STATE OF MICHIGAN

COURT OF APPEALS

CHICAGO-WYOMING REAL ESTATE CORPORATION,

Plaintiff-Appellant,

v

ROBERT LITT, MYLES HOFFERT, and HOFFERT, LITT, SOLWAY & DAITCH, P.C.,

Defendants-Appellees.

UNPUBLISHED
November 30, 1999

No. 206376
Wayne Circuit Court
LC No. 96-636147 NM

Before: Collins, P.J., and Jansen and White, JJ.

PER CURIAM.

In this legal malpractice action, plaintiff appeals as of right the circuit court's orders granting summary disposition under MCR 2.116(C)(10) and MCR 2.116(C)(7), on statute of limitations grounds. We affirm.

Plaintiff incorporated and in June 1991 purchased a parcel of land to operate medical clinics. The medical clinics were to occupy approximately twenty percent of the property. On or about September 12, 1991, plaintiff gifted eighty percent of the property to Barton-McFarlane Neighborhood Association (Barton-McFarlane), a tax-exempt entity. Plaintiff retained defendants to provide legal services relative to plaintiff's incorporation, the purchase of the property, the transfer of eighty percent of the property to Barton-McFarlane, and an attempted reduction in the property tax assessment. Plaintiff anticipated that the legal services would include doing whatever was necessary to insure that it would be liable for property taxes on only twenty percent of the parcel of land purchased, while the remaining eighty percent would be the responsibility of Barton-McFarlane. Plaintiff alleged that defendants failed to effectuate a lot split for property tax purposes, and that as a result it was liable for several years of back taxes on the entire parcel.

We review the circuit court's grant of summary disposition de novo. *Lindsey v Harper Hospital*, 213 Mich App 422, 425; 540 NW2d 477 (1995), aff'd 455 Mich 56 (1997). A motion brought under MCR 2.116(C)(7) may be supported by affidavits, depositions, admissions, or other documentary evidence. *Patterson v Kleinman*, 447 Mich 429, 432; 526 NW2d 879 (1994). If such

material is supplied, the circuit court must consider it. *Lindsey, supra* at 425. The reviewing court must accept all the nonmoving party's uncontested allegations and evidence as true. *Sewell v Southfield Public Schools,* 456 Mich 670, 680; 576 NW2d 153 (1998).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Bd of Road Commrs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The circuit court must consider the pleadings and any depositions, affidavits, admissions or other documentary evidence in the light most favorable to the nonmoving party. *Chandler v Dowell Schlumberger, Inc,* 456 Mich 395, 397; 572 NW2d 210 (1998). The test is whether the kind of record that might be developed, giving the benefit of reasonable doubt to the opposing party, would leave open an issue on which reasonable minds might differ. *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994).

MCL 500.5805; MSA 27A.5805 provides a two-year limitation period for malpractice actions. MCL 600.5838; MSA 27A.5838 states:

> (1) Except as otherwise provided in section 5838a, a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudo-professional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.
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> (2) Except as otherwise provided in section 5838a, an action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. The burden of proving that the plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim shall be on the plaintiff. A malpractice action which is not commenced within the time prescribed by this subsection is time barred.

"A lawyer discontinues serving a client when relieved of the obligation by the client or the court," "*or upon completion of a specific legal service that the lawyer was retained to perform*." *Maddox v Burlingame,* 205 Mich App 446, 450; 517 NW2d 816 (1994).

Plaintiff contends that Litt continued to serve plaintiff until at least July 10, 1996, and that its complaint, filed on August 6, 1996, was therefore timely. We disagree. Plaintiff's president, Dr. Rodney Shaw, stated in an affidavit that he believed that Litt and his firm had performed all necessary legal procedures to ensure that plaintiff owned and was liable for taxes on twenty percent of the property only." Since the property gift to Barton-McFarlane occurred shortly after the parcel purchase in June 1991, and plaintiff allegedly sought to avoid liability for unnecessary taxes from the start, assuming the veracity of the affidavit, the only reasonable inference is that plaintiff's president believed that the tax-split was completed after the 1991 purchase. The deeds were filed and recorded in early September 1991. Litt left the law firm in late September 1991. Defendant Hoffert successfully reduced

the property tax assessment on the entire parcel and informed plaintiff of this by letter dated January 24, 1992. The letter also stated that "[y]ou should review the tax bills that have been issued by the City of Detroit and make sure they are correct, if not, please call the Treasury's office to have them corrected. It is also my understanding that the tax bills for 1991 were not paid." Additionally, plaintiff's president testified that after January, 1992, Litt was representing plaintiff on an "as-needed" basis and that he did not receive a bill for legal services after January 1, 1992. Defendants' successor, Myles Hoffert's Professional Corporation, filed a complaint against plaintiff for unpaid legal services in May 1994. We conclude that plaintiff has not shown that defendants rendered services regarding matters out of which the instant claim for malpractice arose after August 6, 1994, i.e., within the two years previous to plaintiff's filing of its complaint..

