

STATE OF MICHIGAN
COURT OF APPEALS

CHRIS SARR,

Plaintiff-Appellant,

v

SCOTT A. SMITH, P.C.,

Defendant-Appellee.

UNPUBLISHED

May 6, 2004

No. 242395

Washtenaw Circuit Court

LC No. 02-000039-AA

Before: Bandstra, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

In this legal malpractice and fraud claim, plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7), on the basis that plaintiff's claim was barred by the statute of limitations. We affirm.

We review de novo a trial court's decision to grant or deny summary disposition. *Mouradian v Goldberg*, 256 Mich App 566, 570; 664 NW2d 805 (2003). Summary disposition under MCR 2.116(C)(7) is appropriate when a claim is time-barred. *Id.* at 571. In reviewing a request for summary disposition pursuant to MCR 2.116(C)(7), we consider all the documentary evidence provided by the parties and accept as true all of plaintiff's well-pleaded allegations, unless they are contradicted by documentary evidence. *Id.*

The instant case arises out of plaintiff's retention of defendant to represent him in a criminal case involving four counts of first-degree criminal sexual conduct. Plaintiff entered a plea of no contest, allegedly based on defendant's representation that he would receive a maximum sentence of eleven years. However, at sentencing, plaintiff received a minimum sentence of eleven years and a maximum sentence of thirty-five years. On August 13, 1999, plaintiff substituted new counsel, and moved to withdraw his plea on the grounds that he had not fully understood the plea agreement. Plaintiff's motion was subsequently denied. On December 6, 2000, plaintiff filed a grievance against defendant with the Attorney Grievance Commission; however, the grievance was dismissed on June 6, 2001. On January 11, 2002, plaintiff brought the instant suit alleging that he entered the no contest plea because of fraud committed by defendant.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), alleging that plaintiff's complaint stated a cause of action for legal malpractice rather than fraud, and that it was therefore barred by the statute of limitations applicable in legal malpractice actions.

Defendant maintained that he last represented plaintiff on August 13, 1999; therefore, the two-year statute of limitations for malpractice claims that are apparent at the time they were committed had expired. MCL 600.5805(6). Additionally, defendant maintained that plaintiff knew of the claim on December 6, 2000 when he filed the grievance; therefore, the six month statute of limitations for malpractice claims that were not apparent at the time they were committed, but may be brought six months from the time they were or should have been discovered, had also expired. MCL 600.5838(2).

In response to defendant's motion for summary disposition, plaintiff argued that defendant engaged in fraudulent concealment in that he wrongfully concealed the existence of plaintiff's cause of action, that he was unable to discover the cause of action within the limitations period despite the exercise of due diligence, and that defendant made false representations to plaintiff. Plaintiff argued that he did not discover the cause of action until January 30, 2001, and that his claim was not time-barred by the statute of limitations.

The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(7), finding that the gravamen of plaintiff's claim constituted a legal malpractice claim, which was barred by the statute of limitations pursuant to MCL 600.5805(6) and MCL 600.5838(2).

Plaintiff now asserts that the trial court erred in applying the statute of limitations for malpractice and granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7), because his pleadings, exhibits, and affidavit stated a cause of action for fraud. However, this Court has held that if a party "attempts to characterize a malpractice claim as a fraud or other type of claim, a court will look through the labels placed on the claim and will make its determination on the basis of the substance and not the form." *Brownell v Garber*, 199 Mich App 519, 532-533; 503 NW2d 81 (1993).

In order to make out a prima facie case of fraud, a plaintiff must prove the following:

(1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery. [*Brownell, supra* at 533, quoting *Scott v Harper Recreation, Inc*, 192 Mich App 137, 144; 480 NW2d 270 (1991), rev'd on other grounds 444 Mich 441; 506 NW2d 847 (1993).]

Further, MCR 2.112(B)(1) provides that in allegations of fraud, the circumstances constituting fraud must be stated with particularity. General allegations or mere speculation are insufficient. *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 586; 543 NW2d 42 (1995).

In contrast, a plaintiff must prove two elements to recover on a claim of legal malpractice. *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 424; 551 NW2d 698 (1996). The first is "that counsel failed to exercise reasonable skill, care, discretion, and judgment in the conduct and management of the underlying case." *Id.* Second, the plaintiff

“must establish that, but for the negligence, the outcome of the case would have been favorable to [him].” *Id.*

In the instant case, plaintiff’s complaint contains numerous allegations that defendant failed to exercise reasonable care while representing him in his criminal case. But neither the complaint nor the attached exhibits allege any instances where defendant made representations that he either knew to be false or made with reckless disregard for their truth or falsity. Rather, plaintiff asserts that defendant failed to properly explain the plea agreement or to take full advantage of potential defenses. Plaintiff’s claims were insufficient to state a claim for fraud under *LaMothe, supra* at 586. Based on the standard set forth in *Brownell, supra* at 532-533, the trial court properly held that plaintiff’s claim was for legal malpractice rather than fraud.

