[Cite as *Kilko v. Haverfield*, 2010-Ohio-6364.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94920

GEORGE KILKO, JR.

PLAINTIFF-APPELLANT

vs.

WALTER & HAVERFIELD

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-687268

BEFORE: Celebrezze, J., Gallagher, A.J., and Kilbane, J.

RELEASED AND JOURNALIZED: December 23, 2010

ATTORNEYS FOR APPELLANT

Thomas Schmelzer
Stephanie J. Lane
Schmelzer & Lane
1370 Ontario Street
Suite 1814
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

George S. Coakley
Todd M. Jackett
Reminger & Reminger Co., L.P.A.
1400 Midland Building
101 Prospect Avenue, West
Cleveland, Ohio 44115-1093

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, George Kilko, seeks reversal of the trial court's grant of summary judgment in favor of appellee, Walter & Haverfield, L.L.P. ("W&H"), and the denial of his motion for leave to amend his complaint. After a thorough review of the record and the case law, we affirm the decisions of the trial court.

{¶ 2} Kilko owned several pieces of commercial real estate in northeast Ohio that were used for the operation of his various businesses. In March 2004, on the recommendation of his accountant, Kilko sought the services of

Gary Zwick at W&H to, among other things, develop an estate plan. Zwick developed a plan, which included the formation of numerous limited liability corporations ("LLC") to receive title to the commercial real estate Kilko owned. The plan called for an LLC to be formed for each business location and the property to be transferred to the individual LLCs. Kilko and Zwick caused the formation of 11 LLCs.

{¶ 3} Zwick turned over the job of transferring the real estate to an attorney at W&H, Eric Hall. Hall drafted deeds and other documents necessary for the transfer of the properties, which were then executed by Kilko. Hall filed the paperwork with the appropriate recorders' offices and sent the recorded deeds to Kilko on April 28, 2005. From this information, it is apparent that Hall failed to transfer the property located at 1860-1870 Ridge Road in Painesville, Ohio ("Ridge Road Property").[1] This property was to be transferred to Bowhall, LLC. Hall thought the Ridge Road Property was titled in the name of GP&T, LLC, one of Kilko's LLCs for property in Euclid, Ohio. Kilko noticed that the Ridge Road Property was still titled in his name and informed Hall of that fact. The Ridge Road Property was never transferred to any LLC.

[1]Kilko refers to this property as the Bowhall property because it is on the corner of Ridge and Bowhall Roads.

{¶ 4} Meanwhile, a judgment was issued in New York against Kilko in favor of Viking Financial Services ("Viking"). Viking began negotiating with Kilko, initially through Zwick and later through other attorneys hired by Kilko. On April 8, 2005, Viking transferred the judgment to Ohio and filed a judgment lien against Kilko for $226,277.35 in Lake County.

{¶ 5} Kilko asserts that he was not aware of the judgment lien until he attempted to sell the Ridge Road Property on March 12, 2008 because he had negotiated a payment plan with Viking and had been making payments. Upon the sale of the property, Kilko was required to satisfy the Viking judgment out of the sale proceeds.

{¶ 6} Kilko filed a malpractice suit against W&H on March 11, 2009 alleging that, as a result of W&H's malpractice, Kilko was required to satisfy the Viking judgment out of the proceeds of the sale of the Ridge Road Property, which he had intended to use to pay down other debts. As a result, he incurred an additional $2,000 per month in interest payments.

{¶ 7} W&H filed its answer and an amended answer asserting that the statute of limitations had run, barring Kilko's claim. W&H filed for summary judgment arguing the statute of limitations defense and that W&H could not be liable for the alleged malpractice of the law firm generally, but

only through the doctrine of respondeat superior,[2] which Kilko had failed to allege in his complaint.

{¶ 8} In response, Kilko petitioned the trial court to amend his complaint to include the individual attorneys involved. This motion was denied on December 22, 2009,[3] and summary judgment was granted in favor of W&H on March 2, 2010. Kilko then timely filed an appeal citing two assignments of error.[4]

Law and Analysis

{¶ 9} Kilko first argues that the trial court abused its discretion when it denied his motions for leave to amend the complaint.

[2] Defined as "[t]he doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." Black's Law Dictionary (9th Ed. 2009).

[3] A renewed motion to amend the complaint was also denied on January 21, 2010.

[4] Appellant's assignments of error are included in the appendix to this opinion.

Leave to Amend Pleadings

{¶ 10} Civ.R. 15(A) allows for the amendment of a pleading after a responsive pleading has been filed "only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires."

