

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2018 CA 1371

LAURIE MURRAY

VERSUS

SAMUEL C. WARD, JR. & ASSOCIATES, LLC &
SAMUEL C. WARD, JR.

Judgment Rendered: JUN 10 2019

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Suit Number C637977

Honorable Donald R. Johnson, Presiding

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BEFORE: GUIDRY, THERIOT, AND PENZATO, JJ.

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mt.*

GUIDRY, J.

Plaintiff, Laurie Murray, appeals from a judgment of the trial court sustaining an exception raising the objection of peremption filed by defendant, Samuel C. Ward, Jr. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On August 31, 2010, Murray was rear-ended by a school bus owned by the Ascension Parish School Board (School Board) and driven by Lisa Caruso, an employee of the School Board. Murray thereafter retained Ward to represent her in a claim for personal injuries as a result of the accident. On March 7, 2011, Ward filed a lawsuit on behalf of Murray in the Twenty-Third Judicial District Court in Ascension Parish, naming as defendants Caruso; Ascension Parish, the alleged employer of the driver; and Louisiana Risk Management Agency (LARMA), the alleged insurer of the school bus. Service of the petition was requested only on Ascension Parish.

Thereafter, Ward associated A.M. “Tony” Clayton and Michael Frugé to act as co-counsel for Murray. On January 2, 2013, Caruso and LARMA, through their attorney, filed motions for involuntary dismissal pursuant to La. C.C.P. art. 1672(c) and La. R.S. 13:5107(D) because they were not served with Murray’s petition within ninety days of the filing of the lawsuit. LARMA also asserted that it was not an insurer. On the same date, Ascension Parish filed a motion for summary judgment, asserting that Ascension Parish was the not the proper party defendant because it did not employ Caruso. The trial court subsequently signed a judgment on February 14, 2013, granting the unopposed motions for involuntary dismissal. Ascension Parish’s motion for summary judgment was set for hearing on July 26, 2013.

On June 28, 2013, counsel for Murray filed a Motion for Leave to File Amended Petition, which named the School Board as a defendant.¹ Thereafter, on July 26, 2013, the trial court conducted a hearing on Ascension Parish's unopposed motion for summary judgment and signed a judgment granting summary judgment in favor of Ascension Parish and dismissing Murray's claims against it with prejudice.

On August 13, 2013, the School Board filed an Answer and Affirmative Defenses to Murray's petitions, asserting that Murray's cause of action is prescribed. Thereafter, on January 31, 2014, the School Board filed a Peremptory Exception of Prescription, alleging that the School Board was not named as a defendant in the action until almost three years after the accident. Following a hearing, the trial court signed a judgment denying the exception. The School Board thereafter filed an application for supervisory writs with this court on March 17, 2014, requesting that this court overturn the denial of its exception. In an order signed June 12, 2014, this court granted the School Board's writ application, finding that the amending petition did not relate back to the date of filing of the original petition under La. C.C.P. art. 1153. As such, this court reversed the trial court's judgment denying the School Board's exception raising the objection of prescription, granted the exception, and dismissed Murray's case.

Counsel for Murray thereafter filed an application for writ of certiorari with the Louisiana Supreme Court on July 11, 2014. The supreme court, however, denied the writ application on August 11, 2014. On September 11, 2014, Ward met with Murray and informed her that there was nothing more that could be done following the supreme court writ denial, and that the dismissal of the case was his fault because he sued the wrong person.

¹ We note that while the amended petition correctly named Ascension Parish School Board as a defendant, it incorrectly named the defendant employee/driver as "Lisa Carbo."

Thereafter, on March 18, 2015, Murray filed a Petition for Damages for Legal Malpractice, naming Ward and his firm, Samuel C. Ward, Jr. & Associates, LLC, as defendants. Murray alleged that Ward was liable to her for legal malpractice for: naming the incorrect defendant, Ascension Parish, when he had evidence indicating that the bus was owned by the School Board; failing to request service of process and citation upon Caruso within ninety days of the filing of the original petition; failing to request service of the amended petition upon Caruso within ninety days of the filing of the amended petition; misnaming defendant Caruso in the amended petition; naming a new defendant, the School Board, in the amended petition filed nearly three years after the accident in an attempt to relate back to the original filing date so as to avoid prescription; continuing to conceal the above instances of malpractice through acts, omissions, and silence until after the supreme court denied writs; and concealing from her that he had sued the wrong defendant, Ascension Parish, and arguably LARMA, in the original petition and had failed to timely request service on Caruso and LARMA.

