STATE OF MICHIGAN

COURT OF APPEALS

OLD CF, INC, f/k/a CHASE FARMS, INC, and OLD PCS, LLC, f/k/a PREMIER COLD STORAGE, LLC, Plaintiffs-Appellants,	UNPUBLISHED September 20, 2012
v	No. 307484 Kent Circuit Court
REHMANN GROUP, LLC, REHMANN ACCOUNTING, LLC, and ROBSON ACCOUNTING, INC, Defendants-Appellees.	LC No. 11-001859-NM

Before: M. J. KELLY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

In this suit involving allegations of accounting malpractice, plaintiffs Old CF, Inc., which was formerly known as Chase Farms, Inc. (Chase Farms), and Old PCS, Inc., which was formerly known as Premier Cold Storage, LLC (Premier), appeal by right the trial court's order dismissing their claims against defendants Rehmann Group, LLC, Rehmann Accounting, LLC, and Robson Accounting, Inc. (collectively Rehmann). On appeal, we conclude that the trial court correctly determined that Chase Farms and Premier's claims were untimely and, therefore, did not err when it dismissed their claims against Rehmann under MCR 2.116(C)(7). Accordingly, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Chase Farms purchased fruits and vegetables from growers, processed the fruits and vegetables, and then sold them to wholesalers. Premier, which was affiliated with Chase Farms, owned and operated a cold storage facility near Chase Farms. Chase Farms stored its processed fruits and vegetables at Premier's facility before shipping the products to its wholesalers.

Chase Farms contracted with Rehmann to audit and express an opinion on Chase Farms' annual financial statements at various times. In August 2007, Rehmann expressed its opinion that Chase Farms fairly presented its financial position in the financial statements for the fiscal year ending in March 2007. During the time relevant to the 2007 audit, Chase Farms expanded its business using approximately $19 million in bank loans. In late 2008, it was discovered that Chase Farms had overstated its inventory by millions of dollars. As a result, it was in breach of

its covenants with the bank. The bank then foreclosed on Chase Farms and Premier and liquidated their assets.

In February 2011, Chase Farms and Premier sued Rehmann for professional negligence and unjust enrichment.[1] They alleged that Rehmann failed to follow the Generally Accepted Auditing Standards for Chase Farms' 2007 audit and, thereby, breached their duty to both Chase Farms and Premier. They further alleged that this breach proximately caused the "destruction" of Chase Farms and Premier. Specifically, they alleged that, had Rehmann properly conducted the 2007 audit, Rehmann would have discovered the overstated inventory and issued an appropriate opinion. With the corrected information, Chase Farms and Premier would have "scaled back" their expansion, borrowed less money, and would not have lost their businesses.

Rehmann moved for summary disposition in August 2011. Rehmann argued that Chase Farms and Premier's claims were untimely under the two-year period of limitations applicable to malpractice claims. Rehmann presented evidence in the form of an engagement letter that showed that Chase Farms contracted with Rehmann to provide a discrete service with a defined endpoint: an audit of Chase Farms' 2007 financial statements, which it completed with the audit's delivery. Rehmann conceded that it provided additional services at times after the 2007 audit, but argued that those services amounted to new matters that also had discrete start and end points. Rehmann also argued that the undisputed evidence showed that Chase Farms and Premier discovered the discrepancy in the inventory by 2008 and, therefore, were untimely even under the six month period of limitations applicable under the discovery rule. Finally, Rehmann argued that the undisputed evidence showed that it did not owe any duty to Premier because Premier was not Rehmann's client for the 2007 audit and did not otherwise meet the requirements stated under MCL 600.2962.

In response, Chase Farms and Premier argued that the evidence showed that Chase Farms contracted with Rehmann for accounting services over a period of time and that, given this continuing relationship, it had two years from the date that Rehmann last provided an accounting service to Chase Farms to file its suit. Because it sued within two years of the date that Rehmann last performed an accounting service, Chase Farms and Premier maintained that their suit was timely. Premier also argued that, because it too contracted with Rehmann for accounting services and Rehmann knew that it would be relying on Chase Farms' audit, Rehmann could be liable to Premier for its failure to properly audit Chase Farms' financial statements.

After hearing oral arguments, the trial court determined that Rehmann provided discrete services to Chase Farms and that, accordingly, Chase Farms' cause of action accrued on the date that the particular service was complete. Because Chase Farms did not sue Rehmann until more than two years after Rehmann completed service with regard to the 2007 audit, the trial court determined that Chase Farms' suit was untimely. For the same reason, it determined that Premier's claims were also untimely. For that reason, it declined to determine whether Premier stated a viable claim against Rehmann as a third party under MCL 600.2962.

[1] The second claim was titled "Disgorgement of Fees", but appeared to be premised on a theory of unjust enrichment.

The trial court entered an order dismissing Chase Farms and Premier's claims under MCR 2.116(C)(7) in November 2011. This appeal followed.