{¶ 11} "The decision whether to allow a party leave to amend a complaint lies exclusively within the discretion of the trial court and the ruling will not be disturbed on appeal by a reviewing court absent an affirmative showing of an abuse of discretion." *Richard v. WJW TV-8*, Cuyahoga App. No. 84541, 2005-Ohio-1170, ¶21, citing *Natl. Bank of Fulton Cty. v. Haupricht Bros.* (1988), 55 Ohio App.3d 249, 251, 564 N.E.2d 101; *Mead Corp. v. Lane* (1988), 54 Ohio App.3d 59, 67, 560 N.E.2d 1319. To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 12} "'[A] plaintiff must move to amend under Civ.R. 15(A) in a timely manner. However, "[a]n attempt to amend a complaint following the filing of a motion for summary judgment raises the spectre of prejudice."'" (Internal citations omitted.) *Trustees of Ohio Carpenters' Pension Fund v. U.S. Bank Natl. Assn.*, Cuyahoga App. No. 93295, 2010-Ohio-911, ¶25, quoting *Brown v. FirstEnergy Corp.*, 159 Ohio App.3d 696, 2005-Ohio-712, 825 N.E.2d 206, ¶6,

quoting *Johnson v. Norman Malone & Assoc., Inc.* (Dec. 20, 1989), Summit App. No. 14142, at 5.

{¶ 13} In *Johnson*, the Ninth District found that "'plaintiffs should not be permitted to sit by for [a 22-month] period and bolster up their pleadings in answer to a motion for summary judgment.'" Id., quoting *Eisenmann v. Gould-Natl. Bakeries, Inc.* (E.D.Pa.1958), 169 F.Supp. 862, 864, citing *Cty. of Marin v. United States* (N.D.Ca.1957), 150 F.Supp. 619, 623.

{¶ 14} In the present case, Kilko filed his original complaint on March 11, 2009. W&H then filed its motion for summary judgment on August 26, 2009. Almost a month later, on September 24, Kilko filed for leave to amend his complaint. This factor weighs heavily against permitting amendment.

{¶ 15} In denying Kilko's motion for leave to amend, the trial court found that "suit against the individual attorneys [is] time-barred. Under R.C. 2305.11(A), a legal malpractice suit must be commenced within one year from the date when the cause of action accrues. Those dates are April 28, 2005; July 20, 2005; or March 18, 2008. * * * Under either scenario, the situation presented here does not permit Mr. Kilko to use Civ.R. 15(C) to relate his proposed amendment back to the original filing of the complaint."

{¶ 16} As the trial court correctly found, whichever date is selected in the case, the claims Kilko is attempting to assert against the individual attorneys in his proposed amended complaint are barred by the statute of

limitations because those claims do not relate back to the date of the original filing of the complaint.

{¶ 17} Civ.R. 15(C) limits the circumstances where an amended pleading relates back to the filing date of the original.[5] The Ohio Supreme Court has determined that this rule "may be employed to substitute a party named in the amended pleading for a party misidentified in the original pleading to permit the amended pleading to relate back to the date of the original pleading provided the requirements of the rule are otherwise satisfied. However, the rule may not be employed to assert a claim against an additional party while retaining a party against whom a claim was asserted in the original pleading." *Kraly v. Vannewkirk* (1994), 69 Ohio St.3d 627, 632, 635 N.E.2d 323.

{¶ 18} In *Kraly*, a plaintiff tried to amend its complaint to add a claim against an insurance company for uninsured motorist coverage and to add the insurance company as a party due to the insolvency of the original defendant's insurance carrier. The Court determined "that the effect of the

[5]This rule states in part that "[w]henever the claim * * * asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth * * * the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him."

amended complaint herein was not to substitute a proper party for one previously named in the original complaint but to add [the insurance company] while retaining a proper party (i.e., the tortfeasor, Vannewkirk) to the action." Id. at 631-632. The Court found that "[t]he plain language of the rule relates to the substitution of a proper party for one previously misidentified in the original complaint. The concluding clause of Civ.R. 15(C) provides further support for this view inasmuch as it refers to a mistake regarding the identity of the proper party in the original pleading." (Internal citations omitted.) Id. at 632.

{¶ 19} Kilko is attempting to add parties to his complaint, not due to mistaken identity, but to assert claims that should have been asserted in the original complaint. According to the holding in *Kraly*, this is not a situation that allows these claims to relate back to the original filing date, and therefore, they are beyond the one-year statute of limitations as set forth in R.C. 2305.11(A).[6]

{¶ 20} The trial court did not abuse its discretion in denying Kilko leave to amend his complaint after W&H had filed for summary judgment and after the statute of limitations for the new claims he wished to assert had run.

---

[6]Kilko also proposes to assert a breach of contract claim, governed by a longer statute of limitations. However, this cause of action is still one of legal malpractice and is governed by the same statute of limitations, no matter if it sounds in contract or tort. *Muir v. Hadler Real Estate Mgmt. Co.* (1982), 4 Ohio App.3d 89, 90, 446 N.E.2d 820; *Dzambasow v. Abakumov*, Cuyahoga App. No. 86021, 2005-Ohio-6719, ¶17.

Summary Judgment

{¶ 21} Kilko also argues that the trial court erred in granting summary judgment in favor of W&H. "Civ.R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 22} It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798.