Ward answered Murray's petition, asserting that her cause of action is prescribed and barred by the doctrine of peremption. Following a hearing on the exception, the trial court signed a judgment sustaining the exception and dismissing Murray's claims against Ward and his law firm with prejudice. Murray now appeals from the trial court's judgment.

DISCUSSION

The objection of peremption is raised by the peremptory exception. La. C.C.P. art. 927(2). Ordinarily, the exceptor bears the burden of proof at the trial of the peremptory exception. However, if peremption is evident on the face of the pleadings, the burden shifts to the plaintiff to show the action has not perempted. Satterfield & Pontikes Construction, Inc. v. Breazeale Sachse & Wilson, LLP, 15-

1355, pp. 6-7 (La. App. 1st Cir. 1/10/17), 212 So. 3d 554, 558, writ denied, 17-0268 (La. 3/31/17), 217 So. 3d 363.

At a hearing on a peremptory exception of prescription at or prior to trial, evidence may be introduced to support or controvert the exception. La. C.C.P. art. 931. In the absence of evidence, an exception of peremption must be decided upon the facts alleged in the petition with all of the allegations accepted as true. Lomont v. Bennett, 14-2483, p. 8 (La. 6/30/15), 172 So. 3d 620, 627, cert. denied, ___ U.S. ___ 136 S. Ct. 1167, 194 L. Ed. 2d 178 (2016). However, when evidence is introduced, the court is not bound to accept plaintiff's allegations as true. Lomont, 14-2483 at p. 8, 172 So. 3d at 627. If evidence is introduced at the hearing on the peremptory exception, the district court's findings of fact are reviewed under the manifest error-clearly wrong standard of review. Lomont, 14-2483 at p. 8, 172 So. 3d at 627. Accordingly, if those findings are reasonable in light of the record reviewed in its entirety, an appellate court cannot reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Satterfield & Pontikes Construction, Inc., 15-1355 at p. 7, 212 So. 3d at 558.

The time limit for filing a legal malpractice claim is set forth in La. R.S. 9:5605(A), which provides that an action for legal malpractice must be brought within one year of the date of the act, omission, or neglect, or within one year of the date of discovering the act, omission, or neglect and within three years of the date of the act, omission, or neglect. Satterfield & Pontikes Construction, Inc., 15-1355 at p. 7, 212 So. 3d at 558-559. Louisiana Revised Statute 9:5605(B) further provides that both the one-year and three-year periods of limitation provided in Subsection A are preemptive periods within the meaning of La. C.C. art. 3458, and as such, they cannot be renounced, interrupted, or suspended. Satterfield & Pontikes Construction, Inc., 15-1355 at p. 7, 212 So. 3d at 559.

Louisiana Revised Statute 9:5605(E), however, excepts the peremptive periods in cases of fraud as defined by La. C.C. art. 1953. Louisiana Civil Code article 1953 defines fraud 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.” The fraud exception for acts of malpractice may be triggered by either a fraudulent act of malpractice by the attorney or a post-malpractice fraudulent concealment of the act. See Lomont, 14-2483 at pp. 9-10, 172 So. 3d at 627-628.

The date of discovery from which a peremptive period begins to run is the date on which a reasonable man in the position of the plaintiff has, or should have, either actual or constructive knowledge of damage, the delict, and a relationship between them sufficient to indicate to a reasonable person he is the victim of a tort and to state a cause of action against the defendant. Put more simply, the date of discovery is the date the negligence was discovered or should have been discovered by a reasonable person in the plaintiff’s position. Currier v. Anding, 17-0438, pp. 5-6 (La. App. 1st Cir. 11/1/17), 235 So. 3d 1204, 1209.

Constructive knowledge is whatever notice is enough to excite attention and put the injured party on guard and call for inquiry. Such notice is tantamount to knowledge or notice of everything to which a reasonable inquiry may lead. Such information or knowledge as ought to reasonably put the alleged victim on inquiry is sufficient to start the running of peremption. A plaintiff’s mere apprehension that something may be wrong is insufficient to commence the running of peremption unless the plaintiff knew or should have known through the exercise of reasonable diligence that his problem may have been caused by acts of malpractice. Currier, 17-0438 at p. 7, 235 So. 3d at 1210.

In the instant case, it is clear, and the parties do not dispute, that the alleged act of malpractice occurred on August 31, 2011, when Murray’s underlying case

prescribed. Therefore, Murray had to file her action for legal malpractice within one year from the date of the act or within one year of the date of discovery of the act, and within three years of the date of the act, unless she is able to establish that fraud exception contained in La. R.S. 9:5605(E) applies. See La. R.S. 9:5605(A). In her petition, Murray did not specifically allege that Ward committed fraud, but she did allege that Ward “conceal[ed] ... instances of malpractice through acts, omissions and silence, until forced to reveal such to petitioner due to the Louisiana Supreme Court’s denial of the writ application” and “[c]onceal[ed] ... that he had both sued the wrong defendant(s), Ascension Parish and arguably ‘LARMA,’ in the original petition and that he had failed to timely request service on Lisa Caruso and ‘LARMA[.]’”

