IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

NIKERRAY MIDDLEBROOK,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 02C-07-203 PLA
v.	)	
	)	
CAROLINE PATRICIA AYRES,	)	
	)	
Defendant.	)	

Submitted: May 28, 2004
Decided: June 9, 2004

UPON DEFENDANT'S MOTION TO DISMISS,
IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT
GRANTED.

ORDER

Nikerray Middlebrook, Wilmington, Delaware, *Pro se*, Plaintiff.

Caroline Patricia Ayres, Esquire, Wilmington, Delaware, Attorney for Defendant.

ABLEMAN, JUDGE

Before the Court is a Motion to Dismiss for Failure to State a Claim, or in the Alternative, Motion for Summary Judgment, filed by Caroline Patricia Ayres, Esquire, seeking dismissal of a legal malpractice claim filed by Nikerray Middlebrook for failure to file a direct appeal within thirty days from the sentencing date of his criminal conviction. As will be set forth more fully hereafter, Middlebrook's civil complaint alleging legal malpractice is barred by the applicable statute of limitations. Middlebrook has also failed to obtain expert testimony to support his claim of legal malpractice, as required by Delaware case law. Accordingly, the complaint fails to state a claim upon which relief may be granted.

Statement of Facts

In July 1997, after a three-day trial, Nikerray Middlebrook ("Plaintiff") was convicted in the Superior Court, New Castle County, of Attempted Murder in the First Degree, Assault in the First Degree, as a lesser-included offense of Attempted Murder in the First Degree, and three weapon offenses (Cr. A. Nos. IN96-09-1119 thru 1122 and IN96-09-1795). An Assistant Public Defender represented defendant at trial. Following his conviction, Defendant retained new counsel, Caroline Patricia Ayres ("Defendant"), to represent him at sentencing and for the purpose of filing post-trial motions. The record indicates that on January 9, 1998, Plaintiff paid Defendant $1,500.00 to represent him at the sentencing proceedings,

and that on June 22, 1998, Plaintiff paid Defendant $2,000.00 to represent him in an "appeal matter."

On June 12, 1998, Plaintiff was sentenced to thirty-eight years incarceration, to be suspended after thirty-seven years, for one year of probation. On June 23, 1998, Defendant filed a motion for a new trial asserting, among other things, that the Assistant Public Defender who represented him at trial had provided ineffective assistance of counsel. This Court denied Plaintiff's motion with the proviso that, the Plaintiff could renew the motion in the future upon providing more specific information. On November 17, 1998, the Court denied Plaintiff's renewed motion for a new trial.

In November 1999, the Plaintiff filed several *pro se* motions and letters with the Court seeking to obtain a copy of his trial transcript, and requested the appointment of counsel to represent him for purposes of pursuing a postconviction petition pursuant to Superior Court Criminal Rule 61. In January 2000, the Court reappointed Plaintiff's trial counsel to represent him in supervising and pursuing the Rule 61 motion. Plaintiff filed, *pro se*, a Rule 61 motion for postconviction relief in May 2000, asserting that both his trial counsel, and Defendant, were ineffective for failing to file a direct appeal on his behalf. The Court directed both attorneys to respond to Plaintiff's allegations of ineffective assistance of counsel.

Neither attorney acknowledged responsibility for filing a direct appeal on Plaintiff's behalf.

In July 2000, Plaintiff filed another *pro se* motion requesting a certificate of reasonable doubt. After denying Plaintiff's request for a certificate, the Court re-appointed Plaintiff's trial counsel to represent the Plaintiff, "at least with respect to the issues that should have been raised on direct appeal." The Court also affirmed its intent that, "once the issues that should have been raised on direct appeal are addressed, the Court will take up any remaining Rule 61 issues."

