2017 IL App (1st) 152038-U

FIFTH DIVISION
March 24, 2017

No. 1-15-2038

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

CHUCK DORFMAN, MARK ROMZ, and TSTD SERVICES GROUP, INC.,	)	Appeal from the Circuit Court of Cook County
Plaintiffs,	)	
v.	)	
FOREMAN FRIEDMAN, PA, WICZER & ZELMAR, LLC, ELLIOT WICZER, THE LAW OFFICES OF ERIC FREIBRUN, LTD, and ERIC FREIBRUN,	)	No. 14 L 10100
Defendants	)	
(Chuck Dorfman, Plaintiff-Appellant; The Law Offices of Eric Freibrun, Ltd. and Eric Freibrun, Defendants-Appellees and Cross-Appellants).	)	Honorable Patrick J. Sherlock, Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justice Hall concurred in the judgment.
Presiding Justice Gordon specially concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County where plaintiff's lawsuit was properly dismissed pursuant to section 2-619(a)(5) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(5) (West 2014)).

¶ 2 Plaintiff Chuck Dorfman appeals from an order of the circuit court of Cook County dismissing his legal malpractice complaint against defendants The Law Office of Eric Freibrun, Ltd. and Eric Freibrun (the Freibrun defendants). On appeal, plaintiff contends: (1) he sufficiently alleged a cause of action for legal malpractice against the Freibrun defendants; (2) his cause of action was not time barred by the two-year statute of limitations for legal malpractice claims; and (3) his lawsuit was not barred by collateral estoppel. In addition, plaintiff maintains that while he did not so request, he should have been provided an opportunity to file an amended complaint. Because we find the legal malpractice action was not timely filed, we affirm.

¶ 3 BACKGROUND

¶ 4 Plaintiff's legal malpractice complaint alleges the following. In 2003, he founded tSTD Services Group, Inc. (tSTD), a testing company that provides confidential, affordable, quick and accurate testing for sexually transmitted diseases without requiring a visit to a doctor or clinic. Mark Romz (Romz) thereafter founded Romz Technology Services, which operated under the name tSTD Services Online to run the testing company.

¶ 5 In 2007, tSTD entered into an agreement with Ajuga Media, LLC (Ajuga) for lead development and marketing services in exchange for 15% of all orders. The agreement further provided that Ajuga would treat all information it received from tSTD as confidential and not disclose the information to any third party for a period of three years. Despite this agreement, plaintiff discovered that Ajuga was stealing tSTD's trade secrets and providing them to a competitor (Analyte Health). Analyte Health allegedly profited from the shared information to tSTD's financial detriment.

¶ 6 Upon making this discovery, plaintiff approached the Freibrun defendants for the purpose

of employing their services to pursue a claim against Ajuga. According to plaintiff, he established an attorney-client relationship with the Freibrun defendants as evidenced by an unsigned engagement letter. Plaintiff was thereafter referred to Elliot Wiczer of Wiczer & Zelmar, LLC (the Wiczer defendants), who undertook plaintiff's representation.

¶ 7 On July 19, 2010, the Wiczer defendants filed a complaint on behalf of tSTD against Ajuga and others. The complaint asserted claims only on behalf of tSTD for trade secret misappropriation and breach of contract and sought damages for lost profits in excess of $2,000,000. Ajuga moved for partial summary judgment, asserting that tSTD's damages were limited to no more than $114,673.35. The circuit court agreed and on January 11, 2012, granted Ajuga's motion for partial summary judgment. No motion to reconsider was filed. Thereafter, on May 18, 2012, tSTD filed a motion to voluntarily dismiss its complaint, which was granted on June 11, 2012.

¶ 8 Following the dismissal in the underlying matter, the Wiczer defendants (which now included Foreman Friedman, PA), filed a cause of action against plaintiff and tSTD for unpaid legal fees incurred during the underlying case. Plaintiff alleged in his affirmative defenses that the Wiczer defendants' services and expenses in the underlying case were not necessary, reasonable, or performed in a competent manner. Plaintiff further alleged that it was "conceivable that tSTD will suffer damages during the pendency of this lawsuit as a result of the conduct of plaintiff and its predecessors in interest in handling the Ajuga case." The matter proceeded to trial and a final judgment was entered for the Wiczer defendants against plaintiff and tSTD in the amount of $72,967. The matter was not appealed.

