("FAC") naming only Banco and
19 Does 1 through 10 as defendants. Doc. # 6. Despite Plaintiff's
20 decision to drop Amaral as a defendant, Plaintiff continued to
21 allege that Amaral made fraudulent representations to Plaintiff.
22 FAC ¶¶ 24, 52. Plaintiff filed its Second Amended Complaint
23 ("SAC") on April 25, 2007. Again, the complaint named only
24 Banco and Does 1 through 10 as defendants, but continued to make
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28 ¹ Because oral argument will not be of material assistance,
the court orders this matter submitted on the briefs. E.D. Cal.
L.R. 78-230(h).

1 allegations regarding acts by Amaral. SAC ¶¶ 62-64, 69. Then
2 on August 14, 2008, more than two years after Wang dropped
3 Amaral as a defendant, Wang filed its Third Amended Complaint
4 ("TAC") adding Amaral as a defendant. The TAC does not add any
5 additional facts regarding Amaral's involvement with allegedly
6 fraudulent acts other than those facts already contained within
7 the SAC. TAC ¶¶ 63, 65, 70.
8

9 In the instant motion, Amaral seeks to dismiss Wang's
10 complaint against him for failure to state a claim before the
11 applicable statute of limitations expired. Doc. # 65. In
12 opposition, Wang argues the time for bringing an action against
13 Amaral for fraud was extended for two years pursuant to a stay
14 and equitable tolling by the BASF arbitration. Plaintiff also
15 contends that the relation back doctrine applies to the claims
16 against Amaral. Doc. # 70.
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19 II. OPINION

20 A. Legal Standard

21 On a motion to dismiss, the allegation of the complaint
22 must be accepted as true. Cruz v. Beto, 405 U.S. 319, 322
23 (1972). The court is bound to give plaintiff the benefit of
24 every reasonable inference to be drawn from the "well-pleaded"
25 allegations of the complaint. Retail Clerks Int'l Ass'n v.
26 Schermerhorn, 373 U.S. 746, 753 n. 6 (1963). Thus, the
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1 plaintiff need not necessarily plead a particular fact if that
2 fact is a reasonable inference from facts properly alleged. Id.

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4 Nevertheless, it is inappropriate to assume that the
5 plaintiff "can prove facts which it has not alleged or that the
6 defendants have violated . . . the laws in ways that have not
7 been alleged." Associated Gen. Contractors of Calif., Inc. v.
8 Calif. State Council of Carpenters, 459 U.S. 519, 526 (1983).

9 Moreover, the court "need not assume the truth of legal
10 conclusions cast in the form of factual allegations." United
11 States ex. rel. Chunie v. Ringrose, 788 F.2d 638, n. 2 (9th Cir.
12 1986).

13
14 Ultimately, the court may not dismiss a complaint in which
15 the plaintiff alleged "enough facts to state a claim to relief
16 that is plausible on its face." Bell Atlantic Corp. v. Twombly,
17 127 S.Ct. 1955, 1973 (2007). Only where a plaintiff has not
18 "nudged [his or her] claims across the line from conceivable to
19 plausible," is the complaint properly dismissed. Id. "[A]
20 court may dismiss a complaint only if it is clear that no relief
21 could be granted under any set of facts that could be proved
22 consistent with the allegations." Swierkiewicz v. Sorema N.A.,
23 534 U.S. 506, 514 (2002) (quoting Hishon v. King & Spalding, 467
24 U.S. 69, 73 (1984)).

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27 B. Statute of Limitations
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1 The applicable statute of limitations governing Wang's
2 fraud claims is Cal. Code Civ. Proc. § 338(d), which provides a
3 three year statute of limitations for bringing "an action on the
4 ground of fraud or mistake." Cal. Code Civ. Proc. § 338(d).
5 Both parties agree that such claims are governed by the three-
6 year statute of limitations.
7

8 Under California statutory law, a cause of action for fraud
9 or mistake "is not to be deemed to have accrued until the
10 discovery, by the aggrieved party, of the facts constituting the
11 fraud or mistake." Cal. Code Civ. Proc. § 338(d). Courts,
12 however, have "read into the statute a duty to exercise
13 diligence to discover the facts." See Parsons v. Tickner, 31
14 Cal. App. 4th 1513, 1525 (1995). The California Supreme Court
15 has held, in a suit alleging claims for fraud and negligent
16 misrepresentation, that inquiry notice is sufficient to trigger
17 the running of the statute of limitations set forth in § 338(d).
18 See Miller v. Bechtel Corp, 33 Cal. 3d 868, 875 (1983) (noting
19 that if plaintiff therein "became aware of facts which would
20 make a reasonably prudent person suspicious, she had a duty to
21 investigate further, and she was charged with knowledge of
22 matters which would have been revealed by such an
23 investigation").
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27 Here, it is clear from the pleadings that Wang had
28 sufficient knowledge of Amaral's purportedly fraudulent acts,