On August 21, 2000, without specifically ruling on any of the claims contained in Plaintiff's Rule 61 motion, the Court resentenced the Plaintiff. The Court reimposed the sentence that Plaintiff originally received on June 12, 1998, for the purpose of affording Plaintiff the opportunity to pursue a direct appeal within the statutory thirty day period.[1] Despite the fact the Assistant Public Defender was reappointed to represent Plaintiff for all purposes, including the timely filing of an appeal, the Plaintiff filed a notice of appeal, *pro se*, and the State filed a notice of cross-appeal from the Court's August 21, 2000 resentencing Order. Even though the Assistant Public Defender later filed a formal notice of

[1] The content of the Court's Order, dated August 21, 2000, states as follows:
"At this point, it is obvious that considerable confusion surrounds Defendant's original sentencing and the events immediately following it. In short, Defendant, in effect, had two attorneys, one court-appointed and one privately retained. It is unclear as to which attorney was responsible for filing Defendant's appeal. In order to clear up the confusion and to protect Defendant's rights, the sentence originally imposed on June 12, 1998 is reimposed, in its entirety, as of today. The public defender is reappointed to represent Defendant for all purposed, [sic] including the timely filing of an appeal from Defendant's conviction and the reimposed sentence."

appeal on the Plaintiff's behalf, the Plaintiff, quite inexplicably, filed a motion to dismiss his counsel and to proceed *pro se* on appeal. On appeal, the Delaware Supreme Court considered the parties' briefs, the somewhat complicated and obscured circumstances leading up to Plaintiff's appeal, and Plaintiff's apparent conflicting dissatisfaction with his attorneys. In its Order, dated May 11, 2001, the Delaware Supreme Court remanded the matter to this Court with instructions to determine if the Plaintiff desired the assistance of substitute court-appointed counsel, or continued to waive his right to counsel on appeal and wished to proceed *pro se*.

Upon remand, the Court appointed Jerome M. Capone, Esquire, to assist Plaintiff in pursuing his direct appeal. Citing five grounds for relief, Plaintiff filed his direct appeal on November 26, 2002. One of the issues Plaintiff raised on appeal was the argument that he was entitled to a new trial because his attorney did not file a direct appeal after his original sentencing. On January 28, 2003, the Supreme Court denied Plaintiff's appeal, affirming this Court's imposed judgments.[2] The Court agreed with the State's position that, in this instance, an equitable and fair remedy need not entail a new trial, and that the relief sought "need only provide a remedy that completely rectifies the error."[3] In its analysis, the Court examined the viable, alternative, forms of relief available to a defendant

[2] *Middlebrook v. State*, 815 A.2d 739, 747 (Del. 2003).
[3] *Id*. at 743.

when his trial counsel discounts a request to file a direct appeal.[4] Holding that this Court's decision to resentence the Plaintiff on August 21, 2000 "provided a complete remedy for the attorney's failure to file a direct appeal after Middlebrook's original sentencing," the Court concluded that Plaintiff's argument was "without merit."[5]

Prior to Plaintiff filing his direct appeal in November of 2002, he filed a civil complaint with this Court on July 24, 2002, alleging a claim of legal malpractice against Defendant in that she, "knowingly, in willful or wanton disregard [,] failed to file an [sic] timely appeal within the thirty day period mandated by 10 *Del. C*. § 147 and Supreme Court Rule 6." After several delays, due to the Court's necessitated consideration of various pretrial motions filed by both parties,[6] trial was scheduled to commence on June 28, 2004.

Pursuant to the Trial Scheduling Order, the deadline for filing dispositive motions was designated to be April 19, 2004. Defendant filed a renewed Motion to Dismiss, in the Alternative, Motion for Summary Judgment on April 19, 2004. In her motion, Defendant argues, *inter alia*, that Plaintiff has failed to state a claim

[4] The Court noted, "[i]n Delaware, two alternative forms of relief are available when trial counsel disregards a client's instruction to file a direct appeal after sentencing in a criminal proceeding. Generally, the trial court will vacate the sentence and then reimpose the same sentence. (citation omitted). This allows the defendant thirty days to file a direct appeal because the appeal period begins running anew from the date of the reimposed sentence. (citation omitted). The alternative is for the trial court to allow the defendant to raise any issue in a post conviction proceeding that could have been raised on direct appeal. (citation omitted). If that post conviction petition is denied, the defendant can file an appeal, thereby receiving the same review he or she would have had in a timely direct appeal. (citation omitted)." *Id*.

