

STATE OF MICHIGAN
COURT OF APPEALS

NICHOLAS R. CROWDER,

Plaintiff-Appellant,

v

ROBERT H. ROETHER, DAVID G. MYERS
and STEVEN SOWELL,

Defendants-Appellees.

UNPUBLISHED

November 15, 2002

No. 232509

Oakland Circuit Court

LC No. 99-017529-NM

Before: Talbot, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition to defendant David G. Myers in this legal malpractice action. Plaintiff also argues that the trial court erred in its prior orders granting summary disposition to defendants Steven Sowell and Robert H. Roether. We affirm.

This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *DiPonio Constr Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46; 631 NW2d 59 (2001). In determining whether a party is entitled to judgment as a matter of law pursuant to 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. *Brennan v Edward D Jones & Co*, 245 Mich App 156, 157; 626 NW2d 917 (2001). Where there are no factual disputes and reasonable minds cannot differ on the legal effect of the facts, the decision regarding whether a plaintiff's claim is barred by the statute of limitations is a question of law that this Court reviews de novo. *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 77; 592 NW2d 112 (1999). However, if a material factual dispute exists in such a manner that factual development could provide a basis for recovery, summary disposition is inappropriate. *Id.*

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).

The trial court did not err in granting defendant Sowell's motion for summary disposition pursuant to MCR 2.116(C)(10),¹ on the basis that defendant Sowell owed no legal duty to plaintiff. In a legal malpractice action, a plaintiff has the burden of establishing four elements: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994), quoting *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993). A sworn affidavit, as well as exhibits submitted by defendant Sowell, evidenced the following facts. Plaintiff executed a mortgage to defendant Roether on property in Ferndale, Michigan. This mortgage was recorded on April 21, 1993. Defendant Roether assigned the mortgage to B&B Investment Group, which subsequently hired the law firm of Shapiro & Alt to foreclose the mortgage. Defendant Sowell was employed by Shapiro & Alt. The occupants were evicted pursuant to court order on October 16, 1995. Defendant Sowell never represented plaintiff in any fashion.

On appeal, plaintiff argues that further discovery would have revealed documents and deposition testimony showing that defendant Sowell had a legal duty to plaintiff. Generally, a motion for summary disposition pursuant to MCR 2.116(C)(10) is premature when discovery on a disputed issue has not been completed. *Colista v Thomas*, 241 Mich App 529, 537; 616 NW2d 249 (2000). However, summary disposition before the close of discovery is appropriate if there is no reasonable chance that further discovery will result in factual support for the nonmoving party. *Id.* at 537-538. Moreover, if a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support the allegation by some independent evidence. *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994); *Pauley v Hall*, 124 Mich App 255, 263; 335 NW2d 197 (1983). Plaintiff provides no citation to the record showing any evidence of the asserted facts nor are the "documents" referred to by plaintiff presented on appeal. Plaintiff also relies on deposition testimony in another case which plaintiff argues proves that plaintiff and Eric Crowder were contacted by defendant Sowell under the guise that he was acting on behalf of Shapiro & Alt and demanded payment of over \$30,000. Plaintiff refers to this testimony, but does not provide any citation to the lower court record or to any of the exhibits appended to plaintiff's brief on appeal. However, even if the evidence had been presented in the lower court and/or this Court, the fact that defendant Sowell demanded a payment from plaintiff while he was employed by Shapiro & Alt does not evidence an attorney-client relationship between defendant Sowell and plaintiff.

Plaintiff also argues that "defendant Sowell's order" does not conform with the pleadings and was not served upon plaintiff in accordance with court rules. On November 10, 1999, the

¹ Although the trial court's order states that it is pursuant to "MCR 2.116(C)(8) and/or (C)(10)," and that plaintiff "failed to state a claim upon which relief can be granted," the trial court relied on facts contained in defendant Sowell's affidavit thereby precluding reliance on MCR 2.116(C)(8).

trial court heard defendant Sowell's motion for summary disposition. On November 24, 1999, the trial court entered an order granting defendant Sowell's motion for summary disposition. Therefore, it appears that the order was properly entered in the lower court. Even if the order was not properly entered, a subsequent order denying plaintiff's motion for reconsideration was entered by the trial court thereby laying to rest any of plaintiff's concerns about the entry of the trial court's order.

