

RENDERED: JANUARY 16, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2007-CA-002121-MR

GARY MARINELLI AND
SANDRA MARINELLI, his wife

APPELLANTS

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 04-CI-00214

MARK T. MILLER

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * **

BEFORE: CAPERTON AND MOORE, JUDGES; GUIDUGLI,¹ SENIOR
JUDGE.

CAPERTON, JUDGE: Gary and Sandra Marinelli (the Marinellis) file this appeal from the October 3, 2007, order of the Jessamine Circuit Court granting summary judgment to Appellee, Mark Miller (Miller). The Marinellis filed this claim against Miller for purposes of asserting professional negligence concerning

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Miller's representation of the Marinellis in a bankruptcy petition. Upon Miller's motion, the Jessamine Circuit Court granted summary judgment on the ground that the case was not filed within the applicable statute of limitations pursuant to KRS 413.245. After thorough review, we reverse and remand to the circuit court for additional proceedings consistent with this opinion.

Miller is an attorney licensed to practice law in Kentucky. In the matter *sub judice*, the Marinellis allege that on or about June 2002, they engaged Miller to represent them in the filing of a bankruptcy petition in the United States Bankruptcy Court for the Eastern District of Kentucky, Lexington Division.

In the underlying claim, the Marinellis alleged that Miller failed to use proper care and diligence in compiling the information to be set forth in the bankruptcy petition. Further, they alleged that after retaining Miller to file the petition, they informed him that they were engaged in a business of providing food services to a golf club. Additionally, the Marinellis stated that they provided Miller with a complete listing of their creditors, and informed him that they were entitled to receive a payment in the approximate sum of \$8,000.00 to \$10,000. This sum was apparently to be paid to them within a month of their bankruptcy filing, and was to be used to pay off some of the food vendors and live on until the Marinellis could find another way to make a living. The Marinellis allege that Miller's failure to include this information in their initial bankruptcy petition prompted the United States Bankruptcy Trustee to obtain a judgment denying them a bankruptcy discharge.

Miller asserts that despite these allegations, the Marinellis specifically testified at a meeting of creditors in the United States bankruptcy proceeding that they “didn’t know” and “forgot” about the anticipated payment, and that they did not realize they had to name all of their creditors. Further, Miller alleges that at the bankruptcy hearing, Gary Marinelli also testified that he did not know how much he was going to receive as payment for wages or pursuant to his food service contract. Miller asserts that at no time during their sworn testimony at the bankruptcy meeting of creditors did the Marinellis ever suggest that they disclosed this information to Miller, or that Miller knew of the information but nevertheless failed to include it in the bankruptcy petition. Thus, Miller asserts that the sworn testimony of the Marinellis at the bankruptcy proceeding contradicted and was inconsistent with the factual allegations contained in the complaint filed with the Jessamine Circuit Court.

Miller asserts that although he did not have the foregoing information when he initially filed the bankruptcy petition on behalf of the Marinellis, upon receipt of the information pertaining to the above-referenced payment and the existence of additional creditors, he filed an amendment to the Chapter 7 bankruptcy petition and requested to claim an exemption for a portion of the wage payment pursuant to the applicable Kentucky statute. The Marinellis assert that in the amendment, Miller alleged that the Marinellis were employees and should get an exemption for the aforementioned payment, even though he knew they were not employees. Regardless, Miller asserts that due to the initial failure of the

Marinellis to truthfully disclose the existence of the anticipated payment and all of their creditors, the United States Trustee filed an adversary action to deny discharge to the Marinellis in the United States Bankruptcy Court. That adversary action was filed on October 28, 2002.

In their complaint against Miller, the Marinellis further allege that Miller was negligent in failing to arrange an extension of time within which the Marinellis could obtain an attorney and file a response to the adversary action filed by the bankruptcy trustee. Although they acknowledge that Miller expressly told them he could not represent them in the adversary action because he would have to testify on their behalf, the Marinellis nevertheless claim that Miller agreed to file this extension, but ultimately did not do so. According to the Marinellis, Miller's failure in this regard resulted in the entry of a December 19, 2002, default judgment denying bankruptcy relief.

