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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001660-MR

CUMBERLAND SURETY INSURANCE COMPANY, INC. — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS KNOPF, JUDGE
ACTION NO. 97-CI-002404

LANDRUM & SHOUSE — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, JUDGE; SCHRODER, JUDGE; AND MARY COREY, SPECIAL JUDGE[1].

BARBER, JUDGE: This case involves application of the statute of limitations to a claim of legal negligence. In 1992, David Engineering & Construction was awarded a contract to renovate the Beecher Terrace Housing Project in Louisville, Kentucky. David Engineering & Contracting hired a subcontractor, Master Mechanical & Construction, Inc., to replace the plumbing fixtures for the project. Master Mechanical posted a $50,000 "labor only"

[1]Senior Status Judge Mary Corey sitting as Special Judge by assignment of Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

bond, which was underwritten by Appellant, Cumberland Surety Insurance Company("Cumberland Insurance"). When the need for additional plumbing work was discovered, David Engineering & Construction was required to competitively bid the extra work. Master Mechanical submitted the lowest bid.

David Engineering & Construction believed that Master Mechanical was in default under the earlier subcontract. David Engineering obtained a legal opinion letter from Appellee, Landrum & Shouse ("Landrum & Shouse"), to that effect. The law firm counseled David Engineering to accept Master Mechanical's low bid, arguing that litigation might result if the bid was not accepted. Landrum & Shouse conferred with Master Mechanical's attorney, asking that earlier defects be cured.

David Engineering required Master Mechanical to obtain a $1,145,000.00 bond as a condition for accepting the second bid. Master Mechanical promptly posted the requested performance bond. David Engineering also required Master Mechanical to enter into a Memorandum Agreement in which Master Mechanical admitted the earlier defects, and agreed that the new contract could be terminated if Master Mechanical defaulted in any way. The Memorandum Agreement also contained a provision permitting David Engineering to proceed against the surety in case of a default. Landrum & Shouse argues that the Memorandum Agreement was intended as a "red flag", to alert any responsible bonding company to the fact that Master Mechanical was already in default.

The deposition testimony of David Engineering's president, David Holobaugh, states that he wanted to call Cumberland Insurance to "warn them" that he believed Master Mechanical would default on the Agreement. Cumberland Insurance asserts that Landrum & Shouse knew that Cumberland Insurance would be sued due to Master Mechanical's inability to comply with the terms of the Agreement, but failed to warn Cumberland Insurance of this, and in fact advised Holobaugh not to call Cumberland Insurance.

In April 1994, David Engineering sent notice of default to Master Mechanical. David Engineering then terminated Master Mechanical's subcontract in June 1994. David Engineering then gave Cumberland Insurance three days to perform as surety on the bond. Cumberland Insurance consented to permit Landrum & Shouse to act as counsel for both David Engineering and Cumberland Insurance, after being advised of a "potential conflict" between the parties. Cumberland made a partial payment under the bonds, but refused to make full payment.

Cumberland Insurance asserts that advising a client as to a "potential conflict" is not sufficient to put Cumberland Insurance on notice that there had been legal negligence. Cumberland Insurance argues that its consent to joint representation cannot be considered true consent or a waiver, as it was not told that there was an actual and ongoing conflict between its interests and those of David Engineering. SCR 1.7(b) forbids an attorney from representing one client if doing so will materially limit the lawyer's responsibilities to another client.

Cumberland Insurance argues that Landrum & Shouse failed to comply with this rule of professional conduct. Cumberland Insurance also asserts that Landrum & Shouse failed to comply with SCR 1.7(b)(2), mandating an explanation to the client of the implications of joint representation, and the advantages and risks involved in such representation.

Landrum & Shouse withdrew from the joint representation once it became clear that David Engineering and Cumberland Insurance would not resolve their differences without litigation. David Engineering retained other counsel to conduct litigation. In this separate action, David Engineering sued Cumberland Insurance over the bond. This separate action was eventually ended by a financial settlement between the parties.

Cumberland Insurance argues that, during the discovery process in that separate litigation, they discovered that Landrum & Shouse had drawn up the Memorandum Agreement between David Engineering and Master Mechanical. Cumberland Insurance characterized this as a "win-win" strategy for David Engineering. Cumberland Insurance asserts that Landrum & Shouse "sabotaged" them to aid David Engineering.

The record reflects that in May 1994 Cumberland Insurance was made aware of Landrum & Shouse's representation of David Engineering, and waived any objection to the joint representation. In June 1994, communications between Cumberland Insurance and Landrum & Shouse revealed the existence of the Memorandum Agreement drawn up by Landrum & Shouse, and referring to Master Mechanical's past defaults. Based on these facts, the

trial court found that Cumberland Insurance had knowledge of the injury by June 23, 1994. The trial court stated Cumberland Insurance's actions following that date show that Cumberland Insurance knew or should have known of the alleged legal negligence. The trial court found that on October 21, 1994, when Cumberland Insurance made a partial payment on its obligation as surety for Master Mechanical damages were not merely probable or speculative, but were actual and known. For this reason, the trial court ruled that this date was the date on which the limitations period began to run. Cumberland Insurance denied this knowledge, and claims that it did not discover the Memorandum Agreement until April 17, 1995. Cumberland Insurance also argues that the damages were not certain until final settlement of the action, on March 28, 1997.

Landrum & Shouse entered into a tolling agreement with Cumberland Insurance on October 25, 1995. This agreement tolled the limitations period until March 28, 1997. The tolling agreement provided that Landrum & Shouse expressly reserved any statute of limitations defense that they had at the time of its signing. On May 5, 1997, following settlement of David Engineering's litigation against Cumberland Insurance, Cumberland Insurance filed the underlying legal negligence action against Landrum & Shouse.

Landrum & Shouse moved for summary judgment claiming that the applicable statute of limitations barred Cumberland Insurance's suit. The trial court entered summary judgment in favor of Landrum & Shouse, stating Cumberland Insurance should

have discovered that it was wronged no later than October 1994, the date on which the partial payment was made under the performance bond.

Cumberland Insurance argued that entry of summary judgment was improper, as Landrum & Shouse failed to show that Cumberland Insurance could not prevail at trial under any circumstances. Cumberland Insurance asserts that the applicable statute of limitations in the underlying action did not begin to run until Cumberland Insurance's claims were fixed and certain. Cumberland Insurance claims that the trial court fixed an incorrect date as to when the statute of limitations began to run.

The trial court found when Landrum & Shouse wrote to Cumberland on behalf of David Engineering, on June 23, 1994, Cumberland was then put on notice as to the existence of the Memorandum Agreement, and the fact that Landrum & Shouse represented both Cumberland and David Engineering. The trial court stated that the statute of limitations began to run the date that Cumberland Insurance tendered partial payment on the bonds, which was October 21, 1994. The trial court stated that on that date the damages were "not merely probably, but had become a fact and thus, commenced the limitations period to run." Therefore, the trial court held that on the date on which the parties entered into a tolling agreement, October 26, 1995, the statute of limitations had already run.

Cumberland Insurance asserts that the trial court erred in applying the discovery rule to determine when the applicable

limitations began to run. Cumberland Insurance states that the "occurrence rule" should have been applied in its stead. Cumberland Insurance claims that because there was no "occurrence" as of October 21, 1994, and that on that date damages were not fixed and certain, the limitations period could not begin to run. Cumberland Insurance cites Alagia, Day, Trautwein & Smith v. Broadbent, Ky., S.W.2d 121 (1994), holding that until a legal harm becomes fixed and non-speculative, the statute of limitations does not begin to run.

A final settlement was made between Cumberland Insurance and David Engineering on March 28, 1997. Cumberland Insurance claims that it was on that date that the statute of limitations began to run. Cumberland Insurance argues that the discovery rule applied only if the discovery comes after the occurrence. Cumberland Insurance states that an occurrence cannot be found until the damages are fixed and certain.

Cumberland claims that on October 21, 1994, when it made the payment of $84,392.00 to David Engineering it was acting under the reservation of rights, and at the time disputed that it was obligated to pay at all. Cumberland Insurance's letter to David Engineering does not contain a reservation of rights sufficient to support the allegation that Cumberland Insurance did not know of its injury at that time, or was disputing its duty to pay any damages at all. This reservation of rights stated "we reserve the right to make deductions on future payments . . . should we determine after an audit and investigation that any of the charges are not appropriate." This

sentence shows that Cumberland Insurance was reserving the right to question the sum of payments owed, not the fact that payment was owed. In the same letter, Cumberland Insurance also admitted liability stating, "we will acknowledge our obligation to pay for certain of that work . . . ." The terms of the transmittal letter do not constitute an unequivocal reservation of rights sufficient to deny knowledge of an occurrence triggering the limitations period. No further payments were made by Cumberland until final settlement of the action.

In the alternative, Cumberland Insurance argues that if the discovery rule is applied, the applicable date on which the limitations period began to run was April 17, 1995, the date on which Cumberland Insurance obtained sufficient information as to be on notice that Landrum & Shouse had elevated David Engineering's interests above those of Cumberland Insurance. Cumberland Insurance cites Gill v. Warren, Ky., 474 S.W.2d 377 (1971), arguing that the date on which one discovers a wrong is a question of fact, and thus inappropriate for resolution on summary judgment. Cumberland Insurance also argues that the discovery rule should be tolled when the parties are in a confidential relationship and "do not have the reasons or occasions to check on each other that would exist if they were dealing at arms' length." Shelton v. Clifton, Ky. App., 746 S.W.2d 414, 415 (1988). Cumberland Insurance asserts that, had it known of the Memorandum Agreement and been informed of Master Mechanical's prior default, it would not have issued the $1,145,000.00 bond. Regardless of whether Cumberland Insurance

would have issued the bond had it been fully informed of Master Mechanical's earlier performance, this fact does not operate to alter the date on which the limitations period began to run.

KRS 413.245 reads, in pertinent part:

> [A] civil action brought in tort or contract, arising out of any act or omission in rendering, or failing to render, professional services for others shall be brought within one(1) year from the date of the occurrence or from the date when the cause of action was, or reasonably should have been discovered by the party injured.

Id. A statute of limitations begins to run when the party injured has the right and capacity to sue. Lexington-Fayette Urban County Government v. Abney, Ky. App., 748 S.W.2d 376 (1988). A triggering effect cannot take place until a cognizable, non-speculative loss has been suffered. Tomlinson v. Siehl, Ky., 459 S.W.2d 166 (1970).

Two separate rules are used to toll limitations periods. The "discovery rule" tolls a statute of limitations period until such time as the injured party "knows or in the exercise of reasonable care, should know, that the injury has occurred." Gray v. Commonwealth Transp. Cabinet, Department of Hwys., Ky. App., 973 S.W.2d 61, 62 (1997). Under this rule, Cumberland knew or should have known of the injury as of the date it was provided with reference to the Memorandum Agreement, that being June 1994. At the very latest, it should be held to have discovered the injury on the date in which it was required to make partial payment under the bond, that being October 23, 1994. The limitations period triggered on that date expired prior to

the parties' entering into the tolling agreement. Under the discovery rule, the action is clearly time barred, and the trial court's dismissal was correct.

Under the "occurrence rule", claimed by Cumberland Insurance to have tolled the limitations period in this action, the limitations period begins to run as of the date on which the injured party could "justifiably claim that the entire damage was caused by counsel's failure, for which he might seek a remedy." Michels v. Sklavos, Ky., 869 S.W.2d 728, 732 (1994). Citing this case, Cumberland argues that it was the date on which final settlement was made in the action between David Engineering and Cumberland Insurance that triggered the running of the limitations period. In Michels, supra, unlike the present case, the cause of action was for "litigation" negligence, where the attorney's negligence in preparation and presentation of a litigated claim resulted in the failure of an otherwise valid claim. Necessarily, in such an action, the occurrence and known harm does not take place until the jury's verdict is rendered. Id. at 730. The Michels case differs greatly from the present one, where negligence was known and the negligent occurrence took place prior to the institution of any litigation.

Cumberland Insurance's argument that the underlying litigation had to be complete prior to commencement of the limitations period must also fail because the date of the occurrence, when Cumberland Insurance could justifiably claim that the entire damage was caused by the alleged legal negligence of Landrum & Shouse, was the date on which Cumberland realized

that it owed money under a suspect bond issuance. "[T]he use of the term 'occurrence' in KRS 413.245 indicates a legislative policy that there should be some definable, readily ascertainable event which triggers the statute." Northwestern Nat. Ins. Co. v. Osborne, 610 F. Supp. 126, 128 (D.C. Ky. 1985). When Cumberland made partial payment the triggering occurrence took place, even though Cumberland asserts that it would not have issued the bond had Landrum & Shouse informed it of the prior defaults by Master Mechanical.

As this court stated in Barker v. Miller, Ky. App., 918 S.W.2d 749, 751 (1996), the damages are fixed under the occurrence rule when the party knows the possible extent of the harm caused by the legal negligence, not when the underlying litigation is completed. In that case, the Court of Appeals found that the occurrence date was when the plaintiff's motion for discretionary review was denied by the Kentucky Supreme Court, and not the date on which the plaintiff's time to file a motion with the United States Supreme Court expired.

In cases where the party claiming injury has incurred a financial loss, the occurrence rule holds that the limitations period begins to run on the date the injured party knew of the financial loss. Meade Co. Bank v. Wheatley, Ky., 910 S.W.2d 233, 235 (1995). When Cumberland Insurance knew that it would suffer a loss under the bond, and made partial payment in excess of $84,000.00, the limitations period for the legal negligence claim began to run. Cumberland Insurance had personal knowledge of the date on which that occurrence took place, and should have been

aware that the occurrence triggered any applicable limitations period. Real Estate Marketing, Inc., v. Franz, Ky., 885 S.W.2d 921 (1994).

> Limitations periods:
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> [A]re creatures of statute which are intended by the legislature to bring finality to the legal process. Hazel v. General Motors Corp., 863 F. Supp. 435, 438(W. D. Ky. 1994). 'Thus, limitations act arbitrarily, sometimes extinguishing otherwise viable claims and at other times extinguishing speculative claims.'

Barker v. Miller, Ky. App., 918 S.W.2d 749, 751 (1996), additional citation to authority deleted. In the present case, the limitations period expired prior to the execution of the tolling agreement. For this reason, any action by Cumberland Insurance against its legal counsel with regard to the issuance of the bond and the joint representation is time-barred. We affirm the trial court's dismissal of the action.

Cumberland Insurance's attempt to argue that the date on which a limitations period begins to run is a question of fact to be determined by the jury is in error. A limitations period is a question of law. Perkins v. Northwestern Log Homes, Ky., 808 S.W.2d 809 (1991). Offers, negotiations, partial settlement, or other actions taking place after expiration of the limitations period do not estop a party from claiming statute of limitations as a defense to a legal action. Gailor v. Alsabi, Ky., 990 S.W.2d 597, 606 (1999). The trial court's dismissal of the action must be affirmed.

As a separate issue, Landrum & Shouse argued that this appeal should be dismissed for failure to name the individual

partners of Landrum & Shouse as appellees. The record contains a May 2, 1997 Agreement, which stated that "naming of the firm [Landrum & Shouse] only . . . will be considered full compliance with Kentucky law." This Agreement was entered into due to the reluctance of counsel for Cumberland Insurance to name the individual attorney defendants. This Agreement also permits the naming of Landrum & Shouse to be, in effect, a naming of the former firm members directly involved in the complained of incident. Although such an Agreement is unusual, the fact that it was agreed to by both parties should be sufficient to permit the term "Landrum & Shouse" to be considered a naming of each individual defendant.

ALL CONCUR.

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