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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001245-MR

LINDA G. HOLT;
JUDITH E. PREWITT; AND
CYNTHIA L. ROEDER

APPELLANTS

APPEAL FROM KENTON CIRCUIT COURT
v. HONORABLE REBECCA LESLIE KNIGHT, SPECIAL JUDGE
ACTION NO. 16-CI-01429

THOMPSON HINE, LLP

APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, NICKELL, AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Linda G. Holt, Judith E. Prewitt and Cynthia L. Roeder, who are sisters, appeal from a July 17, 2017 order of the Kenton Circuit Court dismissing their aiding and abetting breach of fiduciary duty claims against the law firm of Thompson Hine, LLP. The complaint alleges that for several

decades, attorneys at Thompson Hine helped appellants' brothers to secretly deprive appellants of their rightful share of their parents' large estates. Having reviewed the record and applicable law, and conducted oral argument,[1] we affirm.

Appellants sued some of their brothers in federal court over the alleged manipulation of their parents' estates, including claims for breaching fiduciary duties. That complaint was consolidated with an extant case brought by another sister. The intrafamily litigation became bitter, protracted and sprawling. Eventually, after having dismissed or granted summary judgment to the brothers on many claims, the federal court ruled in favor of appellants on the breach of fiduciary duty claims and ordered the brothers to pay appellants roughly $584 million. *Osborn v. Griffin*, 2016 WL 1092672 (E.D.Ky. 2016) (unpublished). The Sixth Circuit affirmed. *Osborn v. Griffin*, 865 F.3d 417 (6th Cir. 2017).

While the brothers' appeal was pending before the Sixth Circuit, on August 29, 2016, appellants filed this action against Thompson Hine for its alleged role in aiding and abetting the brothers' breaches of fiduciary duty.[2] Doubtlessly anticipating Thompson Hine's arguing that the complaint was untimely, Paragraph

[1] By necessity, the oral argument was conducted by a two-judge panel when the third judge recused immediately prior to the argument. Before an opinion could be rendered, both Judges who participated in the oral argument concluded their service on this Court. All members of the current panel have had the ability to view the oral argument but have otherwise examined the case afresh.

[2] Appellants' sister also sued Thompson Hine in federal court, but that case has been stayed.

107 of the complaint alleges that appellants did not learn they had possible claims against Thompson Hine until August 2013 during discovery in the federal litigation. At oral argument, appellants' counsel stated appellants did not seek to add Thompson Hine as a defendant to the then ongoing federal litigation because they did not discover the claims until after the deadline for amending their federal pleadings.

In lieu of an answer, Thompson Hine filed a motion to dismiss pursuant to Kentucky Rules of Civil Procedure (CR) 12.02, arguing the complaint was not timely filed and otherwise failed to set forth a cognizable claim for relief. On July 6, 2017, roughly three months after conducting oral argument on the motion to dismiss, the trial judge's judicial assistant sent an *ex parte* email to only counsel for Thompson Hine, which stated that the judge had decided to grant the motion to dismiss and wanted counsel to resubmit a previously tendered proposed order. In response, counsel emailed the assistant the same terse proposed order it had previously submitted. On July 7, 2017, the judge's assistant again emailed only counsel for Thompson Hine. That email said the judge wanted counsel to submit a more detailed proposed order. Thompson Hine's counsel emailed a greatly expanded proposed order to only the judge's assistant on July 10, 2017. Appellants' counsel was not copied on any of the emails between the court's staff and Thompson Hine's counsel.

On July 11, 2017, appellants' counsel learned about the *ex parte* emails between the judge's staff and Thompson Hine's counsel at a hearing in federal court. That same date, the trial court signed the order submitted by Thompson Hine without making any changes thereto. Three days later, counsel for Thompson Hine filed its expanded proposed order in the record. On July 19, 2017, the order of dismissal was entered by the circuit court clerk's office.[3] Shortly after the trial court denied appellants' motions to recuse and to withdraw the order, they filed this appeal.

A motion to dismiss for failure to state a claim upon which relief may be granted "admits as true the material facts of the complaint . . . [s]o a court should not grant such a motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved." *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010) (quotation marks, footnotes and citations omitted). When ruling on a motion to dismiss, a court must liberally construe the pleadings in the light most favorable to the plaintiff and accept as true the allegations therein.