1 such that Wang was able to file a complaint against Amaral on
2 September 24, 2004 alleging Amaral's participation in a
3 fraudulent scheme. See Original Complaint. Despite this
4 knowledge, Wang intentionally dropped Amaral from litigation on
5 April 27, 2006 upon filing its FAC. Wang does not contest that
6 a claim for fraud accrues upon "discovery" of facts constituting
7 the fraud. Cal. Code Civ. Proc. § 338(d). By Wang's own
8 admission, it discovered knowledge of Amaral's involvement in
9 the alleged fraud, within the three years prior to filing the
10 Original Complaint on September 24, 2004. FAC ¶ 74.
11
12 Consequently, the statute of limitations for fraud claims
13 against Amaral started running, at the latest, upon the filing
14 of Wang's Original Complaint on Sept. 24, 2004.
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17 The effect of dropping Amaral from litigation was that, for
18 the purposes of computing time under the statute of limitations,
19 Amaral is treated as if he had never been in the litigation at
20 all. See Hal Roach Studios, Inc. v. Feiner & Co., Inc., 896
21 F.2d 1542, 1546 (9th Cir. 1989). "The fact that a party was
22 named in the original complaint is irrelevant; an amended
23 pleading supersedes the original." Id.; see also Loux v. Rhay,
24 375 F.2d 55, 57 (9th Cir. 1967). After dropping Amaral from
25 litigation, Wang had until September 24, 2007 under the three
26 year statute of limitations to bring Amaral back into
27 litigation. Wang added Amaral as a defendant only in its TAC,
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1 filed August 14, 2008. By this time, the statute of limitations
2 had already run. Accordingly, Plaintiff has failed to bring
3 Amaral into litigation within the requisite three year period.
4 Unless Plaintiff can prove to the Court a valid reason
5 supporting why its fraud claims against Amaral are not time-
6 barred, Amaral must be dismissed as a defendant.
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8 C. Statutory and Equitable Tolling

9 Wang contends that the time for filing its fraud claims
10 against Amaral was tolled when Banco initiated arbitration over
11 its fee disputes with Wang. Pl's Opp. 8:12-19. Plaintiff bases
12 its argument on the provisions of the California fee arbitration
13 statute Cal. Bus. & Prof. Code §§ 6200 *et seq.*, and on equitable
14 tolling principles. Id. 9:10, 10:24. However, the fee
15 arbitration statute on which Plaintiff's argument relies is
16 limited in scope to fee disputes between attorneys and their
17 clients, and none of the facts alleged by Plaintiff permit this
18 Court to apply equitable tolling principles.
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21 The provisions of Cal. Bus. & Prof. Code §§ 6200 *et seq.*
22 specifically deal with arbitration of attorney-client disputes
23 concerning "fees, costs, or both." Cal. Bus. & Prof. Code §
24 6200(a). The provisions are limited in their application to fee
25 disputes between "attorneys and their clients to whom they have
26 rendered professional services." National Union Fire Ins. Co.
27 v. Stites Prof. Law Corp., 235 Cal. App. 3d 1718, 1727 (1991).
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1 The statute was "designed to provide a speedy and inexpensive
2 method for determining solely the amount of fees that an
3 attorney is entitled to charge the client." Liska v Arns Law
4 Firm, 117 Cal. App. 4th 275, 287 (2004). It does not encompass
5 arbitration of non-fee dispute claims, such as malpractice
6 claims against an attorney, or other claims related to
7 professional misconduct. Cal. Bus. & Prof. Code § 6203(a).
8 Fraud claims against an attorney or client cannot be resolved in
9 BASF arbitration proceedings. Liska, 151 Cal. App. 3d at 288.
10 Fraud claims are separate claims, to which the statute of
11 limitations applies. Id. at 289.

14 Here, Wang misapplies the statute's tolling provision to
15 its renewed claims against Amaral. The statute "limits the
16 scope of arbitration that the client may demand to the amount of
17 reasonable fees (or costs) to which the attorney is entitled."
18 Id. at 282. Wang's fraud claims against Amaral, a non-client
19 and a non-fee dispute claim, are not subject to arbitration
20 under the statute. Only Wang's civil action for legal fees
21 against Banco was tolled until completion of the arbitration.
22 The time for filing an action for fraud against Banco and Amaral
23 was not tolled by the statute. Thus on February 4, 2004, when
24 Banco exercised its right as a client to demand BASF arbitration
25 over the fee dispute, the fee dispute was arbitrated and tolled
26 until completion. There were no fraud claims asserted or
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1 arbitrated in the BASF arbitration proceeding, nor could there
2 have been because Wang's fraud claims against Amaral were not
3 subject to arbitration under the statute. Liska, 151 Cal. App.
4 3d at 288. Accordingly, the time for filing an action for fraud
5 against Amaral was not tolled by Cal. Bus. & Prof. Code § 6206.