¶ 9 On September 26, 2014, plaintiff, along with Romz and tSTD, filed the instant legal malpractice complaint against the Freibrun and Wiczer defendants. The complaint alleged

Wiczer was guilty of professional negligence in the underlying cause of action due to failing to: (1) follow plaintiffs' objectives throughout the course of the underlying litigation; (2) understand and appreciate the difference between tSTD and Romz Technology Services; (3) effectively communicate; (4) know and apply the law relating to trade secrets; and (5) prepare for trial in any meaningful way. In addition, it was alleged that the Freibrun and Wiczer defendants counseled plaintiff, Romz, and tSTD to perjure themselves at their depositions and made poor strategic and tactical decisions with respect to discovery. The complaint further alleged that the Wiczer defendants' negligence was attributable to the Freibrun defendants because the Freibrun defendants allegedly received a referral fee from the Wiczer defendants which was not disclosed pursuant to Rule 1.5 of the Illinois Rules of Professional Conduct. The one-count complaint alleged that but for the negligence of the Freibrun and Wiczer defendants in the underlying lawsuit, tSTD would have recovered and collected in excess of $10,000,000 against Ajuga.

¶ 10 On November 21, 2014, the Wiczer defendants filed a combined motion to dismiss under section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2014)) asserting: (1) the claim should be dismissed under section 2-615 (735 ILCS 5/2-615 (West 2014)) because plaintiff failed to allege sufficient facts to state a cause of action; (2) the claim should be dismissed under section 2-619(a)(5) (735 ILCS 5/2-619(a)(5) (West 2014)) because it was barred by the two-year statute of limitations provided in section 13-214.3(b) (735 ILCS 5/13-214.3(b) (West 2014)) for actions "against an attorney arising out of an act or omission in the performance of professional services;" and (3) that the claim was barred by *res judicata* due to the final judgment entered in the attorney fee case. The Wiczer defendants further filed a motion for sanctions pursuant to Illinois Supreme Court Rule 137 (eff. July 1, 2013).

¶ 11 On February 23, 2015, the Freibrun defendants filed a similar motion to dismiss pursuant

to section 2-619.1 of the Code. The Freibrun defendants argued: (1) plaintiff failed to allege a sufficient cause of action; (2) the claim was barred by the two-year statute of limitations; and (3) that the claim was barred by collateral estoppel. The Freibrun defendants also filed a motion for sanctions pursuant to Rule 137.

¶ 12 On March 3, 2015, the circuit court granted the Wiczer defendants' motion to dismiss finding the claims in the complaint against them were barred by *res judicata* based on the final judgment obtained by the Wiczer defendants in the attorney fee case. The circuit court reserved ruling on the Wiczer defendants' motion for sanctions.

¶ 13 Thereafter, on June 24, 2015, the circuit court granted the Freibrun defendants' motion to dismiss with prejudice finding that the complaint failed to state a cause of action for legal malpractice against them. The circuit court found the facts alleged did not and could not establish that Freibrun represented plaintiff, Romz, or tSTD in the underlying action so as to be liable for the Wiczer defendants' alleged negligence. The circuit court further denied the Freibrun defendants' motion for sanctions. Plaintiff did not request leave to file an amended complaint.

¶ 14 Following the circuit court's ruling dismissing the complaint against the Freibrun defendants, plaintiff attempted to appeal the matter, but it was premature due to the fact the Wiczer defendants' motion for sanctions remained pending. Plaintiff, Romz, tSTD and the Wiczer defendants then agreed to settle the matter under the condition that the Wiczer defendants would withdraw their motion for sanctions and plaintiff, Romz, and tSTD would not appeal the circuit court's order granting their motion to dismiss. On July 21, 2015, plaintiff, Romz, tSTD and the Wiczer defendants filed a joint motion seeking a good faith finding regarding the settlement. The Freibrun defendants filed a motion in opposition to the joint motion; however,

on August 20, 2015, the circuit court granted the joint motion and entered the good faith finding.

¶ 15 Plaintiff, Romz, and tSTD filed a notice of appeal, but subsequently Romz and tSTD were dismissed by this court for want of prosecution. Accordingly, only plaintiff remains as the appellant. The Freibrun defendants cross-appealed, challenging the circuit court's August 20, 2015, order.

