

STATE OF MICHIGAN
COURT OF APPEALS

RANDY H. BERNSTEIN, D.P.M.,
Plaintiff-Appellant,

UNPUBLISHED
February 20, 2014

v

SEYBURN, KAHN, GINN, BESS, & SERLIN
CORP., and BARRY R. BESS,

No. 313894
Oakland Circuit Court
LC No. 2008-096538-NM

Defendants-Appellees.

Before: GLEICHER, P.J., and SAAD and FORT HOOD, JJ.

PER CURIAM.

I. NATURE OF THE CASE

Plaintiff Randy Bernstein, a podiatrist, entered into a business relationship with Kenneth Poss, another podiatrist. Because Poss had lost his medical license (for insurance fraud), plaintiff and Poss each had a specific duty in the new practice: plaintiff conducted the medical practice, while Poss managed the office's business affairs. To implement this arrangement, Poss suggested that his lawyer, defendant Barry Bess, represent both Poss and plaintiff, and handle the incorporation and corporation documents for the new venture. Plaintiff agreed with Poss's suggestion, and both he and Poss agreed to split the profits from the business equally.

Accordingly, Bess acted as lawyer for plaintiff, Poss, and the various corporate entities utilized over the years, while both podiatrists worked together and shared the profits of the business on an equal basis. But plaintiff claims that he eventually discovered, to his dismay, that the 50-50 ownership arrangement (via stock holdings) was illusory. He alleges that Poss, with the connivance and active fraud of Bess, converted what he thought was his 50 percent ownership into a mere employment relationship.

Plaintiff thus sued Bess for legal malpractice and breach of fiduciary duty for fraudulently working with Poss to defraud plaintiff of his business interests. The trial court erroneously dismissed plaintiff's legal malpractice claim as time barred, and incorrectly ruled that because plaintiff's breach of fiduciary claim was subsumed by his legal malpractice claim that this claim was time barred as well.

We hold that plaintiff's legal malpractice claim is not time barred, and that his breach of fiduciary duty claim is a separate and distinct tort with its own statute of limitations. Plaintiff

should have an opportunity to prove that defendant Bess fraudulently concealed this breach of fiduciary duty claim, which, if true, may preserve plaintiff's breach of fiduciary duty claim. Therefore, we reverse and remand to the trial court for further proceedings consistent with this opinion.

II. FACTS

Plaintiff and Kenneth Poss are two podiatrists who previously practiced together. Defendant Barry Bess is an attorney who represented plaintiff and Poss, as well as their various closely held corporations. In 1991, Poss, who then faced the suspension of his medical license, approached plaintiff about working for Poss's practice. Poss offered to form a new company with plaintiff, where plaintiff would provide podiatric services to Poss's former patients. In return, Poss would provide management and administrative services under the agreement until his suspension ended, and plaintiff and Poss would share all profits equally. On Poss's recommendation, plaintiff retained Bess to form and incorporate the new entity, entitled Foot Health Centers, P.C. (FHC).

From approximately 1991 to 1998, FHC operated and conducted business with plaintiff serving as the sole shareholder of the company. On December 18, 1998, Poss formed a new entity, Foot & Ankle Health Centers, P.C. (FAHC). Thereafter, defendant Bess prepared a certificate of assumed name that indicated that FAHC would be doing business under the assumed name of FHC. At the time Poss incorporated FAHC, he designated himself as a 98 percent shareholder in the company, and designated plaintiff as a two percent shareholder. Defendant Bess prepared the incorporation papers for FAHC at Poss's direction. On December 29, 2000, with legal advice from defendant Bess, plaintiff ratified a document entitled "Consent in Lieu of Special Joint Annual Shareholders and Directors Meeting"; this document approved "any and all actions taken on behalf of the Corporation by the Officers, Shareholders and the sole member of the Board of Directors, since inception"