[5] *Id*.

[6] *See* Docket Nos. 9, 10, 14, 15, 16, 17, 20, 24, 25, 26, & 28.

upon which relief could be granted because: 1) the statute of limitation has expired as to the legal malpractice claim; 2) Plaintiff has failed to obtain an expert to support his allegations; 3) Plaintiff has failed to state what damage was suffered as a result of any purported negligence, the nature of any alleged contract, and the applicable standard of care to have been breached by the attorney; and 4) Plaintiff has failed to demonstrate injury or prejudice as a matter of law, as Plaintiff was later permitted to file his direct appeal. Plaintiff filed his response to Defendant's motion on May 25, 2004, refuting Defendant's defenses to the legal malpractice claim with little or no particularity. On June 2, 2004, Plaintiff filed a Renewed Motion for Summary Judgment. As Plaintiff's renewed motion was filed after the deadline for filing of all dispositive motions with this Court, the Court will not consider Plaintiff's renewed motion for purposes of ruling on the instant motion.

Standard and Scope of Review

In assessing the merits of a motion to dismiss for failure to state a claim pursuant to Superior Court Civil Rule 12(b)(6), all well-pleaded facts in the complaint are assumed to be true.[7] "A complaint[,] attacked by a motion to dismiss for failure to state a claim[,] will not be dismissed unless it is clearly without merit, which may be either a matter of law or of fact."[8] Likewise, a complaint will not be dismissed for failure to state a claim unless "[i]t appears to a

[7] *Laventhol, Krekstein, Horwath & Horwath, v. Tuckman*, 372 A.2d 168, 169 (Del. 1976).
[8] *Diamond State Tel. Co. v. Univ. of Del*., 269 A.2d 52, 58 (Del. 1970).

certainty that, under no set of facts which could be proved to support the claim asserted, would the plaintiff be entitled to relief."[9] That is to say, the test for sufficiency is a broad one. It is measured by whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint.[10] If the plaintiff may recover, the motion must be denied. Similarly, when a defendant who attacks a complaint for failure to state a claim upon which relief could be granted, and who moves to dismiss the complaint, offers affidavits, depositions, or other supporting documentation, in addition to pleadings, the motion will be considered a motion for summary judgment.[11]

Discussion

In view of the fact that Defendant has not offered affidavits, deposition testimony, documents, or other additional facts not presented in her pleadings, her motion shall be rightly considered a motion to dismiss for failure to state a claim upon which relief may be granted under Superior Court Civil Rule 12(b)(6).

"It is the settled law of this State that legal malpractice actions are governed by the three-year statute of limitations in 10 *Del. C*. § 8106."[12] Section 8106 provides, in pertinent part, that "[n]o action to recover damages for trespass, . . .

[9] *Id*.
[10] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978); *Klein v. Sunbeam Corp*., 94 A.2d 385, 391 (Del. 1952).
[11] *Venables v. Smith*, 2003 WL 1903779, at *2 (Del. Super. Ct.); *Shultz v. Del. Trust Co*., 360 A.2d 576, 578 (Del. Super. Ct. 1976).
[12] *Began v. Dixon*, 547 A.2d 620, 623 (Del. Super. Ct. 1988); *accord Dickerson v. Rich*, 2001 WL 34083816, at *1 (Del. Super. Ct.).

and no action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant shall be brought after the expiration of 3 years from the accruing of the cause of such action; . . . ."[13] Further, § 8106 governs actions for legal malpractice, regardless of whether such an action sounds in contract or in tort.[14]

