

STATE OF MICHIGAN
COURT OF APPEALS

DAVID DWAYNE EVANS,

Plaintiff-Appellant,

v

ELIOT S. ZIPSER,

Defendant-Appellee.

UNPUBLISHED

December 28, 2004

No. 249465

Oakland Circuit Court

LC No. 2003-047319-NM

Before: Meter, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

Defendant attorney represented plaintiff in a termination of parental rights case. His representation ended in late October 2000, when the family court issued an order terminating plaintiff's parental rights. Plaintiff sent a malpractice complaint and other papers regarding indigence to the court on October 18, 2002. The court entered an order waiving fees in January 2003, the complaint was docketed as filed in February 2003, and defendant was served with process in March 2003. The trial court dismissed the complaint on defendant's motion, finding that it was barred by the two-year limitations period. MCL 600.5805(6).

II. STANDARD OF REVIEW

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). Whether a cause of action is barred by the statute of limitations is a question of law that is reviewed de novo on appeal. *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340-341; 573 NW2d 637 (1997).

A legal malpractice action must be commenced within two years after the claim first accrues. MCL 600.5805(1), (6). The claim accrues at the time provided in § 5838. MCL 600.5827. A malpractice claim against a state-licensed professional other than a health care professional "accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional 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.” MCL 600.5838(1). An attorney discontinues serving a client “when the attorney is relieved of that obligation either by the client or the court.” *Stroud v Ward*, 169 Mich App 1, 6; 425 NW2d 490 (1988). A malpractice claim may be commenced at any time within the applicable period prescribed in § 5805 “or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later.” MCL 600.5838(2).

III. ANALYSIS

Plaintiff first contends that the court erred in not considering his argument “based on the 6-month rule” because he did not discover that he had a claim for legal malpractice until October 2002. However, the discovery rule requires proof that the plaintiff neither discovered *nor should have discovered* the existence of his claim at least six months before the applicable limitations period expired, and the burden of proof is on the plaintiff. *Id.* While plaintiff claimed that he did not discover that defendant committed malpractice until October 2002, he has not shown that that he could not have discovered his cause of action any earlier. Plaintiff has failed to address an issue which must necessarily be reached to reverse the trial court; thus, plaintiff is not entitled to relief. *Sargent v Browning-Ferris Indus*, 167 Mich App 29, 37; 421 NW2d 563 (1998); *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987).

Plaintiff next contends that his complaint was filed within the two-year limitations period because he mailed it to the court several days before the limitations period expired and it should be deemed as filed when it was received for processing, not when it was docketed. See, e.g., *Keenan v Dep’t of Corrections*, 250 Mich App 628, 632-633; 649 NW2d 133 (2002); *Biafore v Baker*, 119 Mich App 667, 669-670; 326 NW2d 598 (1982).

A civil action is commenced “by filing a complaint with a court.” MCR 2.101(B). However, the filing of the complaint alone is insufficient to toll the statute of limitations. *Gladych v New Family Homes, Inc*, 468 Mich 594; 664 NW2d 705 (2003). The statute of limitations is tolled only when the complaint is filed and the requirements of MCL 600.5856 are met (the plaintiff makes service of process on the defendant, jurisdiction over defendant is obtained by some other method, or the plaintiff delivers the summons and complaint to an officer for service and the officer makes service within ninety days). *Id.* at 595, 605.

In this case, there is no evidence that the trial court received plaintiff’s papers for processing before January 2003. Even assuming the court had received the papers on or before October 27, 2002, plaintiff’s cause of action would not be saved unless the requirements of MCL 600.5856 were also met. Plaintiff did not serve defendant with process until March 2003. There is no evidence that jurisdiction was obtained over defendant by October 2002. The summons was not issued until the complaint was processed for filing and could not have been delivered to a process server until February 28, 2003 at the earliest, by which time the limitations period had already expired. Therefore, plaintiff’s claim was time-barred and the trial court did not err in dismissing it.

Affirmed.

/s/ Patrick M. Meter

/s/ Kurtis T. Wilder

/s/ Bill Schuette