2019 IL App (1st) 172445-U

FIRST DIVISION
May 28, 2019

No. 1-17-2445

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

V. BOMMIASAMY, M.D., S.C. and VEERASIKKU BOMMIASAMY, M.D.,	)	
	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 2017 L 001279
	)	
WILLIAM BRISKIN KOHN,	)	Honorable
	)	Patricia O'Brien Sheahan,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE MIKVA delivered the judgment of the court.
Justices Griffin and Walker concurred in the judgment.

O R D E R

¶ 1 *Held*: Plaintiff doctor's malpractice suit against his attorney for negligently representing him in a wrongful termination case was not time-barred under the two-year statute of limitations period because the attorney's negligence in failing to file an appellate brief tolled the limitations period on the malpractice before the circuit court. We reverse the circuit court's dismissal and remand the case.

¶ 2 Plaintiff, Dr. Veerasikku Bommiasamy, appeals the dismissal of his legal malpractice case against his attorney, arguing the two-year statute of limitations did not bar his suit. In the doctor's underlying employment case, his attorney, William Kohn, failed to timely file a response to summary judgment motions and failed to file an appellate brief on Dr.

Bommiasamy's behalf. The circuit court dismissed Dr. Bommisasamy's malpractice complaint as time-barred. For the following reasons, we reverse and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 Dr. Bommiasamy was represented by counsel in this case before the circuit court, but that attorney did not represent him on appeal and he filed his opening brief on appeal *pro se*. Mr. Kohn did not file any brief in this appeal. However, the record on appeal contains the parties' circuit court briefs on the motion to dismiss, and we will decide the appeal on the merits, relying on those circuit court briefs to the extent necessary. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131-33 (1976) ("[I]f justice requires," an appellate court should review the record "for the purpose of sustaining the judgment of the trial court.").

¶ 5 A. The Underlying Employment Suit

¶ 6 Dr. Bommiasamy alleges in his complaint that he retained Mr. Kohn to represent him against various parties responsible for terminating his employment contract to perform emergency physician services at a hospital in Streator, Illinois. Dr. Bommiasamy filed suit against his employers in the circuit court of Cook County on July 10, 2006. In January 2013, two of the defendants filed motions for summary judgment on various counts of Dr. Bommiasamy's complaint. The circuit court granted Dr. Bommiasamy leave to respond by February 15, 2013, and set a hearing on the summary judgment motions for March 8, 2013. Having filed no response brief by March 5, 2013, Mr. Kohn orally requested an extension of time to do so, which the circuit court denied. The next day, Mr. Kohn filed a motion for leave to respond *instanter*—attaching a copy of a written response to summary judgment—and to reset the briefing and hearing dates. The circuit court denied that motion at the hearing on March 8, 2013, but allowed Mr. Kohn to make responsive arguments orally. After hearing arguments from counsel on both

sides, the circuit court granted summary judgment for the defendant employers. Mr. Kohn filed a motion to reconsider and vacate the summary judgment ruling on April 8, 2013, which the circuit court denied on April 29, 2013.

¶ 7 Mr. Kohn appealed that decision on Dr. Bommiasamy's behalf on May 28, 2013, and sought multiple extensions of time to file the record on appeal, finally filing the record on December 18, 2013. The appellate court allowed Mr. Kohn two extensions to file the opening brief, but Mr. Kohn never filed a brief on behalf of Dr. Bommiasamy. On December 18, 2014, the court dismissed Dr. Bommiasamy's appeal for want of prosecution.

¶ 8 B. Procedural History of the Present Malpractice Suit

¶ 9 Dr. Bommiasamy filed his two-count complaint against Mr. Kohn on February 3, 2017, alleging breach of contract and professional negligence. In it, the doctor alleged that Mr. Kohn "failed to file responsive pleadings to a pending Motion for Summary Judgment and subsequently failed to file an Appellate Brief for a pending appeal," and that this negligence "result[ed] in a dismissal of the Appeal."

¶ 10 Mr. Kohn appeared, representing himself, and was granted an extension to answer the complaint or otherwise plead by May 4, 2017. On May 8, 2017, Mr. Kohn 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 2016)). In it, he argued for dismissal of the breach of contract claim under section 2-615 because Dr. Bommiasamy "failed to allege the terms of the parties' agreement," he failed to allege the doctor's performance under the agreement, and he therefore "failed to properly allege a claim for breach of contract." He also argued the entire complaint was time-barred under section 13-214.3 of the Code (735 ILCS 5/13-214.3 (West 2016)), which establishes a two-year statute of limitations for legal malpractice claims.