II. SUMMARY DISPSOITION UNDER MCR 2.116(C)(7)

A. STANDARDS OF REVIEW

This Court reviews de novo a trial court's decision to grant summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation of statutes and contracts. *Hunter v Hunter*, 484 Mich 247, 257, 771 NW2d 694 (2009); *Rory v Continental Ins Co*, 473 Mich 457, 464, 703 NW2d 23 (2005).

B. MCR 2.116(C)(7)

Under MCR 2.116(C)(7), a defendant may be entitled to summary disposition if the plaintiff's claims are untimely under the applicable statute of limitations. The moving party may support a motion under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other documentary evidence and the trial court must consider the supporting materials. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The court must consider the documentary evidence in the light most favorable to the nonmoving party. *Zwiers v Growney*, 286 Mich App 38, 42; 778 NW2d 81 (2009). If there is no factual dispute, whether a plaintiff's claim is barred under the applicable period of limitations is a matter of law for the court. *Id.*

C. THE LAST TREATMENT RULE

A person harmed by another's professional malpractice must sue the professional within two years of the date that his or her claim first accrued. MCL 600.5805(1), (6). This period of limitations applies to claims arising from accounting malpractice. *Local 1064, RWDSU AFL-CIO v Ernst & Young*, 449 Mich 322, 333; 535 NW2d 187 (1995). A claim premised on accounting malpractice accrues when the professional "discontinues serving the plaintiff in a professional or psuedoprofessional 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).

Here, Rehmann argued that it discontinued serving Chase Farms when it delivered the 2007 audit in August 2007. Chase Farms and Premier, in contrast, argued that, because Rehmann continued to perform accounting services for Chase Farms to March 2009, it did not discontinue service until that date. The question before this Court is whether Chase Farms and Premier's claims accrued when Rehmann completed service on the 2007 audit or when it completed the last accounting service performed for Chase Farms. That is, we must determine whether and how MCL 600.5838(1) applies to the facts of this case.

Our Supreme Court examined MCL 600.5838(1) in *Morgan v Taylor*, 434 Mich 180; 451 NW2d 852 (1990). There the plaintiff, David Morgan, sued Dr. Marcus Taylor and the cooperative for which he worked for malpractice related to Taylor's failure to diagnose and treat Morgan's glaucoma after an eye examination in March 1981. *Morgan*, 434 Mich at 183. The question before the Supreme Court was whether Morgan's claim accrued after the eye

examination in March 1981, which gave rise to his claim, or after the last eye examination that he had with the cooperative in August 1983. The Court explained that whether Morgan's claim accrued in 1981 or 1983 turned on the proper interpretation of MCL 600.5838(1), which it stated was a codification of the last treatment rule derived from common law. *Id.* at 186-187.

The rationale behind the last treatment rule is the reliance and trust that the person seeking the professional's care necessarily places in the professional; until the professional ceases performing, the person under the professional's care has no duty to inquire into the effectiveness of the professional's measures. *Id.* at 187-188. Where there were no occurrences or breaks in the continuity of care that demonstrate that the plaintiff's trust in the relationship had ended, the period of limitations begins to run on the last day of actual service. *Id.* at 188-190.

Turning to the facts of its case, the Court in *Morgan* concluded that there was no evidence that there had been an occurrence that "indicated a termination of the relationship" or "any abandonment by plaintiff of his trust in the defendant and its staff." *Id.* at 190-191. The Court found it noteworthy that the cooperative had a contractual obligation to continue providing care to Morgan: "in light of the contractual arrangement which bound defendant and entitled plaintiff to periodic eye examinations, it cannot be said that the relationship . . . terminated after each visit." *Id.* at 194. Rather, the obligation to properly treat Morgan extended beyond 1981 and the cooperative did not cease treating Morgan as to the matters out of which the claim for malpractice arose until August 1983.

In *Levy v Martin*, 463 Mich 478; 620 NW2d 292 (2001), our Supreme Court reaffirmed the continuing validity of the analysis stated in *Morgan* and applied it to a claim for accounting malpractice. In *Levy*, the defendants prepared the annual tax returns for the plaintiff from 1974 to 1996. *Id.* at 480-481. The plaintiff sued his accountants in August 1997 after he was compelled to pay additional taxes for 1991 and 1992. *Id.* at 481. Our Supreme Court determined that *Morgan* "was 'instructive and, *in appropriate circumstances*, controlling.'" *Id.* at 485 (citation omitted, emphasis added). Using the reasoning from *Morgan*, the Court in *Levy* held that the accountants' continued preparation of tax returns constituted the matters out of which the claim for malpractice arose: "it is clear here that plaintiffs, rather than receiving professional advice for a specific problem, were receiving generalized tax preparation services from defendants." *Id.* at 489. For that reason, the Court reversed the dismissal of the plaintiffs' malpractice claim as untimely. *Id.* at 491.