[3] It is unclear why it took over a week for the order to be entered after it had been signed by the judge. Also, the parties submitted voluminous attachments to the motion to dismiss and the response thereto, none of which was specifically excluded by the trial court. However, those attachments consist of copies of authorities cited in those documents and portions of the federal court record. No party argues the failure to exclude the attachments has converted the motion to dismiss to one for summary judgment. Moreover, consideration of public documents central to the issues raised in a complaint does not automatically result in such a conversion. *Netherwood v. Fifth Third Bank, Inc.*, 514 S.W.3d 558, 563-64 (Ky.App. 2017).

Id. Since a motion to dismiss for failure to state a claim upon which relief may be granted presents "a pure question of law," we review the matter *de novo*. *Id.*

Appellants contend that the trial court's decision contains a host of errors. Upon first glance, we are skeptical of some of the trial court's conclusions, but we need not definitively address many of them because we agree that this action was not timely filed. Initially, we conclude this case is not subject to the one-year statute of limitations for professional malpractice found in Kentucky Revised Statutes (KRS) 413.245. That statute provides in relevant part:

> 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.

Our Supreme Court has held that "KRS 413.245 is the *exclusive* statute of limitations governing claims of attorney malpractice." *Abel v. Austin*, 411 S.W.3d 728, 738 (Ky. 2013).

However, the claims against Thompson Hine are not for attorney malpractice. To prevail in a legal malpractice claim, a plaintiff must prove, among other things, "that there was an employment relationship with the defendant/attorney . . . ." *Stephens v. Denison*, 64 S.W.3d 297, 298 (Ky.App.

2001). In other words, "a legal malpractice claim may accrue only to the attorney's client." *Baker v. Coombs*, 219 S.W.3d 204, 208 (Ky.App. 2007) (quotation marks and citation omitted).

Appellants were not Thompson Hine's clients, so their claims against Thompson Hine cannot be legal malpractice claims and, consequently, are not governed by KRS 413.245. Despite Thompson Hine's reliance upon it, *Abel* does not mandate a contrary result as it explicitly holds only that "claims *brought by clients or former clients* against attorneys for acts or omissions arising out of the rendition of professional services are governed exclusively by the one-year limitation periods established by KRS 413.245." *Abel*, 411 S.W.3d at 739 (emphasis added). *Abel* thus does not apply to claims against attorneys brought by people who were not clients of the attorneys. The trial court erred by applying KRS 413.245. Instead, appellants' claims fall within the general five-year statute of limitations contained in KRS 413.120(6) for actions alleging "an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated." *See Middleton v. Sampey*, 522 S.W.3d 875, 878 (Ky.App. 2017) (applying KRS 413.120(6) to breach of fiduciary duty claims).

However, we agree with the trial court's alternate conclusion that the complaint is nonetheless untimely. With one exception, the complaint is based upon events which occurred well before the applicable five-year limitations period.

We must accept, for purposes of ruling on a motion to dismiss, that appellants did not learn about their possible claims against Thompson Hine until 2013, but that does not save the complaint because the discovery rule does not apply to breach of fiduciary duty claims. *Id.* at 879. Therefore, the five-year statute of limitations had expired prior to the filing of this action as to all but one claim. As to the one exception, appellants claim misconduct occurring in 2010 regarding alleged machinations of ownership of a certain parcel of land, but the federal court granted summary judgment to appellants' brothers on all counts regarding that land. *Osborn v. Griffin*, 50 F.Supp.3d 772, 800-01 (E.D.Ky. 2014). Thompson Hine cannot be liable for aiding and abetting nonexistent breaches of fiduciary duty.

Appellants raise two tolling arguments: statutory tolling under KRS 413.190(2) and equitable tolling. Neither is availing.

KRS 413.190(2) provides in relevant part that:

> When a cause of action mentioned in KRS 413.090 to 413.160 accrues *against a resident of this state*, and he by absconding or concealing himself or by any other indirect means obstructs the prosecution of the action, the time of the continuance of the absence from the state or obstruction shall not be computed as any part of the period within which the action shall be commenced.

