

Cite as 2009 Ark. 581

SUPREME COURT OF ARKANSAS

No. 09-55

LISA POUNDERS,

APPELLANT,

VS.

MIKE REIF;

DOVER, DIXON, & HORNE, PLLC,

APPELLEES,

Opinion Delivered November 19, 2009APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,

NO. CV2008-5296,

HON. CHRISTOPHER CHARLES
PIAZZA, JUDGE,AFFIRMED.**PAUL E. DANIELSON, Associate Justice**

Appellant Lisa Pounders appeals from the order of the Pulaski County Circuit Court dismissing her complaint with prejudice. Her sole point on appeal is that the court erred in applying the three-year statute of limitations that governs legal-malpractice claims to her complaint rather than the five-year statute of limitations applicable to a breach-of-contract claim. This case was certified to our court on September 1, 2009, as an appeal involving the power of the Arkansas Supreme Court to regulate the practice of law. *See Ark. Sup. Ct. R. 1-2(a)(5)* (2009). We affirm the order of the circuit court.

Pounders signed a prenuptial agreement on May 16, 2003, before her marriage to David Pounders. Appellee Mike Reif represented her in conjunction with her execution of that document. Pounders filed for a divorce from her husband in June 2007. The prenuptial

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agreement was held valid by the divorce court.

On May 15, 2008, Pounders filed a complaint against Reif; Dover, Dixon, and Horne, PLLC; and John Doe defendants one through ten.¹ Her complaint alleged one count of breach of contract and a second count of professional malpractice, including breach of fiduciary duty. Pounders alleged that Reif failed to properly explain the prenuptial agreement to her, failed to obtain certain financial information, and pressured her into signing the agreement.

Appellees filed a motion to dismiss on June 3, 2008, claiming that all of Pounders's claims were time barred by the applicable three-year statute of limitations. The circuit court agreed and dismissed the complaint with prejudice on September 24, 2008, finding that Pounders's complaint sounded in negligence rather than contract and was barred by the three-year statute of limitations. It is from that order that Pounders now appeals.

Pounders argues that the circuit court erred in dismissing her complaint because it wrongly applied the three-year statute of limitations for legal-malpractice claims, Ark. Code Ann. § 16-56-105 (Repl. 2005), to her complaint instead of the five-year statute of limitations for a breach of a written contract, Ark. Code Ann. § 16-56-111 (Repl. 2005). In reviewing the circuit court's decision on a motion to dismiss, this court must treat the facts alleged in

¹While Pounders's complaint included John Doe defendants, one through ten, Rule 54(b)(5) of the Arkansas Rules of Civil Procedure instructs that "[a]ny claim against a named but unserved defendant, including a 'John Doe' defendant, is dismissed by the circuit court's final judgment or decree." Ark. R. Civ. P. 54(b)(5) (2009).

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the complaint as true and view them in a light most favorable to the plaintiff. *See Davenport v. Lee*, 348 Ark. 148, 72 S.W.3d 85 (2002). In testing the sufficiency of a complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and all pleadings are to be liberally construed. *See id.*

It is well established that the three-year statute of limitations applies to legal-malpractice actions. *See Sturgis v. Skokos*, 335 Ark. 41, 977 S.W.2d 217 (1998) (citing *Ragar v. Brown*, 332 Ark. 214, 964 S.W.2d 372 (1998)). However, Pounders alleges that there was a writing in this case, a certification attached to the prenuptial agreement that was signed by Reif, that was sufficient to make her claim an action to enforce a written obligation, duty, or right, subject to a five-year statute of limitations pursuant to section 16-56-111. Furthermore, she contends that the certification included specific promises made by Reif that he then breached.

When making a determination about what statute of limitations applies in a case, the court must look to the facts alleged in the complaint itself to ascertain the area of law in which they sound. *See Sturgis v. Skokos*, 335 Ark. 41, 977 S.W.2d 217 (1998); *O'Bryant v. Horn*, 297 Ark. 617, 764 S.W.2d 445 (1989). If two or more statutes of limitation apply to a cause of action, generally the statute with the longest limitation will be applied. *See Sturgis, supra.* However, we look to the gist of the action to determine which statute of limitations to apply. *See O'Bryant, supra.*

This court recently held in *Kassees v. Satterfield*, 2009 Ark. 91, ___ S.W.3d ___, that

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although the appellant claimed that his complaint alleged a breach of contract by his attorney for failing to file a proper appeal in his case, the gist of the complaint was that his attorney had not acted diligently and, therefore, the action sounded in negligence and was properly dismissed pursuant to the three-year statute of limitations. In *Kassees*, the appellant specifically alleged in his complaint that there had been a written agreement between the parties that his attorney would appeal his case. In the instant case, Pounders does not allege that there was a written employment contract between her and Reif. However, Pounders does claim that the certification attached to the prenuptial agreement that was signed by Reif contained specific promises that transformed her claim from one for negligence into one for breach of a written agreement.

The certification attached to the prenuptial agreement, signed by Reif, stated:

I, William Michael Reif, Attorney At Law, have consulted with Lisa Nicole Kirk and advised her of her legal rights and the legal effect of this Agreement between she and David Pounders, dated on this 16th day of May, 2003; specifically, I have gone over the contractual agreement with her, clause by clause, explaining it to her and answering any question that she may have concerning it prior to her execution thereof; furthermore, I have explained to her what her legal rights and obligations would be absent this contractual agreement and under this contractual agreement.

Pounders asserts that the language in that certification constituted specific promises that Reif breached. However, Pounders ignores the fact that this document is simply an acknowledgment of actions Reif claimed to have already taken. It does not include specific promises made to Pounders by Reif and certainly does not contain evidence of an offer,

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acceptance, and consideration, the very basic elements of a contract. The certification was clearly not a written agreement or contract between the parties. Rather, the certification is simply a document commonly included by attorneys in prenuptial agreements to evidence that a premarital agreement is valid and enforceable.² Therefore, we do not find that this writing conveys written obligations, duties, or rights required under the statute of limitations provided by Ark. Code Ann. § 16-56-111.

When we look at the gist of Pounders's complaint, her basic allegation is that Reif failed to properly advise her on the signing of a prenuptial agreement, which is a failure to act diligently and, if true, negligence on the part of Reif as an attorney. As we held in *Sturgis*:

The obligation to act diligently is present in every lawyer-client relationship. The violation of that obligation is, by definition, nothing more than negligence.

335 Ark. at 49, 977 S.W.2d at 221. Even had there been a breach of an implied contract, as this court allowed in *Lemon v. Laws*, 313 Ark. 11, 852 S.W.2d 127 (1993), the three-year statute of limitations would have applied because there was not a written contractual agreement that would bring Pounders's claim under the five-year statute of limitations.

Therefore, the circuit court was correct in applying the three-year statute of limitations. Pounders does not argue on appeal that her complaint was timely pursuant to that

²Arkansas Code Annotated 9-11-406 § (Repl. 2006) instructs that a premarital agreement is not enforceable if the party against whom enforcement is sought did not, amongst other things, "voluntarily and expressly waive after consulting with legal counsel, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided."

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statute. For these reasons, we affirm the order of the circuit court.

Affirmed.

IMBER, J., not participating.