Although the Court in *Levy* determined that the last treatment rule applied to the accountants' preparation of annual tax returns in that case, the Court cautioned that its holding was limited to the unique facts of its case: "in the present case, defendants have not offered documentary evidence regarding the nature of the professional services that were provided by defendants to plaintiffs." *Id.* at 489-490 n 19. The Court explained that, because the defendants failed to present any evidence that each income tax preparation was a "discrete transaction that should be considered to separately constitute 'the matters out of which the claim for malpractice arose,' MCL 600.5838(1)", it was compelled to conclude that defendants had not established that the plaintiffs' claims were barred for purposes of a motion under MCR 2.116(C)(7). *Levy*, 463 Mich at 490 n 19. The Court stated that the result might have been different if the defendants had presented evidence that the annual tax preparations constituted discrete transactions: "Accordingly, this opinion does not mean, for example, that if an accountant prepared income

tax returns for a party annually over a period of decades, the statute of limitations for alleged negligence in preparing the first of these tax returns would not run until the overall professional relationship ended." *Id.*

D. APPLICATION TO THE FACTS

In this case, Rehmann plainly performed accounting services for Chase Farms over a period of time. However, unlike the case in *Levy*, Rehmann presented evidence that it did not perform generalized accounting services for Chase Farms, but instead performed discrete, individualized accounting services with defined start and end points. In support of its motion, Rehmann submitted an "engagement" letter that confirmed with Chase Farms "our understanding of the services we are to provide for Chase Farms, Inc. as of and for the year ended March 31, 2007." In the engagement letter, Rehmann stated that it would audit Chase Farm's financial statements for the year ending March 2007 and explained in detail the limits on the engagement. Indeed, Rehmann stated that, although it could perform extended procedures to detect fraud, it had not been engaged to do so and Chase Farms would have to hire it in a separate engagement if it wished Rehmann to perform that task. The engagement letter also provided that neither party would solicit for hire or consult with the other party's personnel during the *term of the engagement* and for one year after the engagement's termination and that Rehmann's maximum liability for "any negligent errors or omissions committed by us in the performance of the engagement will be limited to three times the amount of our fees *for this engagement* . . ." (emphases added). Rehmann also provided in the letter that "Our engagement ends on delivery of our audit report. Any follow-up services that might be required will be a separate, new engagement. The terms and conditions of that new engagement will be governed by a new, specific engagement letter for that service." Finally, Rehmann asked Chase Farms to sign and return the engagement letter if it agreed "with the terms of our engagement as described in the letter . . . ." Chase Farms' representative signed the letter of engagement and dated it July 2007.

In response to this motion, Chase Farms did not contest the validity of the engagement letter. Rather, it merely relied on the fact that Rehmann continued to provide it with accounting services after the 2007 audit and argued that, because Rehmann had to consider prior years when conducting the accounting services that Chase Farms engaged it to subsequently perform, Rehmann could not contend that each audit was a distinct transaction. But that argument ignores the terms of Chase Farms' agreement with Rehmann. By signing the engagement letter, Chase Farms plainly agreed that it was hiring Rehmann for a discrete and limited task—to audit its financial statements for the fiscal year ending March 2007. It further agreed that that engagement would end no later than the date that Rehmann delivered its audit to Chase Farms and that any future services would constitute a new engagement for services that would be governed by a new, specific engagement letter. Thus, Chase Farms agreed that Rehmann's professional services arising out of the 2007 audit would end on that date and that date is the date that Rehmann discontinued serving Chase Farms "as to the matters out of which the claim for malpractice arose . . . ." See MCL 600.5838(1). The engagement letter provided for an "occurrence" that terminated the relationship between Chase Farms and Rehmann: the delivery of the 2007 audit. See *Morgan*, 434 Mich at 190-191 (stating that there must be evidence of an occurrence that terminated the relationship with the professional). The terms that Chase Farms agreed to in the engagement letter also are clear evidence that the parties intended the audit to be

a "discrete transaction", notwithstanding that Chase Farms later hired Rehmann to perform additional accounting services. See *Levy*, 463 Mich at 489-490 n 19. Accordingly, Chase Farms and Premier's claims premised on accounting malpractice accrued when Rehmann delivered its audit in August 2007.[2]

III. CONCLUSION

The undisputed evidence shows that Chase Farms and Premier's cause of action for malpractice arising from Rehmann's handling of the 2007 audit accrued in August 2007.[3] Moreover, it is undisputed that Chase Farms and Premier discovered the basis of their claims in 2008. However, Chase Farms and Premier did not sue within two years of the accrual date or six months of the date that they discovered the alleged malpractice. MCL 600.5805(1), (6); MCL 600.5838(1), (2). As such, their claims were untimely and the trial court did not err when it dismissed Chase Farms and Premier's claims under MCR 2.116(C)(7).

Affirmed. As the prevailing parties, Rehmann Group, LLC, Rehmann Accounting, LLC, and Robson Accounting, Inc., may tax their costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens

[2] Given our resolution of this case, we decline to consider whether Premier met the qualifications stated under MCL 600.2962.

[3] Because there is no dispute that the engagement letter represented the parties' agreement that the audit was for a discrete and individualized task with a defined termination date, there is—contrary to Chase Farms and Premier's argument on appeal—no factual dispute concerning the accrual date that must be submitted to a jury.