¶ 11 Dr. Bommiasamy responded to the motion to dismiss on August 10, 2017, and included an affidavit outlining his communications with Mr. Kohn, both when the case was pending in the circuit court and when it was on appeal.

¶ 12 The circuit court dismissed the case with prejudice on September 27, 2017, in a one-page, handwritten order. No transcript of the proceeding appears in the record on appeal, but the court noted in its order that both parties and their counsel were present for hearing and argument. That order referenced the hearing "on Defendant's fully briefed Sec. 2-619 Motion to Dismiss (statute of limitations)" and ruled that "the Motion to Dismiss is granted, and this matter is hereby dismissed in its entirety and with prejudice." This appeal followed.

¶ 13 II. JURISDICTION

¶ 14 Dr. Bommiasamy timely filed his notice of appeal on October 5, 2017, challenging the circuit court's dismissal order of September 27, 2017. We have jurisdiction under Illinois Supreme Court Rules 301 and 303, governing appeals from final judgments entered by the circuit court in civil cases. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. July 1, 2017).

¶ 15 III. ANALYSIS

¶ 16 The sole issue in this case is whether the circuit court erred by dismissing Dr. Bommiasamy's complaint as time-barred. This dismissal was granted under section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2016)), on the basis that the complaint was untimely under the two-year statute of limitations for legal malpractice claims. We review dismissal of a complaint under section 2-619 *de novo*, "accept[ing] as true all well-pleaded facts in the complaint, and *** draw[ing] inferences in the plaintiff's favor whenever it would be reasonably defensible to do so." *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 595 (2011) (citing *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008)).

¶ 17 Section 13-214.3(b) of the Code provides that a person injured by an attorney's malpractice must bring suit within two years. *Butler v. Mayer, Brown & Platt*, 301 Ill. App. 3d 919, 922 (1998); 735 ILCS 5/13-214.3(b) (West 2016). However, the statute incorporates the "discovery rule" (*Butler*, 301 Ill. App. 3d at 922), which "delays the commencement of the relevant statute of limitations until the plaintiff knows or reasonably should know that he has been injured and that his injury was wrongfully caused" (*Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill. 2d 240, 249 (1994)). "The time at which a party has or should have the requisite knowledge under the discovery rule to maintain a cause of action is ordinarily a question of fact." *Id.* at 250.

¶ 18 Dr. Bommiasamy alleged in his complaint that Mr. Kohn committed malpractice by failing to file a response to the summary judgment motions at trial and failing to file an appellate brief after summary judgment was granted, resulting in a dismissal of the appeal. The attorney-client relationship "is one in which the attorney is charged with a duty to act skillfully and diligently on the client's behalf." *Goodman v. Harbor Market, Ltd.*, 278 Ill. App. 3d 684, 689-90 (1995). "Given this duty, the client is presumed unable to discern any misapplication of legal expertise." *Id.* at 690.

¶ 19 In his motion to dismiss, Mr. Kohn argued that the doctor was "fully and timely informed no later than *** 4/12/13" of the adverse summary judgment ruling based on the parties' communications. Mr. Kohn attached to his motion a fax cover sheet from Mr. Kohn to the doctor and a certified UPS mail slip from his office to the doctor, both dated April 12, 2013. The fax cover sheet references an eight-page attachment and states: "Samy—As discussed, I am attaching copies of our motion to Reconsider/Vacate filed Monday 4/8/13, and our Notice of presentment filed yesterday upon coordination with counsel. I will mail a complete copy with

exhibits. Please call with any questions." Mr. Kohn argued that no breach or professional negligence occurred because these documents gave "all details regarding the earlier circuit court proceedings leading up to the 3/8/13 entry of summary judgment" and thus "the statute of limitations on any attorney negligence claim *** began to run no later than 4/12/13." According to Mr. Kohn, because the case "was filed nearly four (4) years later, on 2/3/17, it is time-barred" under section 13-214.3.

