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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001448-MR

GREGORY W. MARLOW — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 01-CI-007444

KENNETH A. CONNELLY, JR. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON, AND McANULTY, JUDGES.

JOHNSON, JUDGE: Gregory W. Marlow, pro se, has appealed from an order of the Jefferson Circuit Court entered on June 21, 2004, which granted summary judgment in a legal malpractice lawsuit to Kenneth A. Connelly, Jr., based on the action being barred by the one-year statute of limitations in KRS[1] 413.245. Having concluded that Greg has failed to produce any evidence to support his claim that Connelly breached his duty to Greg and

[1] Kentucky Revised Statutes.

that Connelly is entitled to a summary judgment as a matter of law, although for a different reason, we affirm.[2]

On April 29, 1996, Mary K. Marlow died testate and by her will she bequeathed her estate equally to her three children, Greg, George M. Marlow, and Marcia C. Eastridge. The probate court on May 16, 1996, appointed George executor of Mary's estate pursuant to the terms of her will. A $70,000 bond was set without surety, pursuant to the terms of Mary's will. In May 1996 George, as the executor for the estate, hired Connelly for legal representation on behalf of the estate.

Based on Connelly's advice, George opened an estate checking account at PNC Bank in July 1996. George paid several of the estate's debts from the checking account, including utility and telephone bills. He also issued checks in the amount of $2,500.00 each to Greg, Marcia, and himself, as partial distribution of the estate's assets.

In October 1996 an estate inventory was filed with the probate court listing assets of $61,822.38. Connelly mailed a letter to George on November 18, 1996, requesting George contact him when all the estate checks had cleared so the estate could be finalized. In the meantime, both Greg and Marcia contacted

[2] Kentucky Farm Bureau Mutual Insurance Co. v. Gray, 814 S.W.2d 928, 930 (Ky.App. 1991) (stating that "an appellate [ ] court may affirm the trial court for any reason sustainable by the record").

Connelly regarding the status of the estate, both stating that they had been unable to get in contact with George.

In February 1997 after being unsuccessful in his attempts to contact George, Connelly called George's father, who stated that he did not know George's whereabouts at that time. Connelly immediately filed a motion with the probate court requesting that the estate's bank account be frozen. An order freezing the account was entered on March 3, 1997, and Connelly hand-delivered the order to PNC Bank on that day. On March 10, 1997, Connelly was notified that the estate account balance was zero. It was discovered that George and his wife had written checks payable to "cash," and had fraudulently endorsed and cashed checks made payable to Greg and Marcia.

On October 10, 2001, Greg filed a complaint alleging legal negligence against Connelly. The complaint alleged that Connelly "was hired to, and was responsible for the legal, complete and successful settling of the estate of Mary K. Marlow[,]" and that he "refused or neglected to discharge his compensated duties, thereby rendering ineffective assistance, and representation below the professional norm." Following discovery by both parties, Connelly filed a motion for summary judgment on May 21, 2004, arguing that Greg's claim was barred and should be dismissed because (1) the suit was not filed within the required one year statute of limitations; (2)

Connelly owed Greg no legal duty; and (3) Greg is unable to prove that Connelly breached any duty. Greg responded on June 14, 2004. The trial court granted summary judgment in favor of Connelly on June 21, 2004. This appeal followed.

The standard of review governing an appeal of summary judgment is well-settled. We must determine whether the trial court erred in concluding that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law.[3] Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[4] In Paintsville Hospital Co. v. Rose,[5] the Supreme Court of Kentucky held that for summary judgment to be proper the movant must show that the adverse party cannot prevail under any circumstances. The Court has also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at

[3] Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996).

[4] Kentucky Rules of Civil Procedure (CR) 56.03.

[5] 683 S.W.2d 255, 256 (Ky. 1985).

the trial warranting a judgment in his favor."[6] There is no requirement that the appellate court defer to the trial court since factual findings are not at issue.[7] "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor" [citation omitted].[8] Furthermore, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial."[9]

The action filed by Greg is governed by KRS 413.245, which provides a one-year statute of limitations for professional negligence claims, in pertinent part, as follows:

> [A] civil action . . . 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.

The trial court determined this action was barred because it was not filed within one year of its accrual.

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[6] Steelvest v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991).

[7] Goldsmith v. Allied Building Components, Inc., 833 S.W.2d 378, 381 (Ky. 1992).

[8] Steelvest, 807 S.W.2d at 480.

[9] Id. at 482. See also Philipps, Kentucky Practice, CR 56.03, p. 321 (5th ed. 1995).

Connelly contends the statute of limitations began to run in 1997 after Greg discovered the estate account balance was zero, or, at the latest, in 1999 when the probate court removed George as executor and appointed attorney Chris Meinhart as a public administrator to oversee the estate.[10] However, Greg contends that the statute of limitations did not begin to run until August 2003, when the estate was finalized.

In the context of a legal negligence claim, the discovery provision of the statute of limitations has been interpreted to mean that an injury is discovered (and that, therefore, the statute of limitations begins to run) only when the legal harm has become "definite and non-speculative" or "when the underlying case is final."[11] In Pedigo,[12] where the party alleging legal negligence settled her underlying breast implant claim before filing suit, our Supreme Court reviewed relevant case law and stated the rule as follows:

> A professional negligence claim does not accrue until there has been a negligent act and until reasonably ascertainable

[10] Connelly states in his brief that his only client was George, and once George was removed as executor Connelly had no client to represent. Therefore, Connelly contends that his involvement in the case ended on June 1, 1999, with the appointment of a public administrator and that the statute of limitations expired on June 1, 2000. This argument goes only to the "continuous representation rule" discussed in Alagia, Day, Trautwein & Smith v. Broadbent, 882 S.W.2d 121, 125-26 (Ky. 1994), and does not defeat Greg's claim when the "occurrence rule" is applied. See infra.

[11] Pedigo v. Breen, ___ S.W.3d ___, *3 (Ky. 2005) (citing Alagia, supra).

[12] ___ S.W.3d at *2.

> damages are incurred.[13] When professional negligence occurs during the course of formal litigation, we have held that the injury becomes definite and non-speculative when the underlying case is final.[14] Until the underlying case is final and non-appealable, the statute of limitations is tolled because no cognizable claim has yet accrued.[15]

Similarly, in Meade County Bank v. Wheatley,[16] where a bank brought a legal negligence claim against an attorney whose title examination of property, upon which the bank relied in making what it believed to be a first mortgage, failed to disclose a prior recorded mortgage, our Supreme Court held the statute of limitations did not begin to run until the date of the foreclosure sale on property because that was the date the bank realized legally cognizable damages. The Court noted its recent decision in Alagia, Day, Trautwein & Smith v. Broadbent,[17] and stated as follows:

> As in this case, it was contended that there could be no occurrence until damages arising out of the negligent act became fixed and non-speculative. We agreed. "Not until damages were fixed by the final compromise with the IRS was there an occurrence of the type required to commence the running of the

[13] See Faris v. Stone, 103 S.W.3d 1, 5 (Ky. 2003).

[14] Id.; Hibbard v. Taylor, 837 S.W.2d 500 (Ky. 1992) (holding that damages from underlying cause of action became fixed and non-speculative on the date the Supreme Court denied discretionary review).

[15] See Barker v. Miller, 918 S.W.2d 749, 751 (Ky.App. 1996).

[16] 910 S.W.2d 233 (Ky. 1995).

[17] 882 S.W.2d 121 (Ky. 1994).

> statute." [Broadbent] at 126. We concluded in Broadbent with the reminder that in legal negligence, as in any negligence case, there must have been a "negligent act or omission and legally cognizable damages." Id. Without damages, there is no ripened claim.
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> In the present case, the time allowed began to run as of the date of the foreclosure sale. Prior to that date, Appellants had only a fear that they would suffer a loss on the property. Their fear was not realized as damages until the sale of the property in June of 1992. At that time, what was merely probable became fact, and thus commenced the running of the statute. The May, 1991, appraisal which showed the property's value as being substantially less than the debts against it, was irrelevant as to certainty of damages. At that point, appellant was merely made aware that it might have insufficient collateral on its loan. There was no certainty of damages, as is required by Broadbent.

Thus, in order for Greg's claim to be dismissed based on the statute of limitations, we would have to conclude that his damages became fixed and non-speculative before the estate was settled. Since we believe this to be a close question and since we conclude that none of our precedent is directly on point, we choose instead to affirm the trial court on a ground that we conclude is abundantly clear: Greg's failure to produce any evidence of Connelly's breach of duty.

In Greg's answers to Connelly's first set of interrogatories, he identified Meinhart as a possible witness stating that he "has knowledge of usual protocol and practice of

attorneys in representing wills and estates." However, when Connelly filed his motion for summary judgment, he filed in support an affidavit from Meinhart. In the affidavit Meinhart contended that Connelly owed Greg no duty and that, even if he did owe such a duty, he did not breach that duty. Meinhart's affidavit stated, in part, as follows:

> 3. Based upon my training, knowledge and experience as a licensed and actively practicing attorney in the Louisville, Kentucky area, I am knowledgeable about the standard of practice and standard of care in this geographic region for a non-executor non-trustee attorney who assists an executor-client with the administration of an estate.
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> . . .
>
> 6. On or about May 24, 1999, the Court removed George Michael Marlow as Executor over Mary K. Marlow's estate and appointed me Public Administrator is his place. When I assumed responsibility for the handling of the estate, I spoke with attorney Ken Connelly about the circumstances involving the estate and reviewed the underlying file. I am familiar with the facts concerning Mr. Connelly's handling of the estate and of Mr. Marlow's theft of the estate assets.
>
> 7. Based upon my conversations with Mr. Connelly, my conversations with the Commonwealth Attorney (who criminally prosecuted Mr. Marlow), my knowledge of the situation gained from my own handling of the estate, my legal education, my training and my experience in handling estates, it is my opinion that Mr. Connelly did not

> deviate from the requisite standard of care in assisting Mr. Marlow administer the estate. It is also my opinion that Mr. Connelly did not breach any duty that may have been owed to Gregory Marlow, who is the Plaintiff and an heir of the estate. It is my professional opinion that Mr. Connelly took all actions that were reasonably appropriate to take in the situation and did not commit legal malpractice.
>
> 8. The record reflects that Mr. Connelly was not a co-executor or trustee of the estate and was not a co-signor on the estate bank account. His role was limited to providing Mr. Marlow, the executor, with assistance and guidance in handling the estate paperwork and filings. Mr. Connelly had no control over the assets of the estate bank account, was not involved in the issuance of checks from the estate bank account, and had no duty to supervise the issuance of said checks by Mr. Marlow.

Greg filed a response to Connelly's motion for summary judgment which failed to refute the claims made in Meinhart's affidavit. To defeat a properly supported motion for summary judgment, the non-moving party must present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial."[18] Greg having failed to do so, Connelly was entitled to summary judgment as a matter of law.

Accordingly, while we do so for different grounds, we affirm the Jefferson Circuit Court's summary judgment.

[18] Steelvest, 807 S.W.2d at 480.

ALL CONCUR.

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