

STATE OF MICHIGAN
COURT OF APPEALS

PAUL E. ROCHLEN,

Plaintiff-Appellant,

v

STEPHEN M. LANDAU and LANDAU
GOLDSMITH,

Defendants-Appellees.

UNPUBLISHED
December 13, 2002

No. 232151
Oakland Circuit Court
LC No. 99-019358-NM

Before: Griffin, P.J., and White and Murray, JJ.

PER CURIAM.

Plaintiff filed this action on December 3, 1999, alleging legal malpractice, breach of contract, intentional misrepresentation, and negligent misrepresentation against defendant Stephen Landau, who was his former attorney in an estate matter, and Landau's law firm.¹ The circuit court granted defendants' motion for partial summary disposition of the legal malpractice claim pursuant to MCR 2.116(C)(7), concluding that the claim was barred by the two-year statute of limitations, MCL 600.5805(5).² Plaintiff now appeals as of right, challenging the circuit court's ruling with respect to the statute of limitations. Specifically, plaintiff disputes the court's conclusion that as a matter of law the malpractice claim accrued on November 7, 1997, the date plaintiff picked up his file from defendants' office, rather than December 3, 1997, the date defendants' motion to withdraw was granted in the underlying action. We reverse.

This Court reviews a decision granting summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "When reviewing a motion for summary disposition under MCR 2.116(C)(7), a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor." *Jackson Hog Producers v Consumers Power Co*, 234 Mich App 72, 77; 592 NW2d 112 (1999). If the facts

¹ Landau Goldsmith is a registered assumed name of Stephen M. Landau, P.C., of which Landau is president and sole shareholder.

² The case was later transferred and reassigned to the district court, which subsequently granted defendants' motion for summary disposition of plaintiff's remaining claims. Plaintiff has not appealed the district court's decision.

are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by a statute of limitation is a question for the court to decide as a matter of law. *Id.* However, if a material factual dispute exists, summary disposition is inappropriate. *Id.*

“A legal malpractice claim must be brought within two years of the date that the attorney discontinues serving the client or within six months after the client discovers or should have discovered the claim, whichever is later.” *Hooper v Hill Lewis*, 191 Mich App 312, 314; 477 NW2d 114 (1991); MCL 600.5805(5); MCL 600.5838. Plaintiff’s discovery of the claim is not at issue in the present case. Rather, the focus is on the discontinuation of service. Plaintiff argues that the circuit court erred in determining that the two-year limitation period began to run when plaintiff picked up his file from defendants’ office, improperly concluding that plaintiff had terminated defendants’ representation. As a matter of law, we agree.

In general, an attorney’s representation of a client discontinues, for purposes of the statute of limitations, when “the attorney is relieved of the obligation [to serve] by [either] the client or the court.” *Mitchell v Dougherty*, 249 Mich App 668, 683; 644 NW2d 391 (2002); see also *Hooper, supra* at 315.³ However, this Court has recognized that an attorney-client relationship can be terminated by implication. *Mitchell, supra* at 684.

[N]o formal discharge by the client is required, and the termination of an attorney-client relationship can be implied by the actions or inactions of the client. As stated above, the retention of alternate counsel is sufficient proof of the client’s intent to terminate the attorney’s representation. This Court has also held that a client terminated his attorney’s representation by sending a letter stating that the attorney did not have the authority to act on his behalf. Further, where a client obtained legal advice from an attorney, then had no further contact with that attorney until filing a complaint for legal malpractice, we held that the client relieved the attorney of his obligations on the date the attorney last advised the client. [*Id.* at 684-685 (citations omitted).]

In light of established precedent and the evidence submitted to the trial court, we conclude that the facts of this case establish a factual dispute as to the intent of plaintiff to terminate his relationship with defendants. Defendants did not present any evidence that plaintiff formally discharged defendants, gave instructions that they no longer represented him, discontinued any further contact with defendants, or that he hired other counsel. *Mitchell, supra*. Rather, defendants submitted evidence demonstrating that the relationship between the parties became acrimonious, that plaintiff picked up his file from defendants’ office on November 7, 1997, and that defendants thereafter filed a motion to withdraw, which was granted by the court on December 3, 1997. However, plaintiff presented evidence which specifically countered defendants’ evidence. Plaintiff presented evidence that he picked up his file for the purpose of making photocopies of documents, that he intended to continue with defendant as his legal

³ The general rule does not apply where an attorney is retained to perform a specific legal service, e.g., the sale of a business, in which case the representation ends when the service is completed. *Mitchell, supra* at 683 n 6. That exception is not pertinent to the present case, as defendants were performing ongoing services during the course of continuing litigation.

counsel, that he opposed defendants' motion to withdraw, and that he did not have other legal counsel at the time that the court granted defendants' motion to withdraw. Hence, there was a distinct dispute in the evidence as to plaintiff's intent on November 7, 1997 and beyond. The circuit court's comments at the hearing on defendants' motion for summary disposition suggest that the court was skeptical of plaintiff's explanation for picking up the file. Nonetheless, in ruling on the motion, the court was required to consider the affidavits, pleadings, and documentary evidence in the light most favorable to plaintiff, the nonmoving party. *Barrow v Pritchard*, 235 Mich App 478, 480; 597 NW2d 853 (1999). Viewed in this light, the evidence demonstrated a genuine factual dispute regarding whether the attorney-client relationship ended before the court granted defendants' motion to withdraw.

Relying on *Berry v Zisman*, 70 Mich App 376; 245 NW2d 758 (1976), and *Genrow v Flynn*, 166 Mich 564; 131 NW 1115 (1911), defendants argue that plaintiff's act of picking up his file constituted a constructive discharge. In *Berry*, the Court determined that the plaintiffs effectively discharged their attorney when they filed a legal malpractice action. Based on the record in this case, we are not persuaded that the act of retrieving a file, for purposes of photocopying, was an "unequivocal termination" of the attorney-client relationship that can be likened to the filing of a legal malpractice action. Additionally, *Genrow* concerned a client's suit against his former attorneys to recover a retainer fee. The *Genrow* Court held that the client's dispatch of a telegram that accused the attorneys of deceit and stated, "I don't intend to take your abuse any longer," was the equivalent of a discharge and justifiable cause for the attorneys' failure to fully perform. However, we find the statement, "I don't intend to stand your abuse any longer," in the client's letter in that case much more indicative of an intent to end the representation than can be implied from plaintiff's retrieval of his file in the present case. Thus, plaintiff presented sufficient evidence to create a question of fact with regard to whether he intended to discharge defendants by picking up his file. Accordingly, the circuit court erred in granting defendants' motion for summary disposition of plaintiff's legal malpractice claim, as the evidence established a genuine issue of disputed fact regarding whether the attorney-client relationship was terminated before the court granted defendants' motion to withdraw in the underlying matter.

Defendants argue that summary disposition may nonetheless be affirmed because the legal malpractice claim was also barred by "res judicata and the rule against splitting causes of action." Following the dismissal of the legal malpractice claim, defendants successfully argued that, in light of the parties' settlement of defendants' separate action for legal fees, res judicata and the rule against splitting causes of action barred the breach of contract and misrepresentation claims in the present action. Plaintiff has not challenged the dismissal of the breach of contract and misrepresentation claims. Rather, he is challenging only the dismissal of the legal malpractice claim based on the statute of limitations. Because the circuit court's dismissal of the legal malpractice claim was not based on res judicata or the rule against splitting a cause of action, we disagree with defendants' contention that plaintiff's failure to address the applicability of these principles to the legal malpractice claim waives review of plaintiff's allegation of error. Moreover, the argument that these principles bar the legal malpractice claim was not raised before or addressed by the circuit court and has not been briefed by plaintiff on appeal. Under the circumstances, we conclude that it is inappropriate to address these arguments at this time. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999); *In re Green Charitable Trust*, 172 Mich App 298, 329; 431 NW2d 492 (1988).

Reversed and remanded. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Helene N. White

/s/ Christopher M. Murray