

Third District Court of Appeal

State of Florida

Opinion filed October 29, 2014.
Not final until disposition of timely filed motion for rehearing.

No. 3D13-2142
Lower Tribunal No. 12-6375

Robin Forbes, etc.,
Appellant,

vs.

Lisa Berlow Lehner and Law Offices of Lisa Lehner, P.A.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Spencer Eig,
Judge.

Schlesinger & Associates, P.A., and Michael J. Schlesinger and Andrew W.
Abel, for appellant.

Broad and Cassel, and Rhett Traband; Joel S. Perwin, P.A., and Joel S.
Perwin, for appellees.

Before ROTHENBERG, LOGUE, and SCALES, JJ.

LOGUE, J.

Robin Forbes, as the successor trustee of two trusts, appeals the dismissal of his complaint in a “clawback” action against an attorney who represented the former trustees. The complaint alleges the former trustees used trust assets to pay the attorney contrary to a court order. The complaint was filed more than four years after the alleged payments were made. The trial court dismissed the complaint as barred by the statute of limitations.

Generally, the statute of limitations is an affirmative defense that should be raised in an answer to a complaint. See Fla. R. Civ. P. 1.110(d). There is an exception, however, if an affirmative defense appears on the face of the complaint. Swafford v. Schweitzer, 906 So. 2d 1194, 1195 (Fla. 4th DCA 2005).

In this case, the allegations in the complaint do not support the statute of limitations defense. To the contrary, the complaint contains allegations that suggest the statute of limitations did not bar the two causes of action that were pled. The trial court therefore erred in resolving the defense at the motion to dismiss stage. See Xavier v. Leviev Boymelgreen Marquis Developers, LLC, 117 So. 3d 773, 775 (Fla. 3d DCA 2012) (reversing the dismissal of a complaint due to the statute of limitations because the face of the complaint did not establish the defense). Whether the successor trustee’s claims will survive the defense when the record is more fully developed, either at summary judgment or trial, is a question left for another day.

Reversed and remanded for further proceedings consistent with this opinion.