7 Plaintiff also argues that Banco's request for arbitration
8 "superseded and stayed" the Original Complaint filed by Wang in
9 September 2004, a complaint filed more than six months after the
10 arbitration was initiated. Pl's Opp. 8:10-27. Plaintiff
11 contends that the statutory stay covered the entire action and
12 precluded it from proceeding against any defendant in the
13 action, including Amaral. Id. 9:1-27, 10:12-24.

15 Here, as discussed above, the stay provisions apply only to
16 a civil action to recover fees as to which a client has a right
17 to demand arbitration. Liska, 151 Cal. App. 3d at 288. The
18 stay would not apply to a claim for fraud brought by Wang
19 against Amaral, a non-client and a non-fee dispute claim.

21 Furthermore, the record demonstrates that Wang possessed
22 information that would have permitted it to bring timely claims
23 against Amaral. Wang could have kept Amaral in the case, rather
24 than intentionally dropping him, or Wang could have brought
25 Amaral into the case again before the applicable three year
26 statute of limitations expired in September 2007. The Original
27 Complaint and subsequent complaints show that Wang was aware of
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1 Amaral's identity and potential liability for fraud. The
2 statute is not tolled while a plaintiff searches for evidence to
3 make out its case. Once the suspicion exists, which was
4 evidenced here in September 2004 in Plaintiff's Original
5 Complaint, Plaintiff must formalize its claims within the
6 statutory period. Ervin v. County of Los Angeles, 848 F.2d
7 1018, 1020 (9th Cir. 1988). Where, as is the case here, the
8 plaintiff had this knowledge and information and failed to bring
9 its claims until the statutory period had passed, equitable
10 tolling will not apply, and a motion to dismiss is proper. Id.
11 Accordingly, the facts and law before the Court show that
12 neither the tolling provisions of Cal. Bus. & Prof. Code § 6206
13 nor the principles of equitable tolling apply to Wang's fraud
14 claims against Amaral.
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18 D. Relation Back Doctrine

19 Wang contends Amaral's motion to dismiss fails because it
20 relies on evidence that goes beyond the face of the TAC and that
21 factual issues preclude this Court from deciding whether
22 relation back would apply to Wang's claims against Amaral. Pl's
23 Opp. 11:1-28, 12:1-26. To obtain "relation back" under Fed. R.
24 Civ. Proc. 15(c)(1)(c) a plaintiff must satisfy all the
25 provisions of the rule, and show: (1) that the amended claims
26 arise out of the "conduct, transaction or occurrence" pleaded in
27 the original complaint; (2) that the new defendant had such
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1 notice of these claims that it would not be prejudiced in
2 defending the action; (3) that defendant had such knowledge that
3 it would have been sued earlier, but for plaintiff's mistake
4 regarding the "proper party's identity;" and (4) that the
5 "notice" and "knowledge of mistake" factors had been satisfied
6 within the period for service prescribed by Rule 4(m). If
7 plaintiff fails to show that any one of these provisions is
8 satisfied, then relation back cannot be applied.
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11 Relation back was not meant to apply where plaintiff made
12 an intentional choice not to sue a defendant, and then sought to
13 bring that defendant back into litigation after the statutory
14 period had passed. Nelson v. Adams, 529 U.S. 460, 467 n.1
15 (2000). Where a plaintiff is aware of defendant's identity and
16 potential liability, but has made a conscious choice to sue
17 certain defendants but not others, then the required element of
18 "mistake" is not present, and the omitted defendant cannot be
19 joined after the statute of limitations has passed. Louisiana-
20 Pacific Corp. v. ASARCO, Inc., 5 F.3d 431, 434 (9th Cir. 1993).
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23 Here, Wang was aware of Amaral's identity, and as the
24 complaints demonstrate, aware of Wang's potential liability for
25 fraud well within the statute of limitations. FAC ¶ 74. Wang,
26 by his own admission, intentionally chose not to pursue
27 litigation against Amaral. Pl's Opp. 3:20-27. Thus, Plaintiff
28 has not satisfied the third prong of the relation back inquiry


1 because there was no mistake as to Amaral's identity or
2 involvement. Wang made a conscious decision not to sue Amaral
3 and now seeks to rejoin Amaral after the statute of limitations
4 has passed. Because Wang cannot satisfy the "mistake"
5 requirement of the relation back rule, relation back will not
6 apply. Accordingly, the facts and law before the Court show
7 that the statute of limitations had run by the time Wang filed
8 its TAC and that relation back does not apply to Wang's fraud
9 claims against Amaral.
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12 III. ORDER

13 For the reasons set for above, Defendant Amaral's motion
14 to dismiss Plaintiff Wang's third amended complaint is GRANTED
15 with prejudice.
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18 It is so ORDERED.

19 Dated: November 25, 2008

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21 JOHN A. MENDEZ,
22 UNITED STATES DISTRICT JUDGE
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