¶ 16 ANALYSIS

¶ 17 We first address plaintiff's appeal. Plaintiff maintains that the circuit court erred in dismissing his complaint with prejudice because: (1) he sufficiently plead a cause of action for legal malpractice; (2) his claim is not barred by the statute of limitations; and (3) his claim is not barred by collateral estoppel. We observe that while the circuit court dismissed plaintiff's complaint on the basis that it did not, and could not, state a cause of action for legal malpractice, we may affirm for any basis that appears in the record. *Joyce v. DLA Piper Rudnick Gray Cary LLP*, 382 Ill. App. 3d 632, 638 (2008).

¶ 18 Defendant here presented a hybrid motion to dismiss under section 2-619.1 of the Code, citing both section 2-615 and 2-619 of the Code. 735 ILCS 5/2-619.1 (West 2014). Our review of an order granting a motion to dismiss is *de novo*, whether that motion is brought pursuant to sections 2-615 or 2-619 of the Code. *Phelps v. Land of Lincoln Legal Assistance Foundation, Inc.*, 2016 IL App (5th) 150380, ¶ 11. Under *de novo* review, we perform the same analysis that a circuit court would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 19 Generally, a section 2-615 motion challenges the legal sufficiency of a complaint by alleging defects apparent on its face. 735 ILCS 5/2-615 (West 2014); *In re Estate of Powell*, 2014 IL 115997, ¶ 12. In analyzing a section 2-615 motion, the court must determine whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are

sufficient to state a cause of action upon which relief can be granted. *Phelps*, 2016 IL App (5th) 150380, ¶ 11. A section 2-615 motion admits as true all well-pleaded facts, but not conclusions of law or factual conclusions that are unsupported by allegations of specific facts. *Id.*

¶ 20 In contrast, a motion to dismiss pursuant to section 2-619 (735 ILCS 5/2-619 (West 2014)) admits the legal sufficiency of the complaint, but asserts certain defects, defenses or other affirmative matters that appear on the face of the complaint or are established by external submissions that act to defeat the claim. *Wallace v. Smyth*, 203 Ill. 2d 441, 447 (2002). Specifically, subsection (a)(5) of section 2-619 allows dismissal when "the action was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2014). In ruling on a section 2-619 motion, all pleadings and supporting documents must be construed in a light most favorable to the nonmoving party, and the motion should be granted only where no material facts are in dispute and the defendant is entitled to dismissal as a matter of law. *Kheirkhahvash v. Baniassadi*, 407 Ill. App. 3d 171, 176 (2011); *Mayfield v. ACME Barrel Company*, 258 Ill. App. 3d 32, 34 (1994). In this instance, we find the issue of plaintiff's compliance with the statute of limitations to be dispositive.

¶ 21 Plaintiff asserts that his legal malpractice claim was not barred by the statute of limitations because it was not until June 2014 when he "became aware of the professional negligence when he was provided an analysis of the claim [by another attorney] that indicated that the Defendants negligently handled the matter." Thus, plaintiff contends that he would have had until June 2016 to file his claim.

¶ 22 The Freibrun defendants disagree. They maintain that plaintiff knew or reasonably should have known of his injury on January 11, 2012, the date that the circuit court entered partial summary judgment on the issue of damages in the amount of $114,673.35 instead of the

$10,000,000 he believed the claim was worth. The Freibrun defendants assert that, "A reasonable person, upon learning that their pending claim was capped at an amount nearly $10,000,000.00 less than the minimum amount they valued it at due to an adverse judgment, would have had enough information to be put on inquiry to determine whether actionable conduct is involved."