Plaintiff alternatively argues that because its complaint was filed within six months of discovering defendants' malpractice on or about February 23, 1996, after retaining new counsel to investigate its tax liabilities, summary disposition was improperly granted. We disagree.

Pursuant to MCL 600.5838; MSA 27A.5838, an action alleging malpractice may be commenced at any time within the applicable period prescribed in section 5805 or 5851 to 5856, or within six months after plaintiff discovers or should have discovered the existence of the claim.

Under the discovery rule, a plaintiff's claim accrues

> when the plaintiff discovers, or through the exercise of reasonable diligence, should have discovered, the two later occurring elements [of a malpractice case]: (1) an injury, and (2) the causal connection between plaintiff's injury and defendant's breach. [*Moll v Abbott Laboratories,* 444 Mich 1, 16; 506 NW2d 816 (1993).]

Further,

> We have consistently held that under the discovery rule, a cause of action accrues when 'the claimant knows or should have known of the disease [injury] . . . .' While the term 'knows' is obviously a subjective standard, the phrase 'should have known' is an objective standard based on an examination of the surrounding circumstances. Consequently, we find that a plaintiff's cause of action accrues when, on the basis of objective facts, the plaintiff should have known of an injury, even if a subjective belief regarding the injury occurs at a later date. [*Id.* at 17-18.]

The *Moll* analysis applies to legal malpractice cases. *Gephardt v O'Rourke,* 444 Mich 535, 544; 510 NW2d 900 (1994). The resolution of when the plaintiff discovers a possible cause of action hinges on resolving whether "a reasonable person in plaintiff's circumstances [would have] discovered the claim." *Levinson v Trotsky,* 199 Mich App 110, 112; 500 NW2d 762 (1993). "[O]nly where the victim is not aware that he has been injured because the damage is not discoverable by due diligence does the discovery rule apply." *Grimm v Ford Motor Company,* 157 Mich App 633, 638; 403 NW2d 482 (1986).

In connection with his motion for summary disposition, defendant Litt submitted an affidavit that stated in pertinent part that based on title work, letters and conversations he had had with plaintiff's president, Dr. Rodney Shaw:

> "I can and will testify that Chicago-Wyoming Real Estate Corporation was well aware, in September and October of 1991 and in January of 1992, that real property taxes had been assessed on the property in question by the City of Detroit, were due and payable, and that no "splitting" of the parcel had occurred. Rodney Shaw, D.O., notwithstanding numerous and periodic advice that taxes were due and owing on the parcel in question and that no "splitting" had occurred, has specifically and consistently refused and avoided payment of such taxes.

Litt also submitted an affidavit of Dr. Asfandiar Shukri, who was secretary-treasurer of plaintiff corporation and, along with Dr. Shaw, a fifty percent shareholder until he sold his shares in 1995:

> 5. From 1992 to the summer of 1995, I was aware that the Plaintiff corporation never paid any of the real property taxes assessed against any portion of the former Northwest General Hospital property; I was aware that the taxes that were due and owing prior to the corporate Plaintiff's purchase of the property remained unpaid, as well as those taxes which became due after Plaintiff corporation's purchase of the property.
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> 6. On numerous occasions from 1992 through the summer of 1995, I advised Dr. Rodney Shaw that he, as President of Plaintiff corporation, should pay the taxes that continued to accumulate; on each occasion when I advised Dr. Shaw of this, he indicated that he was aware that taxes were due and owing and accumulating but that he wished to avoid paying the taxes.
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> 7. When the Plaintiff corporation purchased the property in question, it was our plan to "split" the property and donate a portion of it to a non-profit agency that might be able to secure exemption from real property taxes for its portion of the premises; the Plaintiff corporation and its officers, including myself, realized that there would still be real property taxes due and owing on that portion which was being used by the Plaintiff corporation; *as officers of the corporation on and after January [1992], we were aware that no tax "split" could be accomplished unless and until all real property taxes which were due on the premises were fully and completely paid; on numerous occasions in 1992, 1993, 1994, and 1995, when I approached Dr. Shaw to pay the real property taxes, I reminded him that no tax "split" of the property could occur until all of the past due and owing real property taxes were paid.*
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> 8. The conversations that I have referred to in this affidavit took place during the years 1992, 1993, 1994 and 1995, and before February 1, 1996. [Emphasis added.]