(emphasis added). As the plain language of the statute shows, KRS 413.190(2) only applies to Kentucky residents. *Skaggs v. Fyffe*, 299 Ky. 751, 187 S.W.2d 281,

282 (1945). It is uncontested that Thompson Hine was organized in Ohio and does not maintain a place of business in Kentucky.

Appellants argue that Thompson Hine should nonetheless be deemed a Kentucky resident because at least one of its members resides in Kentucky. Tellingly, appellants cite no Kentucky appellate opinions applying tolling under KRS 413.190 under similar facts. Instead, appellants argue we should borrow the federal courts' standard for determining the citizenship of unincorporated entities for diversity jurisdiction purposes whereby "all unincorporated entities—of which a limited liability company [or partnership] is one—have the citizenship of each partner or member." *Delay v. Rosenthal Collins Group, LLC*, 585 F.3d 1003, 1005 (6th Cir. 2009).

However, courts have long recognized that residency, domicile and citizenship are not freely interchangeable synonyms. *LaTourette v. McMaster*, 248 U.S. 465, 470, 39 S.Ct. 160, 162, 63 L.Ed. 362 (1919). We decline to apply the term "citizen" when the General Assembly used the term "resident." A court "must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992). Moreover, there is a difference between determining whether a court has jurisdiction over a party, such as the examination of citizenship for federal diversity jurisdiction purposes, and

determining whether an equitable doctrine should apply to a party which does not otherwise contest the trial court's jurisdiction. Because appellants cannot show that Thompson Hine is a Kentucky resident, statutory tolling under KRS 413.190(2) is unavailable.

As for non-statutory equitable tolling, though appellants mentioned it below, the trial court did not explicitly discuss it in its order granting the motion to dismiss. Instead, the court explained several reasons why it believed statutory tolling was inapplicable (including Thompson Hine's not being a Kentucky resident). Appellants did not ask for specific, additional findings on that issue. "The Court of Appeals is without authority to review issues not raised in or decided by the trial court." *Regional Jail Auth. v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989) (citations omitted). Although we may affirm a trial court on grounds brought to its attention which it does not address, we generally cannot reverse on such issues. *Mark D. Dean, P.S.C. v. Commonwealth Bank & Trust Co.*, 434 S.W.3d 489, 496 (Ky. 2014).

The complaint's untimeliness moots all remaining issues except, arguably, appellants' argument that the decision must be reversed due to the *ex parte* contacts between the court's staff and counsel for Thompson Hine. We agree that the *ex parte* contact was improper, but do not agree that it invalidates the ruling here.

"A basic tenet of the legal profession is *ex parte* communication between a judge and an attorney in a pending case is disfavored." *Commonwealth v. Cambron*, 546 S.W.3d 556, 561 (Ky.App. 2018). Consequently, Supreme Court Rule (SCR) 4.300, Canon 2, Rule 2.9(A) ("Rule 2.9") permits a judge to make *ex parte* contact with a party or its counsel only "for scheduling, administrative, or emergency purposes, which do[] not address substantive matters" provided that "(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and (b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond." *Id.* Comment (1) to Rule 2.9 states in plain language that "[t]o the extent reasonably possible, all parties or their lawyers shall be included in all communications to or from a judge."

Because of the *ex parte* emails, Thompson Hine knew what the outcome of the case would be several days before appellants, who were neither informed of the *ex parte* contact nor given an opportunity to respond to it. A judge may ask counsel for draft findings on the record but may not contact only one side's counsel *ex parte* to inform it of an upcoming decision and to ask for findings to support that inchoate decision. And Rule 2.9(D) and Rule 2.12(A) make plain that a judge may not direct its staff to engage in similar *ex parte* contact.

Because the court indicated that it had already decided to grant the motion, appellants have not shown that the court's decision was not the product of its own independent deliberations. Under these facts, appellants have not demonstrated that the *ex parte* contacts materially impacted the outcome of the motion to dismiss. Therefore, though improper, the contacts here must be deemed harmless errors. However, we strongly discourage the court from engaging in similar *ex parte* communications in the future.

For the foregoing reasons, the Kenton Circuit Court's order granting Thompson Hine's motion to dismiss is affirmed.

ALL CONCUR.

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