A review of the record reveals that a Motion for Default Judgment was sought by the United States Bankruptcy Trustee against the Marinellis in the adversary proceeding on or about December 18, 2002, and that service of the notice of the Motion for Default Judgment was certified by the United States Trustee to the Marinellis at their Las Vegas, Nevada address on December 18, 2002. Thereafter, on December 19, 2002, the Order for Default Judgment was entered by bankruptcy Judge William S. Howard. Pursuant to Local Rule 9022-1(c), the United States Trustee was ordered to serve a copy of the Order on the Marinellis.

Miller asserts that the Marinellis were aware of the entry of the default judgment as evidenced by the clerk's certificate of mailing said judgment to the Marinellis, and from a September 4, 2003, letter forwarded to Miller by the Marinellis' current attorney. Miller asserts that despite the Marinellis' acknowledged awareness of the entry of default judgment against them on December 19, 2002, and despite their allegation of malpractice made against Miller in a September 4, 2003, letter, they took no action against Miller until March 28, 2004. At that time, the Marinellis filed their lawsuit against Miller in the Jessamine Circuit Court. Miller asserts that the Marinellis were thus outside the statute of limitations to file their claim.

In response, the Marinellis assert that the judgment of the bankruptcy court actually became final and non-appealable on July 12, 2003, thus setting the statute of limitations at one year from that date, or July 11, 2004. According to the Marinellis, although the adversary proceeding was closed in December of 2002, the underlying case continued in full effect until July of 2003, at which time it was officially closed. In support of this assertion, they cite to *Pedigo v. Breen*, 169 S.W.3d 831 (Ky. 2004), in which our Supreme Court stated:

A professional negligence claim does not accrue until there has been a negligent act and until reasonably ascertainable damages are incurred. 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. Until the underlying case is final and non-appealable, the statute of limitations is tolled because no cognizable claim has yet accrued.

Further, the Marinellis argue *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260 (Ky. App. 2005) for the proposition that a client's knowledge of any malpractice is not decisive until the final disposition of the case. Thus, the Marinellis argue that the lower court erroneously assumed that the underlying case was the adversary claim, when in fact it was the main bankruptcy claim.

In addition to the foregoing argument, the Marinellis also argue the "continuous representation rule." Essentially, they argue that summary judgment was improper insofar as the statute of limitations on a legal negligence claim cannot begin to run so long as the legal representation continues. To that end, the Marinellis note that after they retained the services of their current attorney to pursue an action against Miller, Miller agreed to pursue an attempt at having the default and subsequent final judgment lifted. On February 13, 2004, Miller, on behalf of the Marinellis, filed a motion to set aside the judgment, which was later denied by Judge Howard on March 17, 2004. Five days later, on March 23, 2004, the Marinellis filed the instant action against Miller. Thus, they assert that as Miller remained their counsel until February 2004, they were within the statute of limitations to file this claim.

As noted, on October 3, 2007, the Jessamine Circuit Court entered an order of summary judgment dismissing the Marinellis' professional malpractice action on the ground that it was barred by the applicable statute of limitation as set forth in KRS 413.245. It is from that order that the Marinellis now appeal.

Certainly, the primary issue on appeal is whether or not the order of summary judgment was appropriate on statute of limitations grounds. KRS 413.245 provides:

Notwithstanding any other prescribed limitation of actions which might otherwise appear applicable, except those provided in KRS 413.140, 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. Time shall not commence against a party under legal disability until removal of the disability.

Having reviewed the record in its entirety, as well as the briefs of the parties and applicable law, we cannot agree that summary judgment was proper in this instance with respect to the statute of limitations set forth above.

Our review of the briefs of the parties and the record submitted indicates that the basis for the malpractice allegations against Miller stem, in reality, from actions he took while representing the Marinellis in the course of filing the Chapter Seven petition. Namely, those actions include Miller's failure to use proper care and diligence in compiling the information to be included in the petition, negligence in preparation of the petition itself, and that he later filed an amendment to the petition attempting to obtain an improper exemption on behalf of the Marinellis. These failures, the Marinellis asserted, caused the United States Trustee to file an adversary action to deny discharge. Finally, the Marinelli's asserted that Miller's failure to arrange an extension of time in which they could

obtain an attorney and file a response to the adversary action, also caused damage in addition to that already outlined above.

