

APPENDICES ATTACHED

APPENDIX A - LOWER TRIAL COURT, LAW & MOTION, DECISION,

APPENDIX B - STATE COURT, COURT OF APPEAL, DECISION,

APPENDIX C - STATE COURT, CALIFORNIA SUPREME COURT, DECISION.

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE**

MINUTE ORDER

DATE: 03/13/2020

TIME: 09:00:00 AM

DEPT: 54

JUDICIAL OFFICER PRESIDING: Christopher Krueger

CLERK: G. Toda

REPORTER/ERM:

BAILIFF/COURT ATTENDANT: N. Alvi, R. Mays

CASE NO: **34-2019-00263643-CU-PO-GDS** CASE INIT.DATE: 08/27/2019

CASE TITLE: **Taylor vs. Otero**

CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Hearing on Demurrer - Civil Law and Motion - Demurrer/JOP

APPEARANCES

Nature of Proceeding: Hearing on Demurrer

TENTATIVE RULING

Defendant Steven Otero's demurrer to Plaintiff's Complaint is **SUSTAINED WITHOUT LEAVE TO AMEND** for the failure to state facts sufficient to constitute a cause of action.

Defendant's request for judicial notice filed in support of its moving papers is granted.

Plaintiff filed this lawsuit on August 27, 2019, premised upon Defendant's representation of him in Criminal Case No. C1522785 in Santa Clara County Superior Court. Defendant was appointed as Plaintiff's defense counsel at his November 10, 2015 arraignment, and Defendant represented Plaintiff for approximately eight months until the court granted Plaintiff's application to remove Defendant as counsel on July 7, 2016.

The prosecution of the underlying criminal case resulted in a no contest plea to one misdemeanor count of violating Penal Code section 417, subdivision (a)(1) (brandishing a weapon). Plaintiff was represented by other counsel at the time of his plea. Following the termination of Defendant's representation, Plaintiff filed several appeals and petitions concerning his criminal case, which have been unsuccessful. On January 17, 2020, the Appellate Division of the Superior Court of Santa Clara issued an order affirming Plaintiff's conviction. (See Def.'s Req. for Judicial Not., Ex. F.) The Appellate Division independently "found no reasonably arguable issues."

Plaintiff alleges in the Complaint three causes of action arising out of Defendant's representation of him in the criminal case: 1) professional negligence, 2) general negligence, and 3) breach of fiduciary duty. All three causes of action are based upon the same general allegations that Defendant: failed to file several motions Plaintiff believed should have been filed, failed to keep Plaintiff informed (or meet with him) to discuss the case, rejected certain facts Plaintiff presented him, and raised his voice at Plaintiff. (Compl. at p. 1, 3, 4.)

Defendant demurs to the Complaint in its entirety on the grounds that it fails to state facts sufficient to

constitute a cause of action because Plaintiff has not alleged his factual innocence and cannot because he has not received postconviction relief.

"When a former criminal defendant sues his or her attorney for legal malpractice resulting in conviction, **the former defendant's actual innocence of the underlying criminal charges is a necessary element of the cause of action.** (*Wiley [v. County of San Diego]* (1998) 19 Cal.4th 532[.]) Moreover, the 'plaintiff must obtain postconviction relief in the form of a final disposition of the underlying criminal case-for example, by acquittal after retrial, reversal on appeal with directions to dismiss the charges, reversal followed by the People's refusal to continue the prosecution, or a grant of habeas corpus relief-as a prerequisite to proving actual innocence in a malpractice action against former criminal defense counsel.' (*Cosica [v. McKenna & Cuneo]* (2001) 25 Cal.4th 1194, 1205[.])" (*Khodayari v. Mashburn* (2011) 200 Cal.App.4th 1184, 1189 [emphasis added].) Further, the "actual innocence requirement" applies not only to causes of action for professional negligence but any others based upon the same primary right, i.e., the right to competent legal representation, regardless of how the causes of action are labeled. (*Id.* at p. 1190.)

Here too, each of Plaintiff's causes of action is premised upon allegations of legal malpractice. Accordingly, the actual innocence requirement applies.

Since Plaintiff has not alleged his actual innocence, Defendant's demurrer is sustained. Moreover, because Plaintiff has not shown a reasonable possibility exists that he can cure the defect by amendment, the demurrer is sustained without leave to amend. Although Plaintiff states in his opposition that he has requested the appellate division vacate its January 17, 2020 order affirming his conviction, he does not contest the records of the underlying criminal proceeding, of which the Court took judicial notice, that show he has not obtained postconviction relief.

Defendant's counsel shall prepare an order for the Court's signature pursuant to California Rules of Court, rule 3.1312.

COURT RULING

There being no request for oral argument, the Court affirmed the tentative ruling.

IN THE
Court of Appeal of the State of California
IN AND FOR THE
THIRD APPELLATE DISTRICT

KENT TAYLOR,
Plaintiff and Appellant,
v.
STEVEN OTERO,
Defendant and Respondent.

C092239
Sacramento County
No. 34201900263643CUPOGDS

BY THE COURT:

The court examined the notice of appeal and determined that the order appealed from is nonappealable. Therefore, the appeal filed on June 12, 2020, is dismissed. (*Youngblood v. Board of Supervisors* (1978) 22 Cal.3d 644, 651.)


RAYE, P.J.

cc: See Mailing List

SUPREME COURT
FILED

NOV 18 2020

Court of Appeal, Third Appellate District - No. C092239

Jorge Navarrete Clerk

S264300

Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

KENT TAYLOR, Plaintiff and Appellant,

v.

STEVEN OTERO, Defendant and Respondent.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice