

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD BRESSON and KAREN BRESSON,
d/b/a LENG'S HARDWARE,

UNPUBLISHED
April 4, 2006

Plaintiffs-Appellants,

v

CHRISTOPHER M. VLACHOS and BELL &
ANKLEY, P.C., d/b/a BELL, ANKLEY &
VLACHOS,

No. 266441
Kalamazoo Circuit Court
LC No. 04-000049-NM

Defendants-Appellees.

Before: Neff, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Plaintiffs appeal by right from the order of the circuit court granting summary disposition under MCR 2.116(C)(7) to defendants on plaintiffs' claim alleging legal malpractice. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs owned and operated a hardware store. Defendants are an attorney and his former¹ law firm. In 1998, plaintiffs' hardware business, along with other buildings, was destroyed in an explosion and ensuing fire caused by a gas leak from a line maintained by Consumers Energy. Plaintiffs engaged defendants to represent them in dealing with their insurance company and local authorities in rebuilding their store. Plaintiffs and defendant Vlachos also discussed a potential negligence claim against Consumers Energy. Vlachos advised that a lawsuit against Consumers Energy would be expensive and suggested that they should wait while the insurance companies for the other property owners sued Consumers Energy on their subrogation claims before plaintiffs litigated their potential claim. Vlachos further indicated that he would monitor the situation and do what was necessary to protect plaintiffs' potential interests, and there is evidence in the record that he did, to some extent, monitor the status of the subrogation claims. In a letter dated December 15, 1999, Vlachos

¹ Defendant Vlachos left defendant law firm to practice law in Florida approximately 3 years before the motion for summary disposition was heard in 2005.

indicated that he was pursuing a potential liability claim against Consumers Energy for uninsured losses.

By the end of 1999, plaintiffs had essentially received the limits of their insurance coverage as a result of negotiation between defendant Vlachos and the insurance company. According to Vlachos, he thought that plaintiffs had been fully compensated for fire-related losses and December 2, 1999, was the last date for which defendants billed plaintiffs for work relating to the fire.² According to plaintiffs, they still had uncompensated losses and they discussed a potential claim against Consumers Energy with Vlachos during 1999 and 2000. Vlachos performed various legal services for plaintiffs until 2002, but he did not perform or bill for any services related to plaintiffs' fire loss after 1999. Plaintiffs acknowledged that they had no discussion with Vlachos about the claim against Consumers Energy after 2000. The three-year statute of limitations for a potential negligence action against Consumers Energy expired on December 17, 2001. MCL 600.5805(10).

In June of 2003, plaintiffs learned that the insurance companies were proceeding against Consumers Energy. At that point, plaintiffs acknowledge, for all of 2001, 2002 and for the first half of 2003, they had heard absolutely nothing from defendants about any claim against Consumers Energy and they had not done anything to inquire into the status of that claim. According to plaintiffs, they contacted defendants in mid-August 2003 to learn what happened to their claim. Defendant law firm advised them that their case had been closed, a suit had not been filed, and that the attorney handling their claim had left the firm. According to defendants, plaintiffs contacted them about their claim in June 2003.

Plaintiffs sued defendants for legal malpractice on February 3, 2004. Defendants moved for summary disposition, arguing that plaintiffs' claim was barred by the two-year statute of limitations for malpractice claims, MCL 600.5805(6), and by the six-month discovery rule, MCL 600.5838(2). After oral argument, the trial judge denied the motion on the grounds that there was "a question of fact as to whether the attorney-client relationship ended within or outside the applicable filing period." However, when the court issued its written opinion two months later, he granted defendants' motion, finding that plaintiffs should have discovered that they had a potential claim against defendants no later than 2002. The judge noted that plaintiffs had not been deposed or involved in any settlement discussions and had not discussed the case with their attorney since 2000. The judge concluded that reasonably diligent clients would have inquired about their claim. We hold that the trial court was correct in holding that, regardless of when the attorney-client relationship ended with regard to a claim against Consumers Energy for uninsured losses, if any, plaintiffs' lack of due diligence leads to the conclusion that plaintiffs should have discovered their cause of action against defendants not later than 2002 and they are therefore foreclosed from pursuing this legal malpractice claim.

² One of the curious aspects of this case is that defendants billed plaintiffs for time spent on recovery for fire-related damages, but the parties also executed a contingent fee agreement. As the trial court noted, the existence of a contingent fee agreement is suggestive of a separate agreement to pursue a claim against Consumers Energy separate from the one against plaintiffs' insurer.

In his written opinion, the trial judge acknowledged that there are unresolved issues of fact and credibility. However, he found that because plaintiffs had not had any communication with defendants about their claim against Consumers Energy after 2000 and they did not inquire about the status of the claim until the summer of 2003, they had failed in their duty of reasonable diligence which required them to make some inquiry long before they did. Relying on *Moll v Abbott Laboratories*, 444 Mich 1; 506 NW2d 816 (1993), he concluded as a matter of law that plaintiffs should have discovered their cause of action against defendants not later than 2002 and that, as a consequence, the six-month discovery extension expired long before this case was filed. We agree with the trial court.

Under the discovery rule, a plaintiff may sue a defendant “any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later.” MCL 600.5838(2). Here, according to plaintiffs, their suit was timely because they filed their suit on February 3, 2004, within six months of learning in late August that defendants did not file their claim within the limitation period. However, based on the record in this case, we agree with the trial court and conclude that plaintiffs should have discovered defendants’ alleged malpractice by no later than 2002. By that time, plaintiffs had heard nothing about their claim for at least two years. They were not deposed, informed of any proceedings in the case, or apprised of settlement discussions. Reasonably prudent and diligent potential plaintiffs would have inquired about the status of their claim after that period of silence from their attorney. Accordingly, we conclude that plaintiffs did not file their claim within six months of when they should have discovered their potential claim of malpractice against defendant and that their claim is, therefore, time-barred.

Plaintiffs also claim on appeal that their suit is timely under the doctrine of fraudulent concealment because defendants concealed their malpractice by their silence when they had a duty, as fiduciaries, to disclose that they failed to file an action against Consumers Energy within the limitation period. This issue was not raised or argued below, although the trial court made a gratuitous reference to it in his written opinion. We decline to address this issue because plaintiffs did not preserve this issue for review and because we do not find that review of this issue is otherwise necessary to a proper determination of this case. *Szidik v Podsiadlo*, 109 Mich App 446, 451-452; 311 NW2d 386 (1981).

Affirmed.

/s/ Janet T. Neff
/s/ Henry William Saad
/s/ Richard A. Bandstra