The question thus posed is, when does the statute begin to run? "The statute of limitations begins to run from the date of the injury caused by the defendant, rather than from the date on which plaintiff became aware of the injury."[15] In most instances, when determining the commencement of the statutory period of limitations, ignorance of the facts constituting a cause of action does not act as an obstacle to the operation of the statute, except in the case of infancy, incapacity, and certain types of fraud.[16] There are exceptions, such as "[w]hen there are no observable or objective factors which put laymen on notice of a problem, such as in a title defect or certain medical malpractice actions."[17]

As such, "[i]n recent years, this absolute standard has been eroded by holdings that particular types of negligent conduct which were inherently unknowable warranted postponement of the commencement of the limitation

[13] DEL. CODE ANN. tit. 10, § 8106 (1999 & Supp. 2002).
[14] *Hood v. McConemy*, 53 F.R.D. 435 (D. Del. 1971).
[15] *Cavalier Group v. Strescon Indus., Inc*., 782 F.Supp. 946, 951 (D. Del. 1992).
[16] *Mastellone v. Argo Oil Corp*., 82 A.2d 379, 383 (Del. 1951); *Began*, 547 A.2d at 623,
[17] *See, e.g., Layton v. Allen*, 246 A.2d 794, 798 (Del. 1968); *Pioneer Nat'l Title Ins. Co. v. Child, Inc.*, 401 A.2d 68, 71-72 (Del. 1979).

period until the victim discovered or should have discovered the wrong."[18] This exception to the general rule is known as the "time of discovery rule." That exception provides, "[w]hen an inherently unknowable injury . . . has been suffered by one blamelessly ignorant of the act or omission and injury complained of, and the harmful effect thereof develops gradually over a period of time, the injury is 'sustained' . . . when the harmful effect first manifests itself and becomes physically ascertainable."[19] The "time of discovery rule" exception is narrowly construed to include injuries, which are both (1) inherently unknowable; and (2) sustained by a blamelessly ignorant plaintiff.[20] "Application of the 'time of discovery rule' is limited and each case must stand or fall on its own facts."[21] When elaborating on the "time of discovery rule," the Delaware Supreme Court has noted, '[e]ven in malpractice and fraud cases where a discovery rule is applied[,] it is not the actual discovery of the reason for the injury which is the criteria . . . . [D]iscovery means discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery.'[22]

With these general principles in mind, the Court turns to the facts of this

[18] *Consol. Am. Ins. Co. v. Chiriboga*, 514 A.2d 1136, 1138 (Del. Super. Ct. 1986).
[19] *Layton*, 246 A.2d at 798.
[20] *David B. Lilly Co. v. Fisher*, 18 F.3d 1112, 1117 (3d Cir. 1994).
[21] *Id*. at 1117 (quoting *Isaacson, Stolper & Co. v. Artisan's Sav. Bank*, 330 A.2d 130, 133 (Del. 1974)).
[22] *Becker v. Hamada, Inc*., 455 A.2d 353, 356 (Del. 1982) (quoting *Omaha Paper Stock Co. v. Martin K. Eby Constr. Co*., 230 N.W.2d 87, 89-90 (Neb. 1975)).

case. The Plaintiff was sentenced on June 12, 1998. Pursuant to 10 *Del. C*. § 147 and Supreme Court Rule 6, Plaintiff had thirty days, until July 12, 1998, to file a direct appeal from his conviction. Therefore, this date represents the "date of the injury caused by the Defendant" by her failure to file Plaintiff's direct appeal pursuant to 10 *Del. C*. § 8106. Plaintiff had three years from this date to file a civil complaint of legal malpractice. Consequently, the statute of limitations expired on July 12, 2001. Plaintiff untimely filed his complaint alleging legal malpractice on July 24, 2002, four years after the date of the alleged sustained injury.

Furthermore, the record indicates that Plaintiff was far from "ignorant of the act or omission and injury," as evidenced by his cognizance of the facts relating to his appealable conviction. He engaged Defendant to represent him in a post-sentencing "appeal matter." A motion for a new trial was timely filed days after his sentencing. He followed this up with a plethora of *pro se* motions and letters, including, but not limited to, a Rule 61 motion for postconviction relief in May 2000, asserting that both his trial counsel, and Defendant, were ineffective for failing to file a direct appeal on his behalf. Theoretically, Plaintiff could have filed a legal malpractice action at this juncture, and certainly before the statutory period had elapsed.

