2019 IL App (3d) 180101-U

Order filed August 13, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

ROBERT MORTENSEN,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellant,	)	Will County, Illinois.
	)	
v.	)	Appeal No. 3-18-0101
	)	Circuit No. 13-L-950
ALONZO H. ZAHOUR and DAVID N.	)	
SCHAFFER,	)	Honorable
	)	John C. Anderson,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Carter and Holdridge concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Trial court did not err in granting defendants' summary judgment motions based on the two-year statute of limitations; and (2) motion to reconsider was properly denied where plaintiff failed to allege any newly discovered evidence or change in the law.

¶ 2 Plaintiff, Robert Mortensen, appeals from the circuit court's dismissal of his legal malpractice claim against defendants, Alonzo H. Zahour and David N. Schaffer. Mortensen hired Zahour and Schaffer to represent him in divorce proceedings and later filed a complaint

against both attorneys, alleging that their representation was negligent. Zahour and Schaffer filed motions for summary judgment, claiming that Mortensen's complaint was untimely. The trial court granted defendants' motions, and we affirm.

¶ 3 FACTS

¶ 4 In February 2007, Mortensen entered into a contractual agreement with Schaffer to represent him in his divorce from his wife, Lisa. While representing Mortensen, Schaffer had several meetings with Lisa's attorney, Frank Valenti, regarding potential resolution through a marital settlement agreement. He also appeared in court on Mortensen's behalf in the divorce proceeding.

¶ 5 Several orders were entered as a result of Schaffer's representation. On July 27, 2007, an order was entered requiring Lisa to pay the mortgage on the marital residence, the utility bills related to the marital home, and a loan for the couple's motor home. The order also required Mortensen to pay Lisa $5,795 in monthly maintenance. Lisa stopped making mortgage payments on the home in October 2008. Schaffer failed to seek any affirmative relief as a result of Lisa's failure to pay the mortgage. In his deposition, Mortensen testified that he discussed his inability to make the monthly maintenance payments with Schaffer, but Schaffer failed to file any pleadings seeking a modification.

¶ 6 On June 23, 2008, an order was entered that required Lisa to obtain a $50,000 home equity line of credit. Mortensen testified that Lisa failed to obtain a home equity loan and Schaffer failed to file any pleadings seeking relief for her violation of that order.

¶ 7 On January 7, 2009, the trial court entered an order directing Mortensen to pay the mortgage company $7,500 within 14 days to prevent foreclosure. In addition, the order gave Mortensen 14 days to file a motion to reduce child support based on evidence that the couple's

oldest child was emancipated. The court also ordered Lisa to complete an application to refinance the marital residence and remove Mortensen's name from the deed. Schaffer did not file a motion to reduce child support.

¶ 8 On January 14, 2010, Schaffer and Mortensen appeared before the court for a hearing on Lisa's petition for rule to show cause why Mortensen should not be held in contempt for failing to pay maintenance. At the hearing, Valenti informed the court that the marital home was in foreclosure and that Lisa was trying to redeem the property. Mortensen was called to testify. During his testimony, he informed the court that instead of paying $5,795 per month as ordered on July 27, 2007, a figure he could not afford, he and Lisa agreed that he would pay her 50% of his income. Lisa testified that Mortensen had not paid the agreed maintenance amount. When asked directly by the court, Mortensen admitted that he had not fulfilled the court's 2007 order or the couple's agreement.

¶ 9 The court entered an order holding Mortensen in contempt for failing to pay 50% of his income pursuant to the couple's oral agreement and sentenced him to 90 days in jail. After the court found him in contempt, Mortensen stated, "Like a long time ago there was an order signed by you to have the house sold or put on the market by a certain date, and they've exceed [sic] that so they are in turn are in con—contempt of court because of that." On January 20, 2010, Mortensen paid $16,196.22 to purge the contempt order and avoid time in jail.

¶ 10 Mortensen terminated Schaffer's legal representation on January 18, 2010. That same day, he retained the services of Zahour. In his deposition, Mortensen testified that he terminated Schaffer on January 18, 2010, because of the January 14, 2010, contempt order.

¶ 11 After Schaffer withdrew, Zahour and Valenti continued to discuss the terms of the proposed agreement on behalf of their clients. Negotiations continued for several months, and

the parties successfully entered into a marital settlement agreement in August 2011. On August 10, 2011, Mortensen and Lisa and their attorneys, Zahour and Valenti, appeared before the trial court for a hearing on all pending matters in the divorce. Valenti conducted a prove-up hearing on the settlement agreement and asked Lisa to confirm her understanding of the terms of the settlement agreement. She confirmed that her income would be equalized with plaintiff's income, that the equalization income was a process that would be reviewable in three years, and that she would receive one-half of Mortensen's interest in his business. Valenti then questioned Mortensen, and he confirmed his understanding of the terms of the agreement. He stated that he believed the agreement to be fair and equitable. He also stated that he agreed to the terms of the settlement agreement and understood that the agreement was to be adopted as part of the dissolution judgment. He acknowledged his signature on the last page of the settlement agreement, dated August 10, 2011.

¶ 12 Approximately one year later, Lisa filed a petition for rule to show cause for arrearages under the marital settlement agreement. On October 31, 2012, with Zahour's advice, Mortensen entered into an agreed order to pay Lisa a back-support arrearage of $100,000. Shortly after the arrearage order was entered, Mortensen terminated his relationship with Zahour and hired Stanley Kaplan. Mortensen has since failed to pay the $100,000 arrearage.

¶ 13 Following Zahour's termination, Mortensen, under Kaplan's services, entered into an agreed order to vacate the settlement agreement and judgment for dissolution of marriage. The divorce was tried and a new judgment was entered on December 22, 2016. Under the terms of the 2016 judgment, Mortensen is obligated to pay Lisa $1,500 in monthly maintenance.

¶ 14 On December 4, 2013, Kaplan filed a legal malpractice complaint against both Schaffer and Zahour on Mortensen's behalf. In his second amended complaint, Mortensen alleged that he

suffered damages in excess of $100,000 due to defendants' negligent acts and omissions. He claimed that Schaffer (1) failed to seek any relief as a result of his ex-wife's failure to comply with court orders, (2) harmed him by allowing contempt orders to be entered against him, and (3) failed to adequately conduct discovery. Mortensen alleged that Zahour (1) failed to review the file when he initially took the case, (2) failed to locate the alleged order underlying the contempt proceedings, (3) failed to depose Lisa, (4) had inappropriate conversations with Lisa's attorney and (5) failed to preserve the understanding that maintenance would be reviewable in three years in the marital settlement agreement. Mortensen further alleged that Zahour did nothing to protect his interests in negotiating the terms of the agreement and that, due to Zahour's negligent acts and omissions, he suffered damages.

¶ 15 Schaffer and Zahour filed separate motions for summary judgment, both arguing that the legal malpractice action was barred by the applicable statute of limitations under the Code of Civil Procedure (Code) (735 ILCS 5/13-214.3(b) (West 2016)). Schaffer claimed that Mortensen knew or should have known that he was injured when the contempt order was entered on January 14, 2010. Both defendants maintained that, at the very latest, Mortensen should have known he was injured on August 10, 2011, when the dissolution judgment was entered that incorporated the marital settlement agreement. Zahour also claimed that because Mortensen had not paid the arrearages ordered by the court, he could not sustain a claim for damages against him.

¶ 16 The trial court granted summary judgment in favor of defendants for the reasons asserted in their summary judgment motions. Mortensen filed a motion to reconsider, which the trial court denied.

¶ 17 ANALYSIS

¶ 18 I. Summary Judgment

¶ 19 Mortensen argues that the trial court erred in granting summary judgment based on the statute of limitations. He claims that the two-year period was tolled until he acquired knowledge of Schaffer's and Zahour's negligence when he retained Kaplan in November 2012.

¶ 20 Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2018). To determine if a genuine issue of material facts is present, courts must construe the pleadings and other supporting documents in the light most favorable to the non-moving party. On the defendant's motion for summary judgment, the plaintiff has the burden of proof to bring forth facts and evidence that would prove the existence of a cognizable cause of action. *Golden v. Marshall Field & Co.*, 134 Ill. App. 3d 100, 102 (1985). On appeal, we review a summary judgment motion *de novo* and perform the same analysis that a trial court judge would perform. *FirstMerit Bank, N.A. v. Soltys*, 2015 IL App (1st) 140100, ¶ 13.

¶ 21 Here, Mortensen sued Schaffer and Zahour for legal malpractice, claiming that they failed to protect his interests when they represented him during his divorce case. To prevail on a legal malpractice claim, the plaintiff client must plead and prove that the defendant attorneys owed him a duty of care arising from the attorney-client relationship, that the attorneys breached that duty, and that he or she suffered damages as a proximate cause of the breach. *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 306 (2005). "For purposes of a legal malpractice action, a client is not considered to be injured unless and until he has suffered a loss for which he may seek monetary damages." *Id.*

¶ 22 Section 13-214.3 of the Code sets forth the limitations and repose period applicable to legal malpractice actions and provides that a cause of action for damages "against an attorney arising

out of an act or omission in the performance of professional services *** must be commenced within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought." 735 ILCS 5/13-214.3(b) (West 2018). The statute of limitations incorporates the discovery rule, which delays the commencement of the two-year statutory period until the injured party "knows or should know facts that would cause him to believe that his injury was wrongfully caused." *Romano v. Morrisroe*, 326 Ill. App. 3d 26, 28 (2001). "A person knows or reasonably should know an injury is 'wrongfully caused' when he or she possesses sufficient information concerning an injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved." *Carlson v. Fish*, 2015 IL App (1st) 140526, ¶ 23.

¶ 23 The statute of limitations does not require that the injured party acquire actual knowledge of negligent conduct. *Dancor International, Ltd. v. Friedman, Goldberg & Mintz*, 288 Ill. App. 3d 666, 673 (1997). Rather, the statutory period will begin once an injured party has a reasonable belief that the injury was caused by wrongful conduct. *Id.* Once a party knows or reasonably should know both of his injury and that the injury was wrongfully caused, the injured person has the burden to inquire further as to the existence of a cause of action. *Castello v. Kalis*, 352 Ill. App. 3d 736, 745 (2004). Although when a party knew or reasonably should have known is generally a question of fact, courts may decide the issue as a matter of law where the facts are undisputed and only one conclusion may be drawn from them. *Trogi v. Diabri & Vicari, P.C.*, 362 Ill. App. 3d 93, 98 (2005).

¶ 24 Mortensen argues that the statute of limitations did not begin to run in this case until he actually acquired knowledge of Schaffer's and Zahour's negligence through his current counsel in 2012. The law is clear, however, that actual knowledge is not required. Under the discovery

rule, the statute of limitations may run despite the lack of actual knowledge of negligent conduct. See *Jackson Jordon, Inc. v. Leydig, Voit & Mayer*, 158 Ill. 2d 240, 257 (1994); *SK Partners I, LP v. Metro Consultants, Inc.*, 408 Ill. App. 3d 127, 130 (2011). As such, the primary question is not when Mortensen had actual knowledge of the negligent conduct and his injury, but rather when he was charged with a duty to inquire further. See *Castello*, 352 Ill. App. 3d at 745.

¶ 25 Illinois courts have found that the statute of limitations for legal malpractice is triggered by the entry of an adverse order against the plaintiff. *Belden v. Emmerman*, 203 Ill. App. 3d 265, 268 (1990). Moreover, in the context of divorce proceedings where, as here, the client takes issue with the terms of the dissolution judgment and is a signatory to the marital settlement agreement, the operative date for the statute of limitations is the date of entry of the dissolution judgment. *Gale v. Williams*, 299 Ill. App. 3d 381, 387 (1998).

¶ 26 In this case, an adverse order was entered against Mortensen on January 14, 2010, when he was found in contempt of court. The record reveals that at that time Mortensen was aware that the marital home was in foreclosure, that he was being sentenced to jail, and that his attorney was not taking affirmative steps related to his complaints about Lisa. Pursuant to his own testimony, Mortensen sought new counsel after the January 2010 hearing due to the contempt order and the unsatisfactory way in which Schaffer was handling his divorce case. Mortensen's knowledge that Schaffer was not working on his case and his admission that he fired Schaffer because he was found in contempt necessarily imply knowledge of negligent conduct. These facts show that Mortensen possessed sufficient information on January 14, 2010, to put a reasonable person on notice to inquire further and determine whether Schaffer's acts and omissions constituted malpractice.

¶ 27 Even if we found January 14, 2010, was not the proper date, Mortensen knew or should have known of a potential cause of action against both Schaffer and Zahour when he signed the marital settlement agreement and the court entered judgment on August 10, 2011. Mortensen knew of the terms of the divorce when he signed the marital settlement agreement and agreed to be bound by its provisions. He also testified at the prove-up hearing that he understood the provisions and that he voluntarily signed the agreement. Mortensen correctly asserts that the statute of limitations does not begin to run until the client knew or should have known that negligence occurred. But, the converse is also true. The discovery rule protects a plaintiff *only* until he knows or reasonable should have known of the injury, not until he has actual knowledge. See Gale, 299 Ill. App. 3d at 387. Mortensen reasonably should have known that his attorneys were negligent on August 10, 2011. Thus, the trial court properly found no reason to toll the statute of limitations as to Schaffer and Zahour beyond the date of the entry of the judgment of dissolution of marriage. Under the two-year statute of limitations, Mortensen's complaint for legal malpractice was untimely.

¶ 28 Mortensen relies on *Trogi* to support his claim that his complaint was not untimely. In *Trogi*, the plaintiff hired the defendant to represent him in a real estate purchase involving the plaintiff's daughter. *Trogi*, 362 Ill. App. 3d at 94. The attorney told the plaintiff that the deed was recorded in Lake County and mailed him a copy. However, the deed should have been recorded in Cook County. Five years later, the daughter sold her interest in the property to a third party, and that deed was recorded in Cook County. Since the attorney did not properly record the initial deed, the plaintiff's interest did not appear in the title search, which resulted in the loss of the plaintiff's interest in the property. The plaintiff filed a legal malpractice complaint, but the trial court dismissed the case because the complaint was not filed within the

two-year statute of limitations. The appellate court reversed, finding that plaintiff did not become aware of the recording error until the deed was conveyed to the third party. The court held that even if the plaintiff had noticed where the deed was recorded, it did not "lead to the conclusion that a layperson who hired an attorney to represent him in a real estate transaction knew or understood the recording requirements or implications." *Id*. at 99.

¶ 29 Mortensen argues that, like Trogi, he also relied on the advice of his attorneys and that, as a layperson, he could not have been expected to know the requirements for an equitable marital settlement agreement. However, *Trogi* is distinguishable because the plaintiff was not expected to understand the correct process of recording a deed. Here, the alleged deficiency of the settlement agreement was apparent to the parties at the time of the settlement. The agreement included a provision requiring the wife to refinance the marital home even though it was in foreclosure, and it did not include a statement that maintenance was reviewable in three years, even though parties admittedly agreed to that term during negotiations. Moreover, it required Mortensen to pay child support for a child who was over the age of 18 and emancipated. Mortensen was aware of each one of these deficiencies. He testified that he was not happy with the terms, but he agreed to them to avoid an expensive trial. The facts demonstrate that, even if he lacked legal expertise, Mortensen was aware that his settlement agreement was grossly flawed. This awareness should have put him on notice to inquire further as to whether Zahour and Schaffer were negligent.

¶ 30 Since Mortensen reasonably should have known of his injury when the dissolution judgment was entered, the statute of limitations, which began to run on August 10, 2010, ended two years later. He did not file his complaint until December 4, 2013, more than two years after his claim accrued. The trial court properly granted defendants' motions for summary judgment.

¶ 31 II. Motion to Reconsider

¶ 32 Mortensen also claims that the trial court erred in denying his motion to reconsider.

¶ 33 The purpose of a motion to reconsider is to alert the court to newly discovered evidence, changes in the law, or errors in the court's application of previously existing law. *Nissan Motor Acceptance Corp. v. Abbas Holding I, Inc.*, 2012 IL App (1st) 111296, ¶ 16. If a motion to reconsider merely reiterates the arguments previously made, it should be denied. See *William v. Dorsey*, 273 Ill. App. 3d 893, 903 (1995). The denial of a motion to reconsider is within the trial court's discretion and will not be reversed absent an abuse of discretion. *In re Marriage of Gowdy*, 352 Ill. App. 3d 301, 307 (2004).

¶ 34 Mortensen's motion to reconsider mentioned neither a change in the law or new evidence not available at the time of the hearing. His motion to reconsider was merely an attempt to replead his case and reargue the issues. The motion only requested the court to review and reconsider its decision to grant summary judgment based on the trial court's "misapplication" of the law. His allegation that the court misapplied the law as to the statute of limitation is not supported by the record, and no other issues were raised. Accordingly, the trial court did not err in denying his motion to reconsider.

¶ 35 CONCLUSION

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

¶ 37 Affirmed.