As both the Marinellis and Miller agree, Miller was retained to represent the Marinellis with respect to the filing of the Chapter Seven Bankruptcy Petition. He was not their counsel in the adversary action, and indeed, as both parties acknowledge, Miller expressly informed the Marinellis that he could not represent them in the adversary action because he would have to testify on their behalf. Indeed, one of the bases upon which the Marinellis allege malpractice is Miller's failure to obtain an extension of time so they could *obtain* an attorney to respond to the adversary action. Further, fact that Miller was not representing the Marinelli's in the adversary proceeding was confirmed in the Bankruptcy Court's March 17, 2004, memorandum opinion. It is thus clear that Miller was not their attorney with respect to that particular portion of the proceeding.

We agree with Miller that adversary proceedings are separate lawsuits within the context of a particular bankruptcy case, each with the attributes of a lawsuit. *See* Federal Rule of Bankruptcy Procedure §7001.01, and *Collier on Bankruptcy*, 15th Edition Revised, Volume 10, Matthew Binder, 2007. Thus, as Miller has correctly noted, a judgment determining dischargeability in a bankruptcy adversary proceeding is a final and appealable order. *See* 11 U.S.C.A. §523(a); 28 U.S.C.A. §158(a)(1), and *In Re Cundiff*, 227 B.R. 476 (6th Cir. BAP 2005).

However, as we have discussed hereinabove, Miller did not represent the Marinellis in the adversary proceeding, as all parties expressly agree. Miller represented the parties in the main bankruptcy petition, which again, all parties agree, was not finally concluded until July 2, 2003. Therefore, we believe that the one year statute of limitations as set forth in KRS 413.425 began to run ten days following the July 2, 2003, closing of their Chapter Seven bankruptcy case, and would have consequently expired on July 11, 2004. Thus, in filing their claim for professional malpractice on March 23, 2004, the Marinellis were within the applicable statute of limitations.

We agree with Miller that had this action been based upon actions he took as the Marinellis' attorney in the adversary proceeding, they would have been beyond the statute of limitations to file this claim. Part VIII of the Federal Rules of Bankruptcy Procedure sets forth the rules pertaining to appeals from judgments, orders, or decrees of a bankruptcy court. Rules 8001 and 8002 provide that appeal of a judgment entered in a bankruptcy adversary proceeding must be filed within ten days following the entry of judgment. That rule is to be strictly applied, and failure to file an appeal renders a judgment final. *See* §8002.01, and *In Re Albers*, 64 B.R. 154 (N.D. Ohio 1986).

We agree with Miller that in this case, the Marinellis received notice of the December 19, 2002, Default Judgment and Order denying their bankruptcy discharge, and accordingly, had until December 29, 2002, to appeal that judgment. As no appeal was taken, that judgment became final and non-appealable. Thus,

had Miller represented the Marinellis solely with respect to the adversary proceeding, they would have had one year from that date, or until December 29, 2003, in which to file a professional malpractice claim against Miller. However, as Miller did not represent the Marinellis in the adversary proceeding, but instead served as counsel with respect to the main petition, we cannot rely upon the foregoing reasoning to dismiss this matter.

A review of the record clearly indicates that the motion was made pursuant to Bankruptcy Rule 9024. That rule provides that Federal Rule of Civil Procedure 60 applies in cases under the Bankruptcy Code. Further, the memorandum opinion issued by the Bankruptcy Court on March 17, 2004, specifically indicated that Miller's motion, which was overruled, was made pursuant to Federal Rule of Civil Procedure 60. Accordingly, we believe *Faris v. Stone* to apply to the matter *sub judice*, and we do not find that the motion to set aside judgment would toll the statute of limitations. Nevertheless, we believe this point moot in light of our previously set forth finding that the Marinelli's statute of limitations did not expire until July 11, 2004.

In light of the foregoing, we find that the order of summary judgment was improperly entered. Under the foregoing analysis, we believe that the Marinelli's claim was indeed timely filed. Certainly, we do not reach the merits of the malpractice claim itself, and we hereby reverse and remand to the trial court for additional proceedings consistent with this opinion.

ALL CONCUR.

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