Furthermore, although Delaware courts have extended the "time of discovery rule" to different types of claims,[23] it is established that,"[d]issatisfaction with an attorney's services or with an agreement is not 'inherently unknowable,' as in the case of a title defect."[24] That is to say, in this instance, the case stands on its own facts, and the exception to the three-year statute of limitations known as the "time of discovery rule" is neither appropriately applied, nor available, to this Plaintiff. In light of the Delaware Supreme Court's interpretation of the "time of discovery rule," i.e., discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry, the Plaintiff does not qualify under the ambit of "an blamelessly ignorant plaintiff" who sustained an "inherently unknowable injury."

Defendant's argument that Plaintiff has failed to produce expert testimony to substantiate his claim of legal malpractice is also fatal to Plaintiff's case. "In order to recover for an attorney's malpractice, the client must prove the employment of the attorney and the attorney's neglect of a reasonable duty, as well as the fact that such negligence resulted in and was the proximate cause of loss to the client."[25] Thus, in order to sustain a claim of professional negligence against a Delaware

[23] *Cavalier Group*, 782 F.Supp. at 951.
[24] *Began*, 547 A.2d at 623 (discussing the limited application of the "time of discovery" rule in *Pioneer Nat'l Title Insur. Co. v. Child, Inc*., 401 A.2d 68 (Del. 1979) in that, where the legal malpractice claim involved an attorney's alleged negligence in clearing a title defect, the exception was available for title defects because a client would not know of the title defect until a third -party purchaser brought it to his attention).
[25] *Weaver v. Lukoff*, 1986 WL 17121, at *1 (Del.) (quoting *Pusey v. Reed*, 258 A.2d 460, 461 (Del. Super. Ct. 1969), overruled on different grounds); *Starun v. All American Eng'g Co*., 350 A.2d 765, 768 (Del. 1975).

attorney, plaintiff must establish the applicable standard of care through the presentation of expert testimony, a breach of that standard of care, and a causal link between the breach and the injury.[26] It is well settled law that claims of legal malpractice must be supported by expert testimony.[27] An exception to this rule exists, however, when the professional's mistake is so apparent that a layman, exercising his common sense, is perfectly competent to determine whether there was negligence.[28]

Plaintiff submits in his Pretrial Stipulation, dated May 25, 2004, a request for this Court to accept two judicial opinions as expert testimony in support of his legal malpractice claim, as well as a request to call, as an expert witness, the presiding judge from this Court who issued the Court's August 21, 2000 resentencing Order. Although Plaintiff's request to call a judge of this Court as an expert witness is novel, Plaintiff submitted a similar request, with respect to the Court taking judicial notice of various letters and judicial opinions, in his previous Motion for the Court to Consider the Subpoena of Legal Malpractice Expert Witness As its Own Witness. In this prior motion, which was filed on March 26, 2003, Plaintiff requested that the Court subpoena a legal malpractice expert under

[26] *Giordano v. Heiman*, 2001 WL 58952, at *1 (Del.).
[27] *Jackson v. Lobue*, 2001 WL 1751243, at *1 (Del.); *Giordano*, 2001 WL 58952, at *1 (citing to *Alston v. Hudson*, 1997 WL 560883, at *2 (Del.); *Weaver v. Lukoff*, 1986 WL 17121, at *1 (Del.); *Seiler v. Levitz Furniture Co*., 367 A.2d 999, 1008 (Del. 1976)).
[28] *Larrimore v. Homeopathic Hosp. Assoc. of Del.*, 181 A.2d 573, 577 (Del. 1962).