¶ 23 An action for legal malpractice must be commenced within two years from the time the plaintiff "knew or reasonably should have known of the injury for which damages are sought." 735 ILCS 5/13-214.3(b) (West 2014). To be considered injured, a legal client must suffer a loss for which he or she may seek monetary damages. *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 306 (2005). Generally, that loss will not occur until the plaintiff has suffered an adverse judgment, settlement, or dismissal of the underlying action caused by the attorney's alleged negligence. *Lucey v. Law Offices of Pretzel & Stouffer, Chartered*, 301 Ill. App. 3d 349, 356 (1998). "[A] plaintiff is injured at the time an adverse judgment is entered, even if the amount of damages is uncertain or the judgment might be later reversed." *Butler v. Mayer, Brown and Platt*, 301 Ill. App. 3d 919, 923 (1998) (citing *Belden v. Emmerman*, 203 Ill. App. 3d 265, 270 (1990); *Zupan v. Berman*, 142 Ill. App. 3d 396, 399 (1986)). The statute of limitations may even commence prior to an adverse judgment being entered. See *Nelson v. Padgitt*, 2016 IL App (1st) 160571, ¶ 15 (the plaintiff should have known of his injury when he was terminated under the employment agreement negotiated for him by the attorney).

¶ 24 This statute of limitations incorporates the " 'discovery rule,' " under which the "limitations period begins to run only when the plaintiff 'knows or reasonably should know of his injury and also knows or reasonably should know that it was wrongfully caused.' " *Morris v.*

Margulis, 197 Ill. 2d 28, 35-36 (2001) (quoting *Witherell v. Weimer*, 85 Ill. 2d 146, 146 (1981)). The term "wrongfully caused" does not require actual knowledge to trigger the limitations period, nor does the plaintiff need knowledge of a specific defendant's negligent conduct or knowledge of the existence of a malpractice claim. *SK Partners I, LP v. Metro Consultants, Inc.*, 408 Ill. App. 3d 127, 130 (2011). Instead, the limitations period begins when the plaintiff has a reasonable belief that the injury was caused by the lawyer's wrongful conduct and the plaintiff, therefore, has an obligation to inquire further. *Nelson*, 2016 IL App (1st) 160571, ¶ 12; *Dancor International, Ltd. v. Friedman, Goldberg & Mintz*, 288 Ill. App. 3d 666, 673 (1997).

¶ 25 We further acknowledge that ordinarily the time when a party becomes charged with the requisite knowledge to maintain a cause of action for legal malpractice is a question of fact. *Butler*, 301 Ill. App. 3d at 922 (citing *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill. 2d 240, 250 (1994)). However, when a plaintiff should have discovered his injury can be decided as a matter of law where the undisputed facts allow for only one conclusion. *Id.*

¶ 26 In his complaint, plaintiff asserts "but for the negligence of Defendants [he] would have recovered and collected an amount in excess of $10,000,000.00 against Ajuga Media, LLC." It is undisputed that on January 11, 2012, plaintiff knew, or reasonably should have known, that he was not going to be able to obtain the $10,000,000 he expected in damages against Ajuga as the circuit court had explicitly ruled that plaintiff's damages were limited to an amount provided by the terms of plaintiff's contract with Ajuga, namely $114,673.35. It was at that time when plaintiff had a reasonable belief that the injury was caused by the attorneys' wrongful conduct and, therefore, had an obligation to inquire further. See *Nelson*, 2016 IL App (1st) 160571, ¶ 12. While plaintiff asserts he was reassured by the Wiczer defendants at the time the January 11, 2012, judgment was entered that it could be resolved by way of a motion to reconsider or an

appeal, our established case law holds that a plaintiff is injured at the time an adverse judgment is entered, even if that judgment might later be reversed. *Belden*, 203 Ill. App. 3d at 270; *Zupan*, 142 Ill. App. 3d at 333. Thus, we conclude that the undisputed facts allow for only one conclusion; January 11, 2012, was the date an adverse judgment was entered against plaintiff. Accordingly, plaintiff's lawsuit, filed on September 26, 2014, was untimely and is barred by the two-year statute of limitations. See 735 ILCS 5/13-214.3(b) (West 2014).

¶ 27 In the alternative, defendant asserts the statute of limitations began to run on "May 18, 2013," when the underlying lawsuit was voluntarily dismissed. Assuming *arguendo* that the January 11, 2012, judgment was not adverse, we agree with plaintiff that as of the date the voluntary dismissal was entered he knew or reasonably should have known of his injury and that it was wrongfully caused. Plaintiff, however, mistakenly states the date the voluntary dismissal was entered. Plaintiff's complaint and the attached exhibits demonstrate that he moved to voluntarily dismiss the underlying matter on May 18, 2012. The docket of clerk of the circuit court of Cook County confirms that this motion was filed on May 18, 2012, and an order voluntarily dismissing the matter was entered on June 11, 2012. See *Wells Fargo Bank, N.A. v. Simpson*, 2015 IL App (1st) 142925, ¶ 24 (taking judicial notice of on-line docket). Using this date, plaintiff had until June 11, 2014, to file his complaint. The complaint, however, was not filed until September 26, 2014. Thus, plaintiff's legal malpractice complaint remains untimely filed even if we were to consider June 11, 2014, to be the date an adverse judgment was entered.

