

STATE OF MICHIGAN
COURT OF APPEALS

KENNETH M. WOJNICZ,

Plaintiff-Appellant,

v

WILLIAM G. JACKSON,

Defendant-Appellee.

UNPUBLISHED

November 30, 1999

No. 212929

Clinton Circuit Court

LC No. 98-008835 NM

Before: Holbrook, Jr., P.J., and Smolenski and Collins, JJ.

PER CURIAM.

In this legal malpractice action, plaintiff appeals as of right from an order granting summary disposition to defendant pursuant to MCR 2.116(C)(7) and (10), on the ground that the claim was time-barred under MCL 600.5805; MSA 27A.5805 and MCL 600.5838; MSA 27A.5838, the two-year statute of limitation and six-month discovery limitation on legal malpractice actions. We affirm.

As plaintiff's attorney in a 1984 criminal matter, defendant prepared a pleading indicating a possible insanity defense. Mental examinations by two psychologists indicated plaintiff was not insane. No competency issue was raised and no competency hearing was held. Defendant's representation of plaintiff ended at his sentencing hearing in 1984. In 1994, plaintiff moved for production of transcripts and documents of the criminal matter, asserting the need for the transcripts and documents in that case in order to factually support a claim of ineffective assistance of counsel. The requested information was provided, and on December 11, 1997, plaintiff filed a motion requesting a new trial, vacation of his sentence, and withdrawal of his guilty plea.¹ On May 14, 1998, plaintiff filed this action, alleging that defendant committed legal malpractice in representing plaintiff in the criminal matter. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiff's action was barred by the statute of limitations. The trial court ruled that plaintiff knew or should have known he had a possible malpractice cause of action in 1994, when he sought the transcripts to pursue an ineffective assistance of counsel claim, and that the action was barred because it was filed outside the statutory limitation period.

Plaintiff first argues that the trial judge erred in ruling that his action was barred by the period of limitation. We disagree. The question whether a claim is within the applicable period of limitation is

one of law for the court to decide and is therefore reviewed de novo. *Solowy v Oakwood Hospital Corp*, 454 Mich 214, 216; 561 NW2d 843 (1997); *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). When reviewing a motion for summary disposition under MCR 2.116(C)(7), a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor. *Guerra v Garratt*, 222 Mich App 285, 289; 564 NW2d 121 (1997).

Michigan's statute of limitation for suits alleging malpractice, MCL 600.5805(4); MSA 27A.5805(4), requires that a plaintiff's action commence within two years after the claim has accrued. MCL 600.5838(1); MSA 27A.5838(1) provides that a claim based on malpractice accrues when the attorney discontinues serving the plaintiff. However, the statute also includes a six-month discovery rule that permits a plaintiff to file a malpractice claim despite the passage of two years from the accrual of the claim, if the action is filed within six months of the time plaintiff discovers or should have discovered the existence of the claim, whichever is later. MCL 600.5838(2); MSA 27A.5838(2). Actions not filed either within the two year limitations period or within six months of discovery of the claim are barred. *Gebhardt v O'Rourke*, 444 Mich 535, 544; 510 NW2d 900 (1994). For the purposes of the six-month discovery rule, plaintiffs discover a claim when they have information sufficient to alert them to a "possible" cause of action, and not when they have notice of a "likely" cause of action. *Moll v Abbott Laboratories*, 444 Mich 1, 23-24; 506 NW2d 816 (1993). An objective standard is used in determining whether a plaintiff should have discovered a possible cause of action. *Id.* at 17-18.

In this matter, defendant's representation of plaintiff ceased in 1984. Therefore, plaintiff clearly missed the two-year limitation for filing a malpractice action. We agree with the trial court that plaintiff's 1994 motion for the transcripts and documents for the purposes of documenting an ineffective assistance of counsel claim indicates that plaintiff was aware of an injury and its possible cause. Accordingly, plaintiff's 1998 action also was barred by the six-month discovery rule. Because plaintiff's suit is time-barred, the trial court properly granted defendant summary disposition.

Plaintiff argues next that the trial court erred in failing to rule that the statute of limitation was tolled by his insanity, pursuant to MCL 600.5851; MSA 27A.5851. We disagree. MCL 600.5851(2); MSA 27A.5851(2) defines insanity as "a condition of mental derangement such as to prevent the sufferer from comprehending rights he or she is otherwise bound to know and is not dependent on whether or not the person has been judicially declared to be insane." The statute gives a formerly insane person one year to file suit after the disability of insanity has been removed. MCL 600.5851(1); MSA 27A.5851(1); *Lemmerman v Fealk*, 449 Mich 56, 70; 534 NW2d 695 (1995). When a cause of action is prima facie barred by the statute of limitations, the burden of proof is upon the party seeking to enforce the cause of action to show facts taking the case out of the operation of the statute of limitations. *Warren Consolidated Schools v W R Grace & Co*, 205 Mich App 580, 583; 518 NW2d 508 (1994). Therefore, the burden is on plaintiff to demonstrate a question of fact regarding his sanity.

Here, plaintiff contends that he was insane, as that term is used under the tolling statute, at the time of his criminal proceedings and remains insane today. As evidence of this insanity, plaintiff notes his long-term alcohol and drug abuse and violent childhood environment, and cites to portions of the

reports of two psychologists in his criminal case finding plaintiff to be anti-social. However, neither psychologist found plaintiff to be insane. One psychologist concluded that defendant did not suffer from “a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or the ability to cope with the demands of life.” The other opined that defendant “was neither mentally ill, nor legally insane.” Given these expert opinions and the fact that defendant has offered nothing other than his own opinion in response, we conclude that plaintiff did not meet his burden of demonstrating insanity for purposes of tolling the statute.

Plaintiff next argues that the trial court erred in granting summary disposition before the completion of discovery. We disagree. Generally, summary disposition is premature before discovery on a disputed issue is complete. *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996). However, summary disposition is not premature if the discovery does not stand a fair chance of uncovering factual support for opposing the motion for summary disposition. *Id.* Here, while plaintiff points out that the trial court suspended defendant’s obligation to answer discovery, the information sought related entirely to defendant’s assets and actions during the criminal proceedings and had no fair chance of strengthening plaintiff’s opposition to summary disposition based upon expiration of the applicable periods of limitation. Accordingly, summary disposition was not premature.

Finally, plaintiff argues that the trial court abused its discretion in failing to grant his motion for change of venue. However, because we are affirming the trial court’s grant of summary disposition to defendant and because MCL 600.1645; MSA 27A.1645 precludes appellate relief based solely on improper venue, see *Grebner v Clinton Twp*, 216 Mich App 736, 744; 550 NW2d 265 (1996), we decline to address the issue of venue.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Michael R. Smolenski

/s/ Jeffrey G. Collins

¹ The outcome of this motion is unknown.