The trial court did not err in granting defendant Roether's and defendant Myers' motions for summary disposition pursuant to MCR 2.116(C)(7) on the basis that plaintiff's legal malpractice claim was barred by the statute of limitations. According to MCL 600.5805 and MCL 600.5838, a plaintiff in a legal malpractice action is required to file suit within two years of the attorney's last day of service, or within six months of when the plaintiff discovered, or should have discovered, the claim. *Gebhardt v O'Rourke*, 444 Mich 535, 539; 510 NW2d 900 (1994). 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). The six-month discovery rule applies if the plaintiff commences the action within six months of (1) discovering the cause of action or (2) when a reasonable person in the plaintiff's circumstances would have discovered the cause of action. *Levinson v Trotsky*, 199 Mich App 110, 112; 500 NW2d 762 (1993). A civil action is commenced by filing a complaint with a court. MCR 2.101(B) The fraudulent concealment of the existence of a cause of action invokes MCL 600.5855, which provides that an action may be commenced within two years after the plaintiff discovers or should have discovered the cause of action. *Brownell v Garber*, 199 Mich App 519, 523-524; 503 NW2d 81 (1993). The fraud must have been manifested by an affirmative act or misrepresentation, unless the defendant owed an affirmative duty to disclose information because of a fiduciary relationship with the plaintiff. *Id.* at 527. The plaintiff has the burden of establishing the alleged fraud. *Id.* at 531.

In regard to defendant Roether, the trial court determined that the latest date that he represented plaintiff was August 1993. Although plaintiff asserts that the record shows otherwise, the only evidence he presented to support these facts were un-notarized "affidavits." Although MCR 2.119(B) does not state that a signature is required for an affidavit to support a motion for summary disposition, MCR 2.113(A) provides that the rules on signing of pleadings apply to affidavits which must be verified by oath or affirmation. See *Bechtold v Morris*, 443 Mich 105, 106; 503 NW2d 654 (1993). Plaintiff's complaint alleges that plaintiff fired defendant Roether on August 2, 1993. Plaintiff also attached to his complaint the United States District Court docket sheet as an exhibit. An August 26, 1993, entry indicates that the court granted defendant Roether's motion to withdraw as counsel. Therefore, based on plaintiff's own pleadings and exhibits, his complaint, filed on September 14, 1999, was well beyond the two-year statute of limitations.

Plaintiff also argues that this Court should consider repeal of MCL 600.5851(9) and (10). However, this issue is not properly presented on appeal because it was not brought before or addressed by the trial court. *Auto Club Ins Ass'n v Lozanis*, 215 Mich App 415, 421; 546 NW2d 648 (1996). Additionally, plaintiff does not present any legal argument, but states that the provisions allow "unscrupulous and well[-]connected Michigan Attorneys [to] deny their victims access to the complaint process." An appellant may not merely announce his position and leave

it to this Court to discover and rationalize the basis for his claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Plaintiff also argues that, because discovery was not completed in the lower court, plaintiff does not have documents to support his argument that MCL 600.5851(1) applies because of plaintiff's mental and physical handicaps caused by the atrocious jail conditions. As discussed above, if a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support the allegation by some independent evidence. *Bellows, supra*, 206 Mich App 561; *Pauley, supra*, 124 Mich App 263. Plaintiff has failed to cite to any record evidence supporting this argument. Regardless of this deficiency, MCL 600.5851(1) requires that the disability exist at the time the cause of action arises. Plaintiff's legal malpractice action accrued on the date plaintiff fired defendant Roether, which was before plaintiff was convicted or imprisoned, and thus, before he allegedly suffered mentally and physically due to imprisonment.