On May 15, 2002, Poss established Sunset Boulevard, LLC ("Sunset"), which purchased the building that served as the main location for three of FAHC's offices. Defendant Bess performed the requisite legal work for the formation of Sunset. At the time, plaintiff believed that he had a 50 percent interest in Sunset. In 2004, plaintiff began to question Poss's control of their business ventures. In approximately November 2005, plaintiff asked Ken Gross, a longtime friend and an attorney, to contact defendant Bess and request copies of pertinent corporate documents and tax returns. Gross did so, but Bess did not provide the documents. At a December 16, 2005 year-end corporate meeting for FAHC, plaintiff discovered that he was only a two percent shareholder in FAHC. In April of 2006, plaintiff informed Poss and defendant Bess that he no longer wished to work for FAHC. On April 28, 2006, defendant Bess wrote plaintiff a letter outlining plaintiff's legal obligations to FAHC. Subsequently, in June 2006, plaintiff discovered that he did not have an equity interest in Sunset.

On April 28, 2008, plaintiff filed a complaint, claiming legal malpractice and breach of fiduciary duty against defendants. In Count I of his complaint, plaintiff alleged malpractice against defendants for: (1) acting under a conflict of interest by representing plaintiff individually, Poss individually and FAHC, an entity of which plaintiff was a member; (2) failing to provide plaintiff with notice of significant corporate events, such as the reduction of his

ownership from 100 percent of FHC stock to two percent of FAHC stock; (3) allowing plaintiff to ratify the December 29, 2000 Consent in Lieu of Joint Annual Shareholders Meeting without informing plaintiff of the effects of the ratification; and (4) allowing Poss to convert plaintiff's equity interest in the manner noted above and to assume the assets of FAHC without any compensation to plaintiff. In Count II of his complaint, plaintiff alleged that defendant Bess breached his fiduciary duty to plaintiff by allowing Poss to commit fraud and to convert plaintiff's shares of stock. Plaintiff alleged that at all times, defendant Bess knew that Poss and plaintiff intended to become equal shareholders, and that Poss defrauded plaintiff by converting his shares in FAHC and his interest in Sunset. Plaintiff further alleged that defendant Bess contributed to Poss's fraud by preparing the necessary corporate documents that effectuated the transfer of shares, and by not providing plaintiff with any notice about the transfer of shares.

Following discovery, the trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) because it found that the statute of limitations time-barred plaintiff's legal malpractice claim. It further found that plaintiff's breach of fiduciary duty claim was subsumed in his legal malpractice claim. Thus, it concluded that the breach of fiduciary duty claim was also untimely.

II. STANDARD OF REVIEW

"This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7) (claim is barred by statute of limitations)." *Hoffman v Boonsiri*, 290 Mich App 34, 39; 801 NW2d 385 (2010). "When reviewing a motion for summary disposition under MCR 2.116(C)(7), the trial court must accept the nonmoving party's well-pleaded allegations as true and construe the allegations in the nonmovant's favor to determine whether any factual development could provide a basis for recovery." *Id.*

III. ANALYSIS

A. MALPRACTICE

"Pursuant to MCL 600.5805(6) and MCL 600.5838(2), a plaintiff must file a legal-malpractice action within two years of the attorney's last day of service to the plaintiff or within six months of when the plaintiff discovered or should have discovered the claim, whichever is later." *Wright v Rinaldo*, 279 Mich App 526, 534; 761 NW2d 114 (2008). Here, plaintiff does not rely on the six-month discovery rule, and therefore, the issue before this Court is whether plaintiff's complaint was timely under the two-year statute of limitations set forth in MCL 600.5805(6). MCL 600.5838(1) sets forth the accrual of a cause of action for malpractice:

Except as otherwise provided in section 5838a or 5838b, a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional 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.

Therefore, a claim for legal malpractice accrues when an attorney discontinues serving the plaintiff in a professional capacity. MCL 600.5838(1); *Kloian v Schwartz*, 272 Mich App 232, 237; 725 NW2d 671 (2006).

“Special rules have been developed in an effort to determine exactly when an attorney ‘discontinues serving the plaintiff in a professional . . . capacity’ for purposes of the accrual statute.” *Kloian*, 272 Mich App at 237. For instance, “[a] lawyer discontinues serving a client when relieved of the obligation by the client or the court” *Maddox v Burlingame*, 205 Mich App 446, 450; 517 NW2d 816 (1994). Other situations require the application of the more general rule that “a legal malpractice claim accrues on the attorney’s last day of professional service in the matter out of which the claim for malpractice arose.” *Kloian*, 272 Mich App at 238 (quotation omitted).

Furthermore, regarding the date on which a claim for malpractice accrues, the Michigan Supreme Court explained that if a plaintiff receives professional services for a specific event out of which an injury arises, as well as related continuing services, the end of the continuing services, not the specific event, constitutes “the matters out of which the claim for malpractice arose.” *Levy v Martin*, 463 Mich 478, 489; 620 NW2d 292 (2001), quoting MCL 600.5838(1). Known as the “last treatment rule,” this rule applies to all claims against non-medical state licensed professionals. *Id.* at 488. In *Levy*, the defendant accountants prepared the plaintiffs’ annual tax returns from 1974 until 1996. *Id.* at 480-481. After an IRS audit, plaintiffs filed a malpractice suit in 1997 pertaining to tax returns filed in 1992 and 1993. *Id.* at 481. The Michigan Supreme Court held that the plaintiffs’ claim for malpractice did not begin to accrue until the defendants ceased providing generalized tax services to the plaintiffs in 1996 because “rather than receiving professional advice for a specific problem, [plaintiffs] were receiving generalized tax preparation services from defendants. These continuing services . . . must be held to constitute ‘the matters out of which the claim for malpractice arose.’” *Id.* at 489, quoting MCL 600.5838(1).

Summary disposition pursuant to MCR 2.116(C)(7) was thus inappropriate as to plaintiff’s legal malpractice claim. Plaintiff’s complaint alleges that he retained defendant Bess to incorporate FHC in 1991, and that “[a]t all times, [plaintiff] looked to [defendant] Bess as his attorney and as the attorney for the corporation” Thus, plaintiff alleges that defendant Bess provided him with generalized legal services. He also alleges that defendant Bess’s malpractice arose out of these generalized legal services, as he asserted that during the course of the representation, defendant Bess committed malpractice by failing to inform that he represented Poss in taking actions that were adverse to plaintiff’s interests. This case is therefore analogous to *Levy*, 463 Mich at 481, 489. Although defendants’ involvement began with a specific legal service for plaintiff—i.e., the formation of FHC—plaintiff alleged that defendant Bess’s services continued as general legal services. And, because the same type of services continued

throughout the representation, plaintiff was entitled to rely upon the effectiveness of those services until the relationship terminated. See *Id.* at 485.¹

April 28, 2006, when defendant Bess sent plaintiff a letter outlining plaintiff's supposed legal obligations to FAHC, is the last date on which defendants rendered professional services to plaintiff. Accordingly, plaintiff's complaint, which was filed on April 28, 2008, was timely. MCL 600.5805(6). We reject defendants' argument that plaintiff's consultation with Gross in 2005 terminated his attorney-client relationship with defendants. Plaintiff contacted Gross as additional, rather than substitute counsel, *Maddox*, 205 Mich App at 451, and, after plaintiff contacted Gross, defendants continued to provide plaintiff with general legal advice. Accordingly, plaintiff's complaint, which was filed on April 28, 2008, was timely. See *Id.* See also MCL 600.5838(1); MCL 600.5805(6).

B. BREACH OF FIDUCIARY DUTY

The trial court found, incorrectly, that plaintiff's breach of fiduciary duty claim was subsumed in his legal malpractice claim and that because his legal malpractice claim was time barred, so was his breach of fiduciary duty claim. In order to determine which period of limitations applies to plaintiff's breach of fiduciary duty claim,

we must first determine the true nature of the claim. The type of interest allegedly harmed is the focal point in determining which limitation period controls. It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim. [*Adams v Adams*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007) (citations and quotation omitted).]