Delaware Uniform Rule of Evidence 614 and Delaware Superior Court Civil Rule 45(a), or in the alternative, to take judicial notice of several judicial opinions and attorney correspondence involving the Defendant pursuant to Delaware Uniform Rule of Evidence 201 and 202.

On June 3, 2003, the Court denied Plaintiff's motion, holding that it is not the duty of this Court to provide a witness to substantiate Plaintiff's claim, and that, "[t]he idea of a court supplying evidence for one party to the detriment of another is patently offensive to the adversarial process."[29] Additionally, the Court held that the letters "[a]re wholly inappropriate for judicial notice under Delaware Uniform Rule of Evidence 201 and 202" because they neither contained adjudicative facts, nor were they cases or statutes.[30] The court concluded by advising the Plaintiff that if he wished to file a renewed motion to request the Court to take judicial notice of the two judicial opinions, he may do so at a later date closer to trial. But, the Court also advised the Plaintiff that, "[j]udicial notice of case law, however, will not obviate the requirement that Mr. Middlebrook produce expert testimony in support of his legal malpractice claim."[31]

Despite the Court's admonition to the Plaintiff that judicial opinions are not a substitute for expert testimony in support of his legal malpractice claim, the

[29] *Middlebrook v. Ayres*, 2003 WL 21733015, at *1 (Del. Super. Ct.).
[30] *Id*. at *2.
[31] *Id*. (emphasis added).

Plaintiff has still failed to obtain expert testimony. Plaintiff has resubmitted the same two judicial opinions in his most recent pleadings, inconsistent with the Court's holding.

In an attempt to provide a resolution to this matter in a light most favorable to the Plaintiff, the Court has reviewed these two opinions and finds that they are innocuous and unsupportive of Plaintiff's claim of legal malpractice. One opinion consists of the Court's August 12, 2000 resentencing Order, which merely resentenced the Plaintiff after the Court determined that it was "unclear which attorney was responsible for filing Defendant's appeal."[32] The other opinion submitted by Plaintiff is the Delaware Supreme Court's Order, dated May 11, 2001, from Plaintiff's *pro se* appeal, remanding the matter back to the Court for a determination of whether the Plaintiff desired the assistance of substitute court-appointed counsel to assist him on his appeal, or if he desired to proceed *pro se*. In its Order, the Delaware Supreme Court made reference to this Court's August 12, 2000 resentencing Order inferring that, "[u]nderlying the Superior Court's order is the presumption that Middlebrook had received ineffective assistance of counsel . . . . [h]owever, that it was "unclear" which attorney had rendered ineffective assistance." Neither opinion either mentions the Defendant by name, or "clearly" implicates her in the negligent performance of legal malpractice. In addition,

[32] *See supra* note 1.

Defendant's alleged "professional mistake" is not so apparent as to warrant operation of the exception to the well-settled law that expert testimony must be offered to support a claim of legal malpractice.

Lastly, the Court cannot avoid noting that the Plaintiff has failed to explain in any detail the nature of the alleged breach of attorney standard of care, and the causal link between the breach and the injury. More importantly, Plaintiff did not sustain any permanent injury or prejudice as a matter of law. Ultimately, he was afforded the assistance of appointed counsel in preparing an appeal, as well as the constitutional right to have his "day in court" by being provided with the opportunity to take an appeal from his conviction.

In summation, for all the aforementioned reasons, Plaintiff's complaint of legal malpractice, allegedly committed by the Defendant, fails to state a claim upon which relief may be granted. As both a matter of law and fact, the claim is decisively without merit. In addition, Defendant is entitled to relief by dismissal of Plaintiff's complaint because the complaint fails to embrace the requisite "certainty" required to substantiate the "set of facts which could be proved to support the claim asserted." As Plaintiff may not recover under any "reasonably conceivable set of circumstances susceptible of proof," the Court finds that it is required to grant Defendant's motion.

Conclusion

For all of the foregoing reasons, Defendant's Motion to Dismiss, in the Alternative, Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

cc: Nikerray Middlebrook
Caroline P. Ayres, Esquire
Prothonotary