At the trial of the exception, Ward testified that Caruso and LARMA filed motions for involuntary dismissal, that he discussed these motions with Murray, that there was no question that Caruso was dismissed because she was not served timely, and that he never attempted to conceal or deny that he did not serve her timely. Ward further stated that co-counsel, Frugé, sent letters to Murray in January 2013 following the filing of the motions for involuntary dismissal. Additionally, with respect to Ascension Parish, Ward stated that he discussed the motion for summary judgment filed by Ascension Parish with Murray and whether it was the proper defendant and had discussions with Murray regarding amending the petition to name the School Board. Ward also stated that he sent Murray a text message and email on November 11 and 12, 2013, respectively, informing Murray that counsel for the School Board was seeking to have the case dismissed based on prescription. Ward’s office forwarded to Murray copies of all pleadings, and he communicated with her regularly via text message, letter, email, and telephone with status updates on her case. Ward further stated that Murray contacted his office on a very regular basis and actively participated in the case, even notifying

him of the supreme court's writ denial before he received their decision. Ward stated that he told Murray that he strongly disagreed with the defense counsel's position and that he "believe[d] the law, and cases do not support his position;" however, he stated that he did not guarantee Murray a result. Ward acknowledged that in a September 11, 2014 meeting with Murray, after the supreme court denied his writ for certiorari, he acknowledged that he had sued the wrong entity.

Tara Richard, Ward's legal assistant, also testified at trial. She stated that the office protocol was to forward all case filings to clients, including Murray. Richard stated that Murray contacted the office on a regular basis asking for updates and was knowledgeable and kept informed of deadlines in the case.

Finally, Murray testified at trial and stated that she was aware in January 2013 of the motion for summary judgment filed by Ascension Parish and the need to amend her petition, and she understood in November 2013 that the School Board was trying to get the case dismissed. However, according to Murray, her understanding from her communications with Ward was that defense counsel, and not Ward, had done something wrong and she had nothing to worry about. Murray stated that she did not become aware that Ward was the cause of any problem with her case until he spoke with her on September 11, 2014. Murray also acknowledged that she received copies of pleadings from Ward on a regular basis, and that if she did not receive something, she would contact his office and ask for copies. Murray stated that she did not recall ever being told about or receiving anything regarding the involuntary dismissal of Caruso and LARMA until she read about it in the School Board's writ application, which she received on March 20, 2014. However, Murray acknowledged that she did receive letters from Frugé in January 2013 and that she did not read the pleadings forwarded to her by Ward, except for the writ application filed by the School Board.

From our review of the evidence in the record, we do not find that the trial court was manifestly erroneous in finding that Murray failed to establish that Ward misrepresented or suppressed the truth from her with the intention of obtaining an unjust advantage. See La. C.C. art. 1953. According to the record, Ward communicated with Murray, not only by providing her with copies of all pleadings filed in her case but also with text messages, letters, and emails regarding the status of her case. Ward also communicated with Murray regarding the issues involved with Ascension Parish being an improper defendant, and kept her informed about the problem of prescription after it arose. Furthermore, while there may be conflicting evidence in the record with regard to whether Ward informed Murray about Caruso being dismissed from the action because of his failure to timely serve her, we cannot say that the trial court's choice between two permissible views of the evidence is manifestly erroneous. See Stobart v. State, Department of Transportation and Development, 617 So. 2d 880, 883 (La. 1993).

Therefore, absent fraud, Murray had one year from the date of discovery of any alleged malpractice to file her action. As evidenced by the record, Murray had knowledge throughout 2013 that Ascension Parish had filed a motion for summary judgment claiming it was not the proper defendant, which was subsequently granted; that Ward had amended Murray's petition to name the School Board as the correct defendant; and that defense counsel for the School Board was seeking to have the School Board dismissed on the basis of prescription. Therefore, Murray had knowledge of facts which would place a reasonable person on notice that malpractice may have been committed by November 12, 2013, when she was informed by Ward that defense counsel was seeking to have her case against the School Board dismissed. Because Murray did not file her malpractice action against Ward until March 18, 2015, well over a year following her date of

discovery of Ward's alleged negligence, we find no error in the trial court's judgment finding that her claim for malpractice is prescribed.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court. All costs of this appeal are assessed to appellant, Laurie Murray.

AFFIRMED.