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2017 IL App (3d) 150316-U

Order filed February 22, 2017

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2017

RALPH DIXON,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellant,)	Will County, Illinois.
)	
v.)	Appeal No. 3-15-0316
)	Circuit No. 11-CH-1978
ERIC MITCHELL,)	
)	Honorable
Defendant-Appellee.)	Roger Rickmon,
)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Holdridge and Justice Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* Motion to substitute judge as a matter of right was properly denied when the trial judge had ruled on motions to strike and for sanctions, rulings that indicated his position on the issues of law similar to those raised in the plaintiff's complaint against his former criminal attorney. Claims by plaintiff against his former criminal defense attorney were properly dismissed as outside the applicable statute of limitations. The plaintiff reasonably should have known about his claims within the two-year statute of limitations applicable to actions against an attorney.

¶ 2 The plaintiff, Ralph Dixon, appealed the dismissal of his civil action against the defendant, his former criminal attorney, Eric Mitchell, for damages arising out of Mitchell's representation of Dixon.

¶ 3 FACTS

¶ 4 Dixon was convicted of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2), (d)(1) (West 2010)) and aggravated sexual abuse (720 ILCS 5/12-16(d), (g) (West 2010)) in 2006. Mitchell was Dixon's privately-retained attorney in the criminal case. After the jury returned its verdict on April 6, 2006, Dixon filed a motion claiming that Mitchell had been paid to prepare posttrial motions but none had been filed and Dixon was unable to reach Mitchell. Mitchell filed a motion for a judgment notwithstanding the verdict on May 5, 2006, and an amended motion on October 23, 2006. In the interim, Dixon filed a motion alleging that Mitchell was providing ineffective assistance of counsel.

¶ 5 On December 21, 2006, the trial court denied Dixon's motion and granted Mitchell's motion to withdraw. The public defender was appointed to represent Dixon. Thereafter, on November 5, 2007, the trial court denied the defendant's posttrial motions. Dixon was sentenced on February 7, 2008, to 16 years and 4 years, to be served consecutively.

¶ 6 We affirmed Dixon's convictions on direct appeal. *People v. Dixon*, No. 3-08-0174 (2010) (unpublished order under Supreme Court Rule 23). We also affirmed the dismissal of Dixon's postconviction petition. *People v. Dixon*, 2013 IL App (3d) 110313-U. On April 15, 2011, Dixon filed the instant civil action against Mitchell. The lawsuit alleged that Mitchell breached his duty as an attorney, committed fraud, and breached his fiduciary duty to Dixon. On September 14, 2012, Mitchell filed a motion to strike and dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)), arguing that Dixon's claims were

insufficient as a matter of law, and Dixon responded with a motion to strike and dismiss the motion. The trial court denied Dixon's motion, and thereafter Dixon filed an amended complaint. The trial court also denied Dixon's motion for sanctions against Mitchell, and the order entered on that date indicates that the parties had reached a tentative settlement agreement with regard to the legal fees paid to Mitchell. On June 14, 2013, Dixon filed a motion for substitution of judge as a matter of right, which was denied the same day. Mitchell filed a motion to strike and dismiss the amended complaint, again arguing that it was legally insufficient, but also raising a statute of limitations defense. At the hearing on the motion to dismiss, Dixon argued that Mitchell had fraudulently concealed facts regarding a lien, making the action timely under the statute of repose. The trial court granted Mitchell's motion to dismiss, and Dixon appealed the order granting the motion to dismiss and the order denying his motion to substitute.

¶ 7

ANALYSIS

¶ 8

Dixon argues that the trial court erred in denying his motion for a substitution of judge as a matter of right and in granting Mitchell's motion to dismiss. With respect to the substitution, Dixon argues that the continuances granted by the trial court judge were not rulings on substantial issue in the case and that he was entitled to a substitution of judge as a matter of right. He argues that the trial court judge had no authority to deny the motion for substitution. Mitchell argues that the trial court had already made substantial rulings in the case and that the motion was not brought in a timely manner.

¶ 9

Motions for substitutions of judges as of right are governed by section 2-1001 of the Code of Civil Procedure (735 ILCS 5/2-1001 (West 2012)), which provides that when a party timely exercises his right to a substitution without cause, the party is entitled to one substitution as a matter of right. 735 ILCS 5/2-1001(a)(2) (West 2012). A party timely exercises his right if

his motion is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case. 735 ILCS 5/2-1001(a)(2)(ii) (West 2012); *Scroggins v. Scroggins*, 327 Ill. App. 3d 333, 336 (2002). "[W]hen properly made, a motion for substitution of judge as a matter of right is absolute, and the circuit court has no discretion to deny the motion." *Bowman v. Ottney*, 2015 IL 119000, ¶ 17 (citing *Cincinnati Insurance Co. v. Chapman*, 2012 IL App (1st) 111792, ¶ 23). A substantial ruling is one that directly relates to the merits of the case. *In re Estate of Gay*, 353 Ill. App. 3d 341, 343 (2004). We review *de novo* a trial court's ruling on a motion for substitution of judge as of right. *In re Chelsea H.*, 2016 IL App (1st) 150560, ¶ 54.