To avoid application of the two-year statute of limitations, plaintiff makes several arguments. First, plaintiff argues that defendant Roether's various acts of fraud tolled the statute of limitations. However, on appeal, plaintiff does not cite to any record evidence. MCR 7.212(C)(7). In the lower court, the only evidence cited by plaintiff includes various court documents, which do not support his alleged facts, and a set of un-notarized "affidavits." Additionally, even if the fraud subsequent to defendant Roether's withdrawal was substantiated with evidence, plaintiff was aware of the alleged malpractice on the date he fired defendant Roether prior to his withdrawal. Therefore, the tolling provision for fraudulent concealment of malpractice does not apply.

Plaintiff also argues that the limitations period was tolled by his incarceration. The tolling statute was amended in 1993 to eliminate imprisonment as a disability. 1993 PA 283. The amendment was effective April 1, 1994, and provided that those persons imprisoned on the effective date had one year within which to file a claim. MCL 600.5851(9). One year from April 1, 1994, would have been April 1, 1995. Plaintiff's complaint was not filed until September 14, 1999. Thus, even if plaintiff was imprisoned on the effective date of the amendment, his complaint was not filed within the one-year grace period. Moreover, if a party is imprisoned after the last day of professional service, the imprisonment cannot be deemed a disability. MCL 600.5851. Plaintiff was not yet imprisoned or even convicted on August 24, 1993, the date defendant Roether withdrew from his case.

In regard to defendant Myers' motion, the trial court based summary disposition on the fact that defendant Myers last represented plaintiff on December 28, 1995. This fact is found in defendant Myers' motion for summary disposition, but is not supported by any evidence. At the hearing on defendant Myers' motion, the trial court asked defendant Myers if he represented plaintiff at any time beyond December 28, 1995. Defendant Myers stated that he did not. The trial court found, on the basis of this fact, that the statute of limitations expired before plaintiff filed his complaint on September 14, 1999. However, there is no evidence anywhere in the lower court file to support the fact that defendant Myers last represented plaintiff on December 28, 1995. Therefore, the trial court erroneously granted summary disposition on this basis.

This Court can affirm a trial court's decision if it reached the correct conclusion albeit for the wrong reason. *Norris v State Farm Fire & Casualty Co*, 229 Mich App 231, 240; 581 NW2d

746 (1998). There is evidence in the lower court file that plaintiff was aware of his claims against defendant Myers as early as 1996 when he filed a complaint against defendant Myers in the United States District Court for the Western District of Pennsylvania alleging that defendant Myers, and several other entities, were responsible for plaintiff's false imprisonment and the theft of family property while acting under color of law. In this case, plaintiff's complaint alleged that defendant Myers was appointed by the court to serve as his attorney after defendant Roether withdrew. Plaintiff also alleged that he was sentenced on May 17, 1994. Beyond these facts, plaintiff alleged that defendant Myers engaged in criminal conspiracy with the other defendants and court personnel to obtain plaintiff's false conviction and sabotage his appeal. Plaintiff alleged that defendant Myers was responsible for years of false imprisonment, destruction of plaintiff's health, the loss of his wife and girlfriend, and all property and assets. Therefore, the 1996 complaint evidences that the facts alleged in this case were known to plaintiff at the time the 1996 complaint was filed. Even assuming that the complaint was filed on the last day in 1996, plaintiff's complaint in this case, filed on September 14, 1999, was not within the two-year statute of limitations. Plaintiff's argument that defendant Myers' alleged fraudulent conduct tolls the statute of limitations is without merit because the tolling provision only applies where the fraud concealed the malpractice. In this case, plaintiff was aware of the malpractice as early at 1996. Therefore, the trial court properly granted summary disposition to defendant Myers on the basis that plaintiff's complaint was filed after the statute of limitations had expired.

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald