NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 1146

MICHAEL J. MARTIN

VERSUS

JOAN MALBROUGH & ASSOCIATES, ET AL

DATE OF JUDGMENT: FEB 18 2014

ON APPEAL FROM THE THIRTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 167,429, PARISH OF TERREBONNE
STATE OF LOUISIANA

HONORABLE MICHAEL E. KIRBY, JUDGE AD HOC

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Michael J. Martin Houma, Louisiana	Plaintiff-Appellant Pro Se
Donna H. Wright Joan M. Malbrough Gray, Louisiana	Counsel for Defendant-Appellee Malbrough & Wright, APLC previously d/b/a Joan Malbrough & Associates, APLC

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BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

Disposition: AFFIRMED; MOTION TO CORRECT PAGE NUMBERS DENIED.

KUHN, J.,

Plaintiff, Michael J. Martin, appeals the dismissal of his legal malpractice suit against the law firm that previously represented him in a medical malpractice claim pursuant to a peremptory exception raising the objection of prescription/peremption. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In January of 2002, Mr. Martin was the plaintiff in a medical malpractice suit pending in the 32nd JDC, in which he was represented by the law firm of Joan Malbrough & Associates, A Professional Law Corporation.[1] On January 8, 2002, Judge David Arceneaux signed an order allowing Malbrough & Associates to withdraw as counsel of record for Mr. Martin pursuant to its *ex parte* motion and order to withdraw.

Over ten years later, on August 6, 2012, Mr. Martin, in proper person, filed a suit for legal malpractice against Malbrough & Associates, alleging that the law firm's withdrawal as his counsel of record was detrimental to his medical malpractice claim and caused him to suffer medical, legal, and financial losses.[2] He alleges that the motion to withdraw filed by Malbrough & Associates was deficient in that it failed to contain information on the status of his case as district court rules required and allowed his counsel to "drop the ball on [his] case..." On March 11, 2013, Mr. Martin filed a second pro se petition. Although the allegations of this petition lack clarity, they seem to suggest that Malbrough & Associates, by filing the *ex parte* motion and order to withdraw, and Judge Arceneaux, by signing the order allowing counsel's withdrawal, participated together in some sort of fraud and/or fraudulent concealment regarding his medical

[1] The law firm is currently doing business under the name of Malbrough & Wright, A Professional Law Corporation.

[2] Mr. Martin also named Judge Arceneaux as a defendant in the suit. The dismissal of Mr. Martin's suit against Judge Arceneaux is the subject of a separate appeal currently before this Court, docket number 2013-CA-0864, also decided this date.

malpractice suit. Additionally, Mr. Martin alleged that Marbrough & Associates also violated numerous rules of professional conduct by not informing him of the motion to withdraw in advance of its filing, in withdrawing as his counsel without good cause and to his detriment, and in failing to adequately protect his interest upon withdrawal.

In response, the defense filed a peremptory exception raising the objection of prescription/peremption. Following a hearing on April 29, 2013, the trial court rendered oral judgment sustaining the exception of prescription/peremption and dismissing Mr. Martin's claims against Malbrough & Associates. The trial court subsequently signed written judgment in accordance with that ruling. Mr. Martin appealed the judgment, arguing that his legal malpractice suit is not prescribed because: (1) he did not discover until years later that he was harmed by Malbrough & Associates' withdrawal as his counsel; and (2) the prescriptive period provided in La. R.S. 9:5605 does not apply in cases of fraud.

DISCUSSION

The time limitation for filing a legal malpractice action is set forth in La. R.S. 9:5605, which provides, in pertinent part:

> A. No action for damages against any attorney at law duly admitted to practice in this state, any partnership of such attorneys at law, or any professional corporation, company, organization, association, enterprise, or other commercial business or professional combination authorized by the laws of this state to engage in the practice of law, whether based upon tort, or breach of contract, or otherwise, arising out of an engagement to provide legal services shall be brought *unless filed in a court of competent jurisdiction and proper venue within one year from the date of the alleged act, omission, or neglect, or within one year from the date that the alleged act, omission, or neglect is discovered or should have been discovered*; however, even as to actions filed within one year from the date of such discovery, in all events such actions shall be filed at the latest within three years from the date of the alleged act, omission, or neglect.
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> B. The provisions of this Section are remedial and apply to all causes of action without regard to the date when the alleged act, omission, or neglect occurred.... The one-year and three-year periods of limitation provided in Subsection A of this Section are peremptive periods

> within the meaning of Civil Code Article 3458 and, in accordance with Civil Code Article 3461, may not be renounced, interrupted, or suspended.
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> E. The peremptive period provided in Subsection A of this Section shall not apply in cases of fraud, as defined in Civil Code Article 1953. [Emphasis added.]

Thus, the applicable time limitations for legal malpractice actions is one year from the date of the alleged act, omission, or neglect, or within one year from the date that the alleged act, omission, or neglect is discovered or should have been discovered, or, at the latest, within three years from the date of the alleged act, omission, or neglect. La. R.S. 9:5605(A); see also ***Paternostro v. LaRocca***, 01-0333 (La. App. 1st Cir. 3/28/02), 813 So.2d 630, 634. The burden of proving peremption is typically on the party pleading it. However, when the action is perempted on the face of the petition, the burden shifts to the plaintiff to show the claim has not been perempted. See ***Dauterive Contractors, Inc. v. Landry and Watkins***, 01-1112 (La. App. 3d Cir. 3/13/02), 811 So.2d 1242, 1253.

Mr. Martin filed his initial petition for damages on August 6, 2012. In both that petition and his subsequent petition, filed March 11, 2012, he complains of actions by Malbrough & Associates centered on its withdrawal as his counsel of record on January 8, 2002. Although he allegedly was not given advance notice of the motion and order to withdraw, Mr. Martin did receive notice of the withdrawal order within a period of days after it was signed. Thus, because Mr. Martin's petition was not filed until over ten years after the order allowing Marlborough & Associates to withdraw from his medical malpractice suit was signed, the instant legal malpractice suit appears to be preempted on its face and the burden shifted to him to show that it is not.

In opposing the exception of prescription/peremption, Mr. Martin contends that the peremptive periods in La. R.S. 9:5605(A) do not apply because of

Malbrough & Associate's acts of deception and fraud, as well as the fact that he did not discover these acts of fraud and deceit until years after the withdrawal. La. R.S. 9:5605(E) provides that the peremptive periods of La. R.S. 9:5605(A) are not applicable in cases of fraud, as defined in La. C.C. art. 1953.[3] Fraud is defined by La. C.C. art. 1953 as "a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other ... and may result from silence or inaction."

Although Mr. Martin's petitions contained allegations of legal malpractice that allude broadly to fraud and deceit by his former counsel, none of the specific facts alleged in either of his petitions were sufficient to state a claim of fraud against Malbrough & Associates. No claim has been made nor facts alleged that would establish that Malbrough & Associates withdrew from the medical malpractice suit with the intention of obtaining an unjust advantage or causing loss or inconvenience to Mr. Martin. The allegations of Mr. Martin's petition simply do not meet the definition of fraud under La. C.C. art. 1953.

Thus, what remains is a claim of legal malpractice that was filed well beyond one year after Malbrough & Associates procured an order allowing its withdrawal as Mr. Martin's counsel. Furthermore, it is clear that within days of the January 8, 2002 withdrawal order, Mr. Martin received notice thereof. At that time, he knew that Malbrough & Associates had withdrawn as his counsel without his consent, leaving him unrepresented in his pending malpractice suit. As such, Mr. Martin had knowledge of facts sufficient to put a reasonable man on notice that legal malpractice may have been committed and, therefore, he was subject to the commencement of peremption by virtue of such knowledge. Peremption

[3] This court has previously determined that the fraud exception applies to both the one-year and three-year peremptive periods. See ***Coffey v. Block***, 99-1221 (La. App. 1st Cir. 6/23/00), 762 So.2d 1181, 1187, writ denied, 00-2226 (La. 10/27/00), 772 So.2d 651, superseded by statute on other grounds as recognized in, ***Naghi v. Brener***, 08-2527 (La. 6/26/09), 17 So.3d 919, 920 n.2.

commences when a claimant has knowledge of such facts even though he asserts a limited ability to comprehend and evaluate those facts. ***Carroll v. Wolfe***, 98-1910 (La. App. 1st Cir. 9/24/99), 754 So.2d 1038, 1041. Accordingly, Mr. Martin's legal malpractice suit was preempted since it was not filed until over ten years after he obtained notice of the withdrawal by Malbrough & Associates from his medical malpractice suit. The trial court correctly sustained the exception of prescription/peremption. Mr. Martin's arguments on appeal are without merit.

CONCLUSION

For the reasons outlined, the judgment of the trial court sustaining the exception of prescription/peremption and dismissing Mr. Martin's suit against Malbrough & Associates is affirmed. Additionally, Mr. Martin's motion to correct the record page numbers referenced in his appellate brief is denied as being moot, since this Court was able to ascertain independently the correct record references during its review of this matter. All costs of this appeal are assessed against plaintiff-appellant, Mr. Martin.

AFFIRMED; MOTION TO CORRECT PAGE NUMBERS DENIED.