STATE OF MICHIGAN

COURT OF APPEALS

DALLAS BURTON,

Plaintiff–Appellee,

v

JAMES V. FOWLER,

Defendant–Appellant.

UNPUBLISHED
September 17, 1996

No. 183801
LC No. 94-434180 NM

Before: Jansen, P.J., and Reilly and M.E. Kobza,* JJ.

PER CURIAM.

Defendant appeals by leave granted from a February 10, 1995, order of the Wayne Circuit Court denying his motion for summary disposition brought under MCR 2.116(C)(7) (claim barred because of statute of limitations). We reverse.

This is a legal malpractice action. Plaintiff's rental property was destroyed during renovations being made by a contractor, James Beatty. Apparently, one of Beatty's cement trucks damaged the property during the work. In 1984, Beatty filed suit against plaintiff and State Farm Fire & Casualty Company for breach of contract when plaintiff did not pay on the construction contract. Plaintiff hired defendant as his attorney. Ten months after Beatty filed suit against plaintiff, plaintiff filed a cross-claim against State Farm, his homeowner's insurance carrier. On January 19, 1989, State Farm was dismissed for improper filing. In February 1989, a jury verdict was rendered in the 40th District Court in Beatty's favor.

In October 1989, while litigation was still pending, plaintiff hired a new attorney and defendant turned over the files. Over the next several years, plaintiff unsuccessfully sought postjudgment and appellate relief from the 1989 judgment. The circuit court upheld the judgment on direct appeal, and plaintiff's applications for leave to appeal were denied by this Court (Docket No. 129078) and by the Supreme Court, 437 Mich 1055 (1991). Thereafter, plaintiff filed a motion for a new trial or relief from judgment on the ground of newly discovered evidence. However, the district court denied the motion,

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* Circuit judge, sitting on the Court of Appeals by assignment.

the circuit court affirmed the denial on appeal, and plaintiff's applications for leave to appeal were again denied by this Court (Docket No. 163384) and the Supreme Court, 444 Mich 970 (1994).

Although plaintiff's cross-claim against State Farm had been dismissed, plaintiff pursued a separate lawsuit against State Farm in the Macomb Circuit Court. That lawsuit was instituted when plaintiff's cross-claim was dismissed. On September 24, 1991, the Macomb Circuit Court dismissed all of plaintiff's claims against State Farm except for the claim of fraud. Ultimately, the trial court directed a verdict in State Farm's favor. Plaintiff's motions for reconsideration, a new trial, or for relief from judgment were denied. Plaintiff appealed to this Court, and, on July 21, 1995, this Court reversed and remanded for a new trial. *Burton v State Farm Fire & Casualty Co*, unpublished opinion per curiam of the Court of Appeals, (Docket No. 165641, issued July 21, 1995). The Supreme Court denied the application for leave to appeal on July 29, 1996.

Plaintiff filed the present legal malpractice suit against defendant in the Wayne Circuit Court on November 22, 1994. Defendant moved for summary disposition, arguing that the claim was barred by the statute of limitations. Defendant argued that the suit was not brought within two years of his last performance of legal services for plaintiff, nor was it brought within six months of when plaintiff discovered or should have discovered his malpractice claim against defendant. In response, plaintiff argued that the limitations period was tolled because of the pendency of the appeals. The trial court, apparently agreeing with plaintiff's position, denied defendant's motion for summary disposition. Defendant now appeals this ruling by leave granted.

We review de novo the trial court's decision on a motion for summary disposition. *Peters v Dep't of Corrections,* 215 Mich App 485, 486; 546 NW2d 668 (1996). The affidavits, pleadings, depositions, admissions, and any other documentary evidence submitted must be considered by the court when deciding a motion brought under MCR 2.116(C)(7). MCR 2.116(G)(5).

Defendant asserts that plaintiff's cause of action for legal malpractice is statutorily barred by the statute of limitations provisions of MCL 600.5805; MSA 27A.5805, and MCL 600.5838; MSA 27A.5838. Under § 5805(4), the applicable period of limitation in which to bring a malpractice action is two years from the time the claim accrues. Section 5838(1) provides that the claim accrues "at the time that person discontinues serving the plaintiff in a professional . . . capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." Further, § 5838(2) provides that the claim must be brought within two years from when the claim accrues or within six months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later.

The uncontested facts reveal that in late 1989, plaintiff replaced defendant as his attorney in a series of underlying cases based on a breach of contract action instituted against plaintiff by Beatty. Defendant remained "of counsel" for an indeterminate period of time, but turned all of plaintiff's files over to replacement counsel in 1989. Plaintiff brought his cause of action for legal malpractice on November 22, 1994. Therefore, because the claim accrued for purposes of the statute at the time

defendant last served plaintiff in late 1989, plaintiff's cause of action is clearly barred under the two-year statute of limitations.

Plaintiff, however, argues that under § 5838(2), the statute of limitations was tolled pending finality of the appellate process in the underlying cases when his harm became identifiable and appreciable. Defendant asserts that the six-month discovery period began in January of 1989, when State Farm was dismissed from the underlying cause of action due to improper filing, and a new suit was instituted against State Farm in Macomb Circuit Court.

Under the six-month discovery rule, a cause of action accrues when the plaintiff discovers that he has a possible cause of action. *Gebhardt v O'Rourke*, 444 Mich 535, 544; 510 NW2d 900 (1994). Once an injury and its possible cause is known, the plaintiff is aware of a possible cause of action. *Id.*, p 545. Harm is established by the occurrence of identifiable and appreciable loss, not by the finality of the damages. *Id.*

We find that plaintiff discovered or should have discovered a possible cause of action, suffering identifiable and appreciable loss, on February 23, 1989, when the lower court, in the underlying breach of contract case dismissed State Farm due to plaintiff's improper filing. Plaintiff himself, in his complaint against State Farm, stated that because of the breach of duties by defendant at that point, plaintiff suffered damages in excess of $20,000. Further, plaintiff clearly knew of a possible cause of action when he filed his suit against State Farm in the Macomb Circuit Court in January 1989. Because plaintiff did not bring the instant action until November 1994, it is well outside of the six-month discovery period.

Moreover, the appeals did not toll the limitations period. Our Supreme Court made clear that the statute of limitations is not tolled by an appeal of the underlying matter. *Id.*, p 546. Accordingly, the trial court erred in denying defendant's motion for summary disposition under MCR 2.116(C)(7). Plaintiff's cause of action was not timely filed under § 5805(4) or under § 5838.

We reject plaintiff's claim that § 5838 violates equal protection because it allows a legal malpractice claim to accrue before the determination of damages is final, when other tort claims can only accrue once all elements of proof are present. The statute of limitations under § 5838 affords the opposing party a fair opportunity to defend itself, relieves the court system from dealing with stale claims, and protects potential defendants from protracted fear of litigation. *Gebhardt, supra*, p 546. Further, the six-month discovery period permits a plaintiff some flexibility because it provides additional time to file within six months of when he discovered, or should have discovered, his claim. *Id.*, p 541. Because a reasonable relationship exists between the classification and a legitimate state interest, there has been no denial of equal protection. *Forest v Parmalee*, 402 Mich 348, 356-357; 262 NW2d 653 (1978); *Bissell v Kommareddi*, 202 Mich App 578, 580-581; 509 NW2d 542 (1993).

Reversed and remanded for summary disposition in defendant's favor. Defendant may tax costs.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Michael E. Kobza