Litt also submitted an affidavit of Dr. Carl Fowler, who bought Dr. Shukri's shares of plaintiff corporation in the summer of 1995, which stated that he knew at the time of the purchase that there were due and unpaid real property taxes owed and owing on plaintiff's property "comprised of certain land and a portion of the building which formerly was known as the Northwest General Hospital" because he was told this by Dr. Shukri, and that when he purchased the property he was also aware that there were due and unpaid taxes on the entire property which had previously constituted that land and building of Northwest General Hospital because Dr. Shukri told him.

Defendant Hoffert supported his motion for summary disposition with an affidavit in which he stated that he "advised Plaintiff that the property taxes were reduced, not eliminated and not exempted from payment," "never advised Plaintiff that a tax-exemption applied to any portion of the property," and "was never retained for the purpose of 'splitting real estate.'"

Plaintiff's response to defendants' motions argued that:

> Plaintiff had knowledge of taxes owing on the parcel occupied by the plaintiff only. Plaintiff was not aware that it could be, would be, or was, liable for taxes on the parcel owned and controlled by the Barton-McFarlane Neighborhood Association, a 501(c)(3) tax exempt corporation, which was the site of the old Northwest General Hospital and constituted eighty percent (80%) of the parcel. Plaintiff was not made aware of the failure to report the lot split to the tax authorities such that tax liability for the larger parcel which should have fallen on the tax exempt [Barton-McFarlane] now allegedly falls on the plaintiff.
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> Plaintiff did not become aware of its cause of action until February 1996 while investigating the amount of taxes owed on its parcel so that it could lease a portion of the premises to AT&T for a cellular tower. On February 23, 1996, Montie Labadie, Esq., discovered that the lot split had not been recorded with or [sic] nor had notification been sent to the tax authorities and informed Dr. Shaw that the Corporation now owed in excess of $60,000.00 in back taxes on the parcel. Therefore, the date of discovery of this action was not until on or after Mr. Labadie's findings of February 23, 1996. This case was filed on August 6, 1996 which is within the six (6) month discovery period.
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> Damages here were not ascertained until February 23, 1996, at the earliest, when the failure to notify the tax authorities of the lot split was first discovered. No tax bills or statements have ever been received by the plaintiff corporation.

Plaintiff argued and Dr. Shaw stated in an affidavit that it was struggling financially and that both he and Dr. Shukri decided to delay paying the property taxes. Plaintiff argued that it was not until "sometime in 1995 that Dr. Shukri mentioned paying the taxes" when he applied to perform work for the Detroit Police Department but was rejected because of the delinquent taxes. Plaintiff argued that Drs. Shaw

and Shukri discussed paying the taxes then but Dr. Shukri decided he did not want the contract and told Dr. Shaw to forget the whole thing. Plaintiff argued that "[I]n January 1996, AT&T approached the Corporation to lease a portion of their parcel . . . In late January or early February, AT&T pulled out of the deal stating that they would not lease a portion of the land because of the back property taxes." Plaintiff submitted affidavits of Dr. Shaw responding to the affidavits of Litt and Dr. Shukri, in which Dr. Shaw stated that as a physician, he was not aware of the legal procedures necessary to complete the parcel purchase and reduction of tax assessment on the property, and that he heard the term "lot split" for the first time in late February 1996, at that time discovering that the lot split should have been recorded with the appropriate tax authorities to allow for proper pro-rata apportionment of the taxes. He further stated that he thought Barton-McFarlane was tax-exempt and could not legally owe taxes on its portion of the property. Dr. Shaw's affidavit further stated:

> 22. I do not recall any conversations with Mr. Litt and members of his firm indicating that it was required that our Corporation pay all back taxes on the property before it could assign a portion of the property to Barton-McFarlane, or change the existing tax liabilities. In fact, such conversations never occurred.

Viewing the facts in the light most favorable to plaintiff, plaintiff never received a tax bill from the City of Detroit and opted to not pay taxes for lack of finances, and Dr. Shaw was not told by defendants that a lot split was necessary to effectuate plaintiff's being responsible for only twenty percent of the taxes on the parcel, and believed defendants did everything legally necessary to ensure that plaintiff owed taxes only on that portion. However, plaintiff never sought to obtain any tax bills to verify that they reflected the appropriate taxes. And, Dr. Shukri, who was the secretary/treasurer of the corporation, was, according to his unrefuted affidavit, aware of the need to pay taxes to effect the split. We cannot therefore agree with plaintiff that the circuit court erred in concluding as a matter of law that plaintiff knew or should have known of the injury before February 6, 1996, *Moll, supra* at 17-18, and in dismissing the claim as untimely.

Affirmed.

/s/ Jeffrey G. Collins
/s/ Helene N. White