{¶ 23} This court reviews the lower court's granting of summary judgment de novo. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. An appellate court reviewing the grant of summary judgment must follow the standards set forth in Civ.R. 56(C). "The reviewing court evaluates the record * * * in a light most favorable to the nonmoving party. * * * [T]he motion must be overruled if reasonable minds

could find for the party opposing the motion." *Saunders v. McFaul* (1990), 71 Ohio App.3d 46, 50, 593 N.E.2d 24.

{¶ 24} Kilko asserted claims of direct legal malpractice against W&H only.[7] The Ohio Supreme Court has recently held that "a law firm is a business entity through which one or more individual attorneys practice their profession. * * * Thus, in conformity with our decisions concerning the practice of medicine, we hold that a law firm does not engage in the practice of law and therefore cannot directly commit legal malpractice." *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, ¶18.

{¶ 25} In his original complaint Kilko did not name any of the individual attorneys who allegedly provided deficient services. He only asserted claims against W&H generally. The Ohio Supreme Court has determined that "a law firm may be vicariously liable for legal malpractice only when one or more of its principals or associates are liable for legal malpractice." Id. at ¶26.

---

[7] As explained above, Kilko also asserted a breach of contract action, but "'[m]alpractice by any other name still constitutes malpractice * * *. [U]nprofessional misconduct may consist either of negligence or the breach of contract of employment. It makes no difference whether the professional misconduct is founded in tort or contract, it still constitutes malpractice.'" *Omlin v. Kaufmann & Cumberland Co., L.P.A.*, Cuyahoga App. No. 82248, 2003-Ohio-4069, ¶15, quoting *Omlin v. Kaufman & Cumberland, Co.* (July 7, 2000), N.D. Ohio No. 99-00047. See, also, *Bohan v. Dennis C. Jackson Co., L.P.A.*, Cuyahoga App. No. 93756, 2010-Ohio-3422, ¶20.

{¶ 26} W&H cannot be held liable for malpractice without allegations that an attorney at W&H provided inadequate legal services, and W&H could be held liable through a master-servant relationship. This is a theory that requires "the existence of control by a principal (or master) over an agent (or servant), terms that we have used interchangeably." *Wuerth*, at ¶20. Kilko did not allege any of these required elements. In *Bohan*, this court found that a complaint that alleged malpractice by a law firm and did not allege a breach by an individual attorney was properly dismissed via summary judgment according to the holding in *Wuerth*. Id. at ¶6-9. This court also ruled that the decision in *Wuerth* should apply to litigation pending at the time of its publication. Id. at ¶9. Therefore, summary judgment was appropriate to dispose of Kilko's direct claims of malpractice against W&H.

{¶ 27} Even if this were not the case, the trial court found that the applicable statute of limitations had run. R.C. 2305.11(A) sets forth the limitations period in this case and provides that "[a]n action * * * for malpractice * * * shall be commenced within one year after the cause of action accrued * * *." This period begins to accrue on the happening of a "cognizable event whereby the client discovers or should have discovered that his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue his possible remedies against the attorney or when the attorney-client relationship for that particular transaction or undertaking

terminates, whichever occurs later." *Zimmie v. Calfee, Halter & Griswold* (1989), 43 Ohio St.3d 54, 538 N.E.2d 398, at the syllabus.

{¶ 28} Kilko argues that, because he has a continuing attorney-client relationship with W&H and Zwick regarding these businesses, among other things, the relationship is ongoing and suit is not precluded by this statute. However, the language used in *Zimmie* makes clear that it is only the relationship "for that particular matter" that is determinative.

{¶ 29} Kilko was aware, or reasonably should have been aware of the failure to transfer the Ridge Road Property to an LLC at least one year prior to March 11, 2009, the date the complaint was filed. The sale agreement for the Ridge Road Property listed the seller as Kilko individually, not any LLC. Further, Kilko received real estate tax assessments in his name in 2005, 2006, 2007, and 2008. Various leases for the premises were also executed in the intervening time period by Kilko individually, rather than in the name of any company. This accumulation of evidence demonstrates that Kilko reasonably should have been aware of the fact that the Ridge Road Property was still titled in his name prior to March 2008.

{¶ 30} The attorney-client relationship established for the transfer of properties ended soon after those properties were transferred and the deeds sent to Kilko on April 8, 2005. He learned at that time that one property remained in his name. W&H last provided any sort of communication or

representation in this matter on July 20, 2005. W&H asserted that the bill Kilko received on this date was the final bill he received from them. Kilko did not set forth any evidence to the contrary. This termination is the other cognizable event that could trigger the accrual of the limitations period. *Zimmie* at 57. All of these events occurred at least one year prior to March 11, 2009. Therefore, the trial court did not err in granting summary judgment in favor of W&H.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

SEAN C. GALLAGHER, A.J., and
MARY EILEEN KILBANE, J., CONCUR

APPENDIX

Appellant's assignments of error:

"I. The trial court abused its discretion when it denied appellant's motions for leave to amend the complaint."

"II. The trial court erred in granting summary judgment because a genuine issue of material fact existed and because appellee was not entitled to judgment as a matter of law."