STATE OF MICHIGAN

COURT OF APPEALS

DALLAS M. BURTON, JR.,

Plaintiff-Appellant,

v

MICHAEL M. ELKINS, and ELKINS AND ASSOCIATES,

Defendants-Appellees.

UNPUBLISHED
December 1, 2005

No. 262438
Oakland Circuit Court
LC No. 2003-054646-CK

Before: Whitbeck, C.J., and Saad and O'Connell, JJ.

PER CURIAM.

I.

Plaintiff, Dallas Burton, Jr., appeals from the trial court's grant of summary disposition to defendants, Michael Elkins and Elkins and Associates.[1] We reverse the trial court and remand for further proceedings consistent with this opinion.

Plaintiff Burton filed this legal malpractice claim against Elkins and asserted that Elkins failed to timely file a malpractice claim against plaintiff's prior counsel, Kevin McNulty.[2] Elkins says that he notified Burton by way of a December 5, 2001 letter, that Elkins would not be pursuing any claims against McNulty. Burton denied that he received Elkins' December 5, 2001 letter and said that there were further communications between Burton and Elkins after that date, including a January 2003 conversation during which Elkins advised Burton that his case was still being evaluated to determine what claims, if any, would be pursued against McNulty.

Burton filed his complaint on December 5, 2003, placed the complaint in the hands of an officer for service on January 14, 2004, and Elkins was served on January 21, 2004. Elkins

[1] Throughout this opinion, the name Elkins refers to both Michael Elkins and his law firm, Elkins and Associates.

[2] Burton wanted to sue McNulty because McNulty allegedly allowed the statute of limitations to expire on claims Burton had against a former contractor, James Beatty, and another former attorney, James Fowler.

moved for summary disposition and asserted that Burton's claims were barred by the applicable two-year statute of limitations for malpractice actions. The trial court agreed and found that (1) Elkins' December 5, 2001 letter was mailed in the due course of business, (2) Burton was presumed to have received it, and (3) Burton's denial of receipt was not sufficient to defeat that presumption. On appeal, Burton argues that there was a genuine issue of material fact regarding whether he received defendants' December 5, 2001 letter.

II.

This Court reviews a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7) de novo. *DiPonio Construction Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46-47; 631 NW2d 59 (2001). When ruling on a motion under this subrule, "a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in plaintiff's favor." *Brennan v Edward D Jones & Co*, 245 Mich App 156, 157; 626 NW2d 917 (2001).

Under Michigan law, it is presumed that a letter mailed in the due course of business is received. *Good v Detroit Automobile Inter-Insurance Exchange*, 67 Mich App 270, 274-275; 241 NW2d 71 (1976) (citing *Long-Bell Lumber Co v Nynam*, 145 Mich 477, 481; 108 NW 1019 (1906)). "This presumption may be rebutted by evidence, but whether it was [received] is a question for the trier of fact." *Stacey v Sankovich*, 19 Mich App 688, 694; 173 NW2d 225 (1969). In *Farmer's Handy Wagon Co v Newcomb*, 192 Mich 634, 638; 159 NW 152 (1916), our Supreme Court noted that the defendant's placing of a notice of cancellation of an order for delivery of a silo in the mail, "properly addressed and with postage prepaid, undoubtedly create[d] a presumption that [the cancellation was] duly received; but receipt of the notice by plaintiff was denied by such agents and officers of the company as usually received its mail, and [thus] whether it was received, if sent, became a question for the jury." Similarly, in *Goodyear Tire & Rubber Co v Roseville*, 468 Mich 947; 664 NW2d 751 (2003), our Supreme Court stated:

> While a presumption arises that a letter with a proper address and postage will, when placed in the mail be delivered by the postal service, this presumption can be rebutted with evidence that the letter was not received. If such evidence is presented, as it was here, then a question of fact arises regarding whether the letter was received. [Citations omitted.]

See also, *Celina Mutual Insur Co v Falls*, 72 Mich App 130, 136; 249 NW2d 323 (1976) (the defendant's testimony that he had not received a notice of cancellation mailed to him by plaintiff, coupled with return of the notice stamped "unclaimed" rebutted any presumption that the defendant had received the notice) and *Cuttle v Concordia Mut Fire Ins Co*, 295 Mich 514; 295 NW2d 246 (1940) (the plaintiffs' testimony that they did not receive a notice of assessment together with a letter from a secretary of defendant company to another party complaining of the manner in which the agent sent out such notices created a question of fact for the jury as to whether a notice of assessment was sent to plaintiffs).

In contrast, in *Good, supra*, this Court ruled that the plaintiffs' testimony that they could not remember seeing a cancellation notice was not sufficient to rebut the presumption that a cancellation notice, properly mailed, was received and therefore, that the plaintiffs' insurance policy was duly cancelled. 67 Mich App at 277. Thus, our Courts have distinguished between a

firm assertion that the purported letter was not received and an assertion that a party did not remember receiving it. The former is sufficient to create a question of fact regarding whether the letter was received, while the latter does not.

Here, plaintiff Burton submitted an affidavit in which he claimed that he did not receive any letter from Elkins that advised that Elkins would not be pursuing his claims against McNulty. Burton also provided documentary evidence to support his assertions that he sent a registered letter to defendants on December 8, 2001 that inquired about the status of his case and that he placed telephone calls to defendants' office in January and August 2003 to make further inquiries. The parties do not dispute that Elkins did not respond to Burton's December 8, 2001 letter. Burton suggests that it is a reasonable inference that, had Elkins sent a letter three days before his December 8th letter advising him that they were not going to pursue his claims, Elkins would have responded. Burton also stated that, in January 2003, Elkins told him that he was still evaluating Burton's claims against McNulty. This evidence, considered in a light most favorable to Burton, was sufficient to rebut the presumption that Burton received the December 5, 2001 letter. Thus, the trial court erred when it ruled that the statute of limitations expired before Burton placed the complaint in the hands of a process server on January 14, 2003. Whether Burton received the letter is a question of fact for the jury. Accordingly, we decline to address the other issues raised on appeal.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Peter D. O'Connell