A legal malpractice claim involves a plaintiff's interest in damages arising from the defendant attorney's breach of the professional standard of care. See e.g., *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 424; 551 NW2d 698 (1996). By contrast,

[t]he conduct required to constitute a breach of fiduciary duty requires a more culpable state of mind than the negligence required for malpractice. Damages may be obtained for a breach of fiduciary duty when a "position of influence has

¹ The facts of this case are also analogous to those of *Nugent v Weed*, 183 Mich App 791; 455 NW2d 409 (1990). In *Nugent*, the plaintiff hired the defendant to perform general legal services, and these services continued from approximately 1971 to 1984. *Id.* at 793. Because of these general and continuous legal services, our Court held that the plaintiff's malpractice claim, which was filed more than two years after the date of some of the instances of malpractice, but within two years after the defendant last rendered professional services to the plaintiff, was timely. *Id.* at 796. Similarly, Mr. Bernstein's malpractice claim did not begin to accrue until the date Bess last rendered him a professional service, despite the fact that some of plaintiff's alleged instances of malpractice occurred more than two years before he filed his complaint. See *Id.* See also *Maddox*, 205 Mich App at 450-451.

been acquired and abused, or when confidence has been reposed and betrayed.”
[*The Meyer and Anna Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 47; 698 NW2d 900 (2005), quoting *Vicencio v Ramirez*, 211 Mich App 501, 508; 536 NW2d 280 (1995).]

Further, “this Court has held that claims against attorneys brought on the basis of inadequate representation sound in tort and are governed by the malpractice statute of limitations[,]” even if the plaintiff classifies the claim as something other than legal malpractice. *Aldred v O’Hara-Bruce*, 184 Mich App 488, 490; 458 NW2d 671 (1990). However, claims alleging fraud by an attorney allege more than the mere breach of the applicable standard of care. *Brownell v Garber*, 199 Mich App 519, 532; 503 NW2d 81 (1993).

The trial court thus erred as a matter of law when it found that plaintiff’s legal malpractice claim subsumed his claim for breach of fiduciary duty. In alleging breach of fiduciary duty, plaintiff alleged that defendant Bess “contributed to the fraud and conversion committed by Poss by preparing the necessary corporate documents that effectuated the transfer [of stock] without providing any notice to [plaintiff].” This was not an allegation that defendants breached the appropriate standard of care. Rather, it was an allegation that defendants assisted Poss in committing fraud. As such, plaintiff’s complaint alleged more than mere negligence by defendants in their professional services rendered to plaintiff, and plaintiff independently pleaded a breach of fiduciary duty claim. See *Prentis Family Foundation*, 266 Mich App at 47; *Brownell*, 199 Mich App at 532.

Though the statute of limitations for breach of fiduciary duty claims is three years,² in actions such as this one—where the plaintiff alleges that the defendants fraudulently concealed the existence of a claim—the “action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.” MCL 600.5855. We therefore remand to the trial court wherein plaintiff may pursue his claim that defendants fraudulently concealed their breach of fiduciary duty from plaintiff.³

² *Wayne Co Employees Retirement Sys v Wayne Co*, 301 Mich App 1, 67 n 37; 836 NW2d 279 (2013). We note that many of the instances of which plaintiff complains took place more than three years before he filed his complaint. Absent fraudulent concealment of those actions by defendant, it is possible that plaintiff’s breach of fiduciary duty claim is time barred.

³ Defendants’ argument that plaintiff did not preserve his fraudulent concealment claim is without merit. As noted, the trial court did not address this issue because it incorrectly held that plaintiff’s breach of fiduciary duty claim was subsumed by his claim for legal malpractice. And though plaintiff’s complaint at the trial court is not a model of clarity and did not mention MCL 600.5855, it alleges Bess effectuated and acted to conceal Poss’ fraud against plaintiff—in other words, that he fraudulently concealed plaintiff’s claim. See *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011) (“The gravamen of plaintiff’s action is

IV. CONCLUSION

We hold that: (1) plaintiff's legal malpractice claim is not time barred; (2) plaintiff's breach of fiduciary duty claim is a separate and distinct tort, with its own statute of limitations; and (3) plaintiff should have an opportunity to prove that defendant Bess concealed his fraud, which, if true, may preserve plaintiff's suit for breach of fiduciary duty.

Therefore, we reverse and remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Henry William Saad
/s/ Karen M. Fort Hood

determined by examining the entire claim. The courts must look beyond the procedural labels in the complaint and determine the exact nature of the claim”) (citations omitted).