This Court has stated that there are three possible situations in which an action for legal malpractice may arise and that a different statute of limitations applies to each. *Brownell, supra* at 529. The first exists where “the malpractice is apparent at the time it is committed.” *Id.* Under MCL 600.5805(4)¹, a “two-year period begins to run when the act of malpractice occurs.” *Id.* The second occurs where the act constituting the malpractice is not apparent at the time it was committed and the two-year statute of limitations has already run. *Id.* In such situations, MCL 600.5838(2) gives plaintiffs six months from the time the claim was or should have been discovered to bring their claim. *Id.* The third exists where a defendant fraudulently conceals an act of malpractice. *Id.* Under such circumstances, MCL 600.5855 grants plaintiffs two years from the date when they discovered or should have discovered their claim. *Id.*

In *Brownell, supra* at 526-527, this Court found that because the plaintiff alleged that his attorney fraudulently concealed the fact that he had a cause of action for malpractice, summary disposition pursuant to MCR 2.116(C)(7) was premature. Because it was required to construe the allegations in the light most favorable to the plaintiff and the defendant did not challenge the factual sufficiency of the claims regarding fraudulent concealment, this Court reversed the trial court’s order dismissing the plaintiff’s malpractice claim. *Id.* at 531-532.

In the instant case, the trial court held that because more than two years had passed since defendant ceased representing plaintiff and more than six months had passed since plaintiff knew or should have known of the purported malpractice, plaintiff’s suit was barred by the statute of limitations. But the trial court did not determine whether the statute of limitations provided by MCL 600.5855 applied.

Paragraph 30 of plaintiff’s complaint states as follows:

Further, Defendant intentionally and fraudulently concealed from Plaintiff the fact of Defendant’s negligence and the identification of all matters in opposition of a guilty plea, such concealment effected by employment of artifice, device,

¹ MCL 600.5805(4) was renumbered as MCL 600.5805(6) by 2002 PA 715, effective March 31, 2003.

misstatement of misrepresentation planned to prevent inquiry or escape investigation, and hinder the acquiring of information disclosing a right of action.

Plaintiff's complaint merely makes a conclusory assertion that defendant fraudulently concealed the existence of a potential malpractice claim. When reviewing a motion for summary disposition pursuant to MCR 2.116(C)(7), the trial court must accept as true all of the plaintiff's well-pleaded allegations, and construe them in the light most favorable to the plaintiff. *Wade v Dep't of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). But here, plaintiff's general allegations do not describe the circumstances constituting fraud with sufficient particularity. *LaMothe, supra* at 586. Because plaintiff failed to sufficiently allege fraudulent concealment, the lengthier statute of limitations from MCL 600.5855 does not apply.

Even if plaintiff had properly alleged the existence of fraudulent concealment, his claim would nonetheless fail. The statute of limitations set forth in MCL 600.5855 allows a plaintiff two years from the time he knew or should have known of the existence of his claim to file suit. In the instant case, the acts that plaintiff alleges constitute malpractice occurred before August 13, 1999. On that date, plaintiff retained substitute counsel and attempted to withdraw the plea he had entered based on defendant's advice, arguing that he should be allowed to withdraw the plea because he entered it without understanding the sentencing consequences. Because plaintiff replaced defendant with a different attorney, it is evident that plaintiff was dissatisfied with defendant's level of performance. Despite plaintiff's claim that defendant fraudulently concealed the malpractice claim from him, plaintiff knew or should have known of a potential malpractice claim on August 13, 1999. But he failed to file suit until January 11, 2002. Even under the lengthier period provided by MCL 600.5855, plaintiff's suit is time-barred. Therefore, we affirm the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7).

Plaintiff next contends that his due process rights were violated in that the trial judge had a pecuniary interest in the outcome of the instant case. Because plaintiff failed to move for disqualification in the trial court pursuant to MCR 2.003(C)(1), he has waived any claim that the trial judge should have been disqualified. See *Welch v District Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996). Even if plaintiff had not waived it, his claim fails on its merits. Plaintiff asserts that the presiding judge would somehow profit from deciding against him because the Washtenaw courts would lose prestige and the chief judge's political aspirations would be harmed if plaintiff's suit was successful. The alleged connection between these potential political aspirations and the trial judge's pecuniary interests is too tenuous to overcome the presumption of judicial impartiality. *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 600; 640 NW2d 321 (2001).

Finally, plaintiff argues that his due process rights were violated when the trial court failed to consider the brief he submitted in response to defendant's reply brief in support of his motion for summary disposition. We find that this claim has no merit. The trial court properly dispensed with oral arguments pursuant to MCR 2.119(E)(3), which provides that "a court may, in its discretion, dispense with or limit oral arguments on motions, and may require the parties to file briefs in support of and in opposition to a motion." In the order dispensing with oral arguments, the trial court stated that defendant could submit a reply brief no later than May 4, 2002. Although defendant did not file his reply brief until May 9, 2002, nothing in the trial court's opinion granting defendant's motion for summary disposition indicates that the trial court

considered this document when making its decision. Therefore, no injustice occurred due to the fact that trial court did not consider plaintiff's response.

We affirm.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald