RENDERED: JULY 27, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002618-MR

JERRY A. LOONEY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KATHLEEN VOOR MONTANO, JUDGE
ACTION NO. 03-CI-002505

BERG & JONES, PLLC; STEVEN R. BERG;
LISA JONES GARRY; AND
PETER L. QUEBBEMAN — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, ABRAMSON AND WINE, JUDGES.

ACREE, JUDGE: Jerry A. Looney appeals a summary judgment entered by a Jefferson Circuit Court in his legal malpractice action against the law firm of Berg & Jones, PLLC, and attorneys Steven R. Berg, Lisa Jones Garry, and Peter L. Quebbeman. We conclude, as did the trial court, that Looney's claim is barred by Kentucky Revised Statute (KRS) 413.245, the applicable statute of limitation, and therefore, we affirm.

The underlying action was Looney's suit to recover an engagement ring from his former fiancée. This replevin suit was filed by Garry. The firm subsequently hired Quebbeman who, along with Berg, served as counsel to Looney in this matter. Quebbeman subsequently left the firm while the replevin suit was pending.

Much of the underlying case is irrelevant to this decision. All that is significant here is that on March 14, 2001, Jefferson Circuit Court dismissed Looney's replevin action.

Looney acknowledges in an affidavit that he learned of the dismissal "in late February, early March 2002" when he received a letter to that effect dated February 27, 2002, from Quebbeman. He immediately engaged another attorney, Stewart Bland. According to a March 12, 2002, letter from Bland to Quebbeman, Looney hired Bland "for the sole purpose of reviewing representation he received in the" replevin action. Looney, through Bland, filed his legal malpractice action on March 21, 2003, more than two years after the replevin action was dismissed, nearly two years after the dismissal became final, April 13, 2001, and more than one year after he learned the replevin action was dismissed.

Based on these undisputed facts, the trial court granted summary judgment because the action was barred by the applicable statute of limitations.

The standard of review of a trial court's grant of summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law."

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment is proper when it appears that it would be impossible for the adverse party to produce evidence at trial supporting a judgment in his favor. *James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co.,* 814 S.W.2d 273, 276 (Ky. 1991). An appellate court must review the record in a light most favorable to the party opposing the motion and must resolve all doubts in its favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

The controlling language of the applicable statute requires that:

> a civil action, whether 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.

KRS 413.245.

The statute contains two periods of limitation. The first period begins one year from the date of the negligent act or omission, and the second period begins on the date of discovery if it is later in time. *Faris v. Stone,* 103 S.W.3d 1, 3 (Ky. 2003). In the case before us, the first period commenced thirty (30) days after the March 14, 2001, order dismissing the case, or April 13, 2001. However, because Looney was not immediately aware of the dismissal and finality of the replevin action, the date of discovery marks the commencement of the applicable period of limitation. This becomes the critical date.

Because the malpractice action was filed on March 21, 2003, the circuit court properly focused on events preceding March 21, 2002, and determined the date of discovery to be "at the latest, in February of 2002." This Court notes Looney's affidavit in which he admits learning of the dismissal of the replevin action "in late February, early March 2002[.]" Additionally, we note the March 12, 2002, letter from Looney's attorney in the malpractice action that memorializes a March 4, 2002, conversation he had with Quebbeman in which he stated he was hired "to determine whether the representation provided [in the replevin action] met with the standard of care required under the law."

Based on the foregoing, we are convinced that the trial judge correctly determined there was no genuine issue of material fact on this point and that summary judgment was appropriate as a matter of law.

Looney argues alternatively that the statute of limitations should be tolled. First is his argument that Quebbeman's filing of a motion pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 tolled the statute. However, the Supreme Court has directly addressed this question, stating "a party may not use it [CR 60.02] as a means to extend a statutory period." *Faris,* 103 S.W.3d at 4. Looney's efforts to factually distinguish this legal principle are unpersuasive.

Citing *Alagia, Day, Trautwein & Smith v. Broadbent*, 882 S.W.2d 121 (Ky. 1994), Looney next argues that the "continuous representation rule" tolls the statute. In *Alagia*, the Supreme Court "considered as sound yet declined to decide the case upon the 'continuous representation rule,' a branch of the discovery rule that permits no effective

discovery of the professional negligence so long as the original attorney-client relationship prevails." *Faris*, 103 S.W.2d at 4. But the Supreme Court, recognizing that *Alagia* "presented highly unusual circumstances[,]" *id.* at 3, indicated that the "continuous representation rule" would yield to the "occurrence rule" when the underlying negligence arises during the course of formal litigation.

> [W]e view as distinguishable *Alagia,* wherein the injury did not become fixed and non-speculative until the ongoing negotiations with the IRS were concluded and a final sum determined. Ongoing negotiations as in *Alagia* are not analogous to litigation . . . . [W]e observe that in malpractice cases in which the underlying negligence occurred during the course of formal litigation, Kentucky decisional law has consistently held that the injury becomes definite and non-speculative when the underlying case is final. At that time, the one-year statute of limitations begins to run. In *Alagia* . . . however, the malpractice arose from legal work that was not part of formal litigation. *Alagia* involved an estate plan . . . . Thus, it was necessary to decide when a malpractice injury becomes fixed and nonspeculative in the absence of an underlying court case. In *Alagia*, it was when a final compromise was reached and damages became fixed . . . . Unlike these cases, the "occurrence rule" is more suited to the instant case, as the underlying negligence occurred in the course of formal litigation.

Faris, 103 S.W.3d at 5 (footnotes omitted).

Furthermore, Looney engaged a subsequent attorney specifically to advise him on the viability of a malpractice claim against the law firm and its attorneys for its handling of formal litigation on his behalf. Under such circumstance, we cannot fairly say that "the original attorney-client relationship prevails" over the new attorney-client relationship he created for that purpose.

For the reasons stated above, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEES:

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