¶ 20 Dr. Bommiasamy responds that using the date of April 12, 2013, disregards half of Mr. Kohn's professional negligence, namely the malpractice Mr. Kohn committed on appeal. The doctor argues that "[t]he adverse Summary Judgment ruling in the underlying matter[] was due at least in part to [Mr. Kohn's] failure to timely file a response to the pending Motion for Summary Judgment" and "[t]he dismissal of the Appeal of that matter was due wholly to Defendant's failure to file an Appellant's Brief." Dr. Bommiasamy attached an affidavit to his dismissal response in which he acknowledged that he received the fax communication from Mr. Kohn and the mailed motion to reconsider summary judgment on April 12, 2013. He also stated that Mr. Kohn told him of the attorney's plan to appeal the summary judgment ruling.

¶ 21 In specific reference to the appeal, Dr. Bommiasamy attested in his affidavit that he "had no personal oral or written communication with Kohn regarding the Appeal or any other matter after the early part of March 2014." In addition, he alleged that he "was not provided with any written materials related to the Appeal by [Mr.] Kohn, and was not provided with a copy of the Order dismissing the Appeal."

¶ 22 Mr. Kohn's defense that Dr. Bommiasamy's claim is barred by the statute of limitations relies almost entirely on our holding in *Belden v. Emmerman*, 203 Ill. App. 3d 265 (1990). In *Belden*, a psychotherapist sued his attorney after settlement of a commercial lease dispute,

claiming malpractice in the settlement negotiations that culminated in a release of the therapist's claims. *Id.* at 267. The circuit court's settlement order was affirmed on appeal. *Id.* at 267-68. The plaintiff in that case waited more than five years after the date of settlement to sue his attorney, and his malpractice suit was dismissed as time-barred under section 2-619 of the Code. *Id.* at 268.

¶ 23 On appeal, the plaintiff argued that "because the circuit court's order could have been reversed on appeal, [plaintiff and his practice] did not know whether they had been damaged by the actions of defendants" as of the date of the settlement order. *Id.* at 268. We rejected this argument and affirmed the dismissal on timeliness grounds, reasoning that the plaintiff client was present for the settlement discussion and was aware of his attorney's potential malpractice upon entry of the settlement order, not the appellate court's order affirming the settlement. *Id.* at 270.

¶ 24 Dr. Bommiasamy distinguishes *Belden* on the basis that, unlike that case, Mr. Kohn "undertook two representations of the same client for the same matter, both at the trial level and at the Appellate level," committing negligence at both points in the case.

¶ 25 We agree with Dr. Bommiasamy that *Belden* is distinguishable. Our holding in *Belden* stands for the straightforward proposition that, when malpractice occurred in the circuit court and the client was aware of it, the statute of limitations on a legal malpractice claim ordinarily begins to run from the circuit court's final order in the underlying action, rather than the date the appellate court affirms the circuit court's order. *Id.* at 269; see also *Racquet v. Grant*, 318 Ill. App. 3d 831, 837 (2000) (distinguishing *Belden* and finding that the *Belden* court "[did] not hold that an adverse judgment alone always signals a client that legal malpractice has occurred" because "a bad result itself does not give fair warning that the attorney is to blame"). The later appellate activity in this case distinguishes *Belden* and tolled the period to file a malpractice suit.

¶ 26 This case is more similar to the situation before our supreme court in *Jackson Jordan*, 158 Ill. 2d 240. In *Jackson Jordan*, a manufacturer brought a legal malpractice claim against its attorney for failing to advise it of a competitor's patent rights to crucial technology. *Id.* at 243-44. After the law firm advised the manufacturer that it was legally permissible to make and market a particular product, the manufacturer began production and was later sued by the patent-holding competitor. *Id.* at 244. After the federal district court ruled for the competitor, the manufacturer's law firm assured it that there was "a 50-50 chance that the problem w[ould] disappear" because the court of appeals would reverse the district court, and gave other assurances of success on appeal. *Id.* at 245.

¶ 27 The manufacturer ultimately sued the firm for malpractice and the claim was dismissed as time-barred, measured from the date of the initial negligent advice. *Id.* at 248. Our supreme court reversed and found that the law firm was equitably estopped from raising the statute of limitations based on its insistence of success on appeal, because "had it not been for defendant's constant reassurances that no patent was infringed upon and that [the competitor's] claim was without merit, plaintiff's suit would not have been so delayed." *Id.* at 251-52.