¶ 28 Plaintiff further maintains that he did not know of the legal malpractice in the underlying lawsuit until June 2014 when he was so informed by another attorney; however, actual knowledge is not necessary to trigger the limitations period. *SK Partners I, LP*, 408 Ill. App. 3d at 130. Moreover, a "professional opinion that legal malpractice has occurred is not required

before a plaintiff is charged with knowing facts that would cause him to believe his injury was wrongfully caused." *Butler*, 301 Ill. App. 3d at 923.

¶ 29 In sum, we affirm the circuit court's judgment dismissing plaintiff's complaint against defendants as the legal malpractice suit was not filed within the two-year statute of limitations. See 735 ILCS 5/13-214.3(b) (West 2014). As we have concluded that plaintiff's lawsuit is time barred, it necessarily follows that plaintiff's contention that the circuit court erred in dismissing his complaint with prejudice fails. *Bajwa v. Metropolitan Life Ins. Co.*, 208 Ill. 2d 414, 435 (2004) (where a circuit court dismisses a complaint and plaintiff does not seek leave to amend, the cause of action must stand or fall on the sufficiency of the stricken pleading). We further observe that the Freibrun defendants cross-appealed, arguing that the circuit court abused its discretion when it entered a good faith finding in regards to the settlement agreement between plaintiff and the Wiczer defendants. The Freibrun defendants, however, concede that if this court were to affirm the circuit court's dismissal of the complaint its cross-appeal would be moot. Based on our affirmation of the dismissal of the complaint with prejudice, we decline to address the Freibrun defendants' cross-appeal.

¶ 30 CONCLUSION

¶ 31 For the reasons stated above, the judgment of the circuit court of Cook County is affirmed.

¶ 32 Affirmed.

¶ 33 PRESIDING JUSTICE GORDON, specially concurring.

¶ 34 I disagree with the majority's analysis that the date of January 11, 2012, when a partial summary judgment was entered against plaintiffs in the underlying lawsuit reducing their damages as a result of a written contract, is the date the plaintiffs should have known that their

lawyers committed legal malpractice. If that was the case, then whenever a party has a summary judgment entered against them, they should contemplate that their lawyer committed legal malpractice. That is not the law and the majority cites no authority to support that finding. What happened in the underlying lawsuit was plaintiffs filed a complaint based on a lead generation agreement with a company known as Ajuga for customer acquisition services. The lead generation agreement had a term of six months and expired on April 19, 2008. The lead generation agreement was replaced with a second agreement called a marketing agreement. Both agreements contained the following provision: "Ajuga's liability to you [tSTD] for any damages, legal or otherwise, relating to this agreement shall not exceed the total fees paid by you [tSTD] to Ajuga."

¶ 35 Based on the agreements, the court granted partial summary judgment against plaintiffs limiting their damages to what they paid Ajuga- approximately $114,000.00.

¶ 36 The defendants attached both agreements to the complaint they filed on plaintiffs' behalf in the underlying lawsuit so they had to be aware of the limitation on damages at that time and filed no opposition to the motion for partial summary judgment.

¶ 37 The time when a party becomes charged with the requisite knowledge to maintain a cause of action for legal malpractice is a question of fact. *Jackson Jordan, Inc. v. Leydig, Voit & Meyer*, 158 Ill. 2d 240, 250 (1994).

¶ 38 In the case at bar, when plaintiffs' complaint in the underlying lawsuit was voluntarily dismissed and plaintiffs were made aware of the dismissal, that fact should have triggered the plaintiffs to investigate whether their lawyers committed legal malpractice. At that point, plaintiffs knew of their injury and any reasonable person would investigate whether any wrongful conduct occurred. The partial summary judgment finding actually should have been

contemplated by plaintiffs and their attorneys since the agreement limited the damages.