¶ 10 Dixon argues that the only orders ruled on by the trial court prior to his motion for substitution of judge were not substantial rulings. Mitchell argues that the trial court's rulings denying Dixons' motion for sanctions and motion to strike were substantial rulings. Mitchell also argues that the motion to substitute was not brought in a "timely" manner because it was brought six months after Judge Roger Rickmon was assigned to the case and after Dixon had the opportunity to form an opinion as to how Judge Rickmon would rule. The record indicates that Judge Marzell Richardson was the original judge to preside over this case, but on January 1, 2013, Judge Rickmon replaced Judge Richardson as the judge. Dixon filed his motion to substitute on June 14, 2013. The motion to strike was brought on the grounds of improper service but also alleges that Mitchell submitted a false proof of service and intentionally delayed the court process. The motion for sanctions was brought on the grounds that Mitchell made improper or fraudulent filings to cause a delay.

¶ 11 "Examples of 'rulings on substantial issues' include situations in which the trial court has ruled on a motion to dismiss, made pretrial rulings of law, or where the party moving for a

substitution of judge has discussed issues with the trial judge, who then indicates a position on a particular point." *Colagrossi v. Royal Bank of Scotland*, 2016 IL App (1st) 142216, ¶ 30 (citing *Partipilo v. Partipilo*, 331 Ill. App. 3d 394, 398 (2002)). On the other hand, an order which sets a briefing schedule or a hearing date is not directly related to the merits of the case, so it is not a substantial ruling. *In re Marriage of Crecos*, 2015 IL App (1st) 132756, ¶ 26. In this case, Judge Rickmon's rulings on the motion to strike and the motion for sanctions were not rulings setting a hearing date or based simply upon procedural rules. Rather, Judge Rickmon's rulings indicated his position on Dixon's allegations that Mitchell was intentionally misleading the court, which related to the substance of Dixon's amended complaint. Thus, Judge Rickmon had made rulings on substantial issues, and the motion to substitute as a matter of right was properly denied.

¶ 12 Dixon argues that the trial court erred in granting Mitchell's motion to dismiss. First, Dixon argues that the trial court erred in dismissing his claim that Mitchell fraudulently concealed that he never hired a second expert, for which Dixon paid \$12,000. Dixon contends that he did not learn of Mitchell's alleged fraud until October 22, 2009, when Dixon received a copy of the supplemental record from the trial court, and he filed his action within two years of that date. Second, Dixon contends that the trial court erred by dismissing his claim that Mitchell demanded and received an additional \$2000 fee for a posttrial motion that was never filed. Dixon contends that Mitchell filed a motion for judgment notwithstanding the verdict on October 23, 2006, but Dixon did not learn of it until he received the supplemental record on October 22, 2009. Third, Dixon contends that the trial court erred in dismissing his claim that Mitchell unlawfully withheld discoverable documents from the State, which destroyed the foundation of the expert's testimony.

¶ 13 Mitchell argues that Dixon's claim that he was defrauded of \$12,000 for an additional expert and \$2,000 in fees for a posttrial motion were not raised in the trial court and are waived. However, we find that Dixon stated both claims in his original complaint, which was adopted in total by his amended complaint, so the claims were not waived. Alternatively, Mitchell argues that both of these claims are barred by the statute of limitations because they both were claims against an attorney in the performance of his professional services. The applicable statute of limitations for an action against an attorney for damages based on contract or tort arising out of the attorney's professional services is two years from when the person knew or reasonably should have known of the injury for which damages are sought. 735 ILCS 5/13-214.3(b) (West 2012). Mitchell was Dixon's attorney during Dixon's jury trial from April 3-6, 2006. Mitchell filed a motion to withdraw from the case on October 24, 2006, and it was granted on December 21, 2006. Dixon filed his civil action against Mitchell on April 15, 2011. Clearly, Mitchell's representation of Dixon ceased, at the latest, on December 21, 2006, and Dixon's complaint was filed more than two years after that date.

¶ 14 Section 13-214.3, however, contains its own discovery rule, which provides that the limitations period does not begin to run until the plaintiff knew, or reasonably should have known, of the injury and that it was wrongfully caused, but also limits the bringing of an action against an attorney to six years from such discovery. *Morris v. Margulis*, 197 Ill. 2d 28, 35-36 (2001); 735 ILCS 5/13-214.3(c) (West 2012). In this case, with respect to any claim regarding a second expert, Dixon knew, or reasonably should have known, that there was no testimony from a second expert at his criminal trial in April 2006. As for the claim regarding the fees paid for the posttrial motion, Mitchell did file such a motion, while the trial court retained jurisdiction. Even if Mitchell had failed to file that motion, Dixon knew, or reasonably should have known, of that

failure by the time that Mitchell was discharged as his attorney on December 21, 2006. Both of those dates are well within the two-year statute of limitations. Dixon also claimed that he was aware of Mitchell's actions with respect to the discovery documents when he received a letter on December 2, 2006. Thus, since Dixon did not file the instant civil action until April 15, 2011, all of his claims are barred by the two-year statute of limitations applicable to actions against an attorney.

¶ 15 Dixon also argues that he stated claims for fraudulent concealment, subject to a five-year statute of limitations under section 13-215 of the Code (735 ILCS 5/13-205 (West 2012)). However, as stated above, Dixon reasonably should have discovered all of his claims well within the applicable two-year statute of limitations, so section 13-215 did not toll the limitations period. *Morris*, 197 Ill. 2d at 38.

¶ 16 CONCLUSION

¶ 17 The judgment of the circuit court of Will County is affirmed.

¶ 18 Affirmed.