¶ 28 The same reasoning is applicable here. Similar to the "constant reassurances" of appellate success of an underlying claim in *Jackson Jordan* that equitably tolled the limitations period there, here the *actions* of Mr. Kohn in personally appealing the circuit court's decision, seeking numerous extensions, and failing to file an appellate brief culminating in a dismissal of the appeal, estop any reliance by Mr. Kohn on the date that the circuit court entered the summary judgment order as the start of the limitations period. As the court in *Jackson Jordan* noted, to rule otherwise would force a client in Dr. Bommiasamy's position to seek a second opinion regarding the legal strategy of the underlying case, which is unreasonable. *Id.* at 253.

¶ 29 Mr. Kohn argued alternatively that, even if the court looks to what happened on appeal, Dr. Bommiasamy's malpractice complaint was still untimely because it was filed more than two years after the appellate court affirmed dismissal of the underlying case. However, Mr. Bommiasamy has, at the least, raised an issue of fact as to whether he knew about the appellate dismissal two years before he filed this suit.

¶ 30 "The defendant has the initial burden of proving the affirmative defense relied upon in its motion to dismiss" but, once that burden is met, "it becomes incumbent upon the plaintiff to set forth facts sufficient to avoid the statutory limitation." *Brummel v. Grossman*, 2018 IL App (1st) 162540, ¶ 23. Properly raising the "discovery rule" as an exception to the limitations period "is not burdensome," but simply requires that the plaintiff "allege what fact or facts support the late discovery of the injury." *Ogle v. Hotto*, 273 Ill. App. 3d 313, 323 (1995). The issue of when a party knew or reasonably should have known of an injury and its wrongful cause is ordinarily a question of fact. *Landreth v. Raymond P. Fabricius, P.C.*, 2018 IL App (3d) 150760, ¶ 36.

¶ 31 Dr. Bommiasamy has alleged sufficient facts to raise the "discovery rule" to defeat Mr. Kohn's alternative argument. The doctor attested in his affidavit that he received the materials from the April 12, 2013, fax and mailing, and that Mr. Kohn later told him that he (the attorney) intended to file an appeal, but that the doctor "had no personal[,] oral or written communication with Kohn regarding the Appeal or any other matter after the early part of March 2014." He was not provided any written materials related to the appeal, nor was he provided a copy of the order dismissing the appeal for failure to prosecute. In reply to the doctor's affidavit, Mr. Kohn argued that the doctor "made no inquiry after March 2014," did not "state when and how [he] learned of the dismissal of the appeal," and could have "check[ed] the Appellate Court docket" for the dismissal.

¶ 32 Dr. Bommiasamy's affidavit contains sufficient facts to raise a factual question on whether the late discovery of the appellate court's ruling tolled the statute of limitations. Mr. Kohn is correct that, once it reasonably appears an attorney's malpractice has caused a client's injury, the client "has the burden to inquire further as to the existence of a cause of action" against the attorney. *Brummel*, 2018 IL App (1st) 162540, ¶ 26. However, Mr. Kohn was under an affirmative duty pursuant to Rule 1.4(a) of the Illinois Rules of Professional Conduct "to take the necessary steps to keep clients informed about their cases." *In re Smith*, 168 Ill. 2d 269, 282 (1995). According to Dr. Bommiasamy's uncontroverted affidavit, Mr. Kohn did not communicate the progress of the appeal, the failure to file a brief, or the dismissal of the case. Dr. Bommiasamy has alleged sufficient details to create a factual issue of when he knew or reasonably should have known of the appellate dismissal, precluding section 2-619 dismissal of his malpractice claim. See *Landreth*, 2018 IL App (3d) 150760, ¶ 36. ("The question of when a party knew or reasonably should have known both of an injury and its wrongful cause is one of fact, unless the facts are undisputed and only one conclusion may be drawn from them.")

¶ 33 Dr. Bommiasamy offers two additional bases for reversal in his appellate brief: that he should have been allowed to amend his complaint and that the motion to dismiss was untimely. Having determined that dismissal on statute of limitations ground was improper, we need not address these arguments.

¶ 34 IV. CONCLUSION

¶ 35 For these reasons, we reverse the circuit court's dismissal of Dr. Bommiasamy's complaint and remand for further proceedings on his legal malpractice claim against Mr. Kohn.

¶ 36 Reversed.