# STATE OF MICHIGAN

# COURT OF APPEALS

RICHARD LIVINGSTON,

Plaintiff-Appellant,

v

C. MICHAEL VILLAR, P.C.,

Defendant-Appellee.

UNPUBLISHED
February 28, 2012

No. 299687
Allegan Circuit Court
LC No. 10-046562-NZ

Before: WILDER, P.J., and HOEKSTRA and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant and assessing attorney costs and fees based on the finding that this legal malpractice action was barred by the statute of limitations. Because plaintiff brought this legal malpractice action more than two years after C. Michael Villar's[1] representation of plaintiff ceased, we affirm.

Plaintiff argues that the trial court erred in granting summary disposition because the previous malpractice action plaintiff brought against defendant tolled the statute of limitations and the trial court should also have found that there was an equitable tolling of the statute of limitations. We review a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7) de novo. *Grimes v Mich Dep't of Transp*, 475 Mich 72, 76; 715 NW2d 275 (2006). Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred because of the statute of limitations. *Zwiers v Growney*, 286 Mich App 38, 42; 778 NW2d 81 (2009).

Plaintiff does not dispute that Villar ceased representing plaintiff on January 22, 2008, and that, absent tolling, the statute of limitations for a malpractice action against Villar expired on January 22, 2010. See MCL 600.5805(6). Plaintiff also does not dispute that he initiated the instant action on April 19, 2010, which obviously was after January 22, 2010. Plaintiff,

[1] Notably, defendant, C. Michael Villar, P.C., never represented plaintiff. In fact, it appears that this entity never existed. When Villar represented plaintiff, Villar worked for Allegan Law Offices, P.C.

however, argues that the statute of limitations was tolled, by the filing of his January 12, 2010 complaint against defendant, making his April 19, 2010 filing timely. We disagree.

MCL 600.5856 provides that the statute of limitations is tolled in any of the following circumstances:

> (a) At the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules.
>
> (b) At the time jurisdiction over the defendant is otherwise acquired.
>
> (c) At the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statue of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given. [Footnote added.]

Subsection (a) did not act to toll the statute of limitations because its plain language provides that, as a condition to tolling, "a copy of the summons and complaint [be] served on the defendant within the [allotted time]." It is undisputed that Villar (or defendant) was never served by the deadline of April 13, 2010. Similarly, subsection (b) did not act to toll the statute of limitations because the trial court did not otherwise acquire jurisdiction over Villar (or defendant) before April 13, 2010. And subsection (c) addresses medical malpractice, which is not present here. Therefore, the statute of limitations was not tolled by virtue of MCL 600.5856.

We note that plaintiff's reliance on the fact that the process server was an "officer of the court" is misplaced. Plaintiff presumably is relying on a previous version of MCL 600.5856, which stated that a statute of limitations is tolled when "the complaint is filed and a copy of the summons and complaint in good faith, are placed in the hands of an officer for immediate service, but in this case the statute shall not be tolled longer than 90 days thereafter." Thus, since the controlling version of MCL 600.5856 makes no reference to any "officer," this aspect of plaintiff's argument is without merit.

The trial court also did not err by finding that equitable tolling of the statute of limitations was not warranted. "Equitable tolling . . . has a legal basis arising out of our common law, and it may be invoked when traditional equitable reasons compel such a result." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 204; 747 NW2d 811 (2008). However, equity does not "trump an unambiguous and constitutionally valid statutory enactment." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 591; 702 NW2d 539 (2005). "[I]f courts are free to cast aside a plain statute in the name of equity, even in . . . tragic case[s] . . . , then immeasurable damage [would] be caused to the separation of powers mandated by our Constitution." *Trentadue v Buckler Lawn Sprinkler Co*, 479 Mich 378, 406-407; 738 NW2d 664 (2007), citing *Devillers*, 473 Mich at 591. Stated another way, "[s]tatutes lose their meaning if an aggrieved party need only convince a willing judge to rewrite the statue under the name of equity." *Trentadue*, 479 Mich at 407 (internal quotations omitted).

In this case, the statutory scheme controlled the limitation period and tolling, and the trial court was not free to cast aside the statutory scheme in the name of equity. *Id*. at 406-407.

Furthermore, there were no equitable reasons to warrant tolling. Despite having a two-year period in which to file a claim, plaintiff waited until ten days before the expiration of the statute of limitations to file his initial claim. Plaintiff admits that, even though he received notice that payment to the process server was required by no later than February 25, 2010, he belatedly sent payment over a month late, on March 29, 2010. Furthermore, he did not contact the process server to inquire about service on defendant until *after* the summons had expired. Though plaintiff claims that the failure to serve defendant in the first action was based on a mistake that was "wholly within the justice system," it is clear that his own actions contributed to the failure to serve defendant in a timely manner. Accordingly, equity would not be served by allowing plaintiff to ignore the statutory requirements. See *Ward v Rooney-Gandy*, 265 Mich App 515, 520; 696 NW2d 64 (2005) reversed on other grounds 474 Mich 917 (2005) ("An element of equitable tolling is that a plaintiff must exercise reasonable diligence in investigating and bringing his claim.").

Additionally, plaintiff argues that the trial court should have amended the proof of service to relate back to the date the complaint was filed in the first action under either MCR 2.102(C)[2] or MCL 600.2301[3]. However, plaintiff does not explain how these two provisions stand for the proposition that the trial court was required to amend the proof of service back to the date the original action was filed. Again, it is not disputed that, instead of seeking to set aside the dismissal after the initial time to serve defendant had expired, MCR 2.102(F)[4], plaintiff filed a new and separate complaint. Accordingly, plaintiff cannot establish any error related to the trial court's failure to amend the proof of service on the second lawsuit to relate back to the first law suit.

Plaintiff also argues that the trial court erred in sanctioning him on the basis that he was pursuing a meritless claim. We review a trial court's decision to impose sanctions under MCR 2.114 for clear error. *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008). "A decision is clearly erroneous when, although there may be evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *Id*. "The amount of sanctions imposed is reviewed for an abuse of discretion." *BJ's & Sons Constr Co, Inc v Van Sickle*, 266 Mich App 400, 410; 700 NW2d 432 (2005).

---

[2] MCR 2.102(C): "At any time on terms that are just, a court may allow process or proof of service of process to be amended, unless it clearly appears that to do so would materially prejudice the substantive rights of the party against whom the process issued. . . ."

[3] MCL 600.2301: "The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties."

[4] MCR 2.102(F): "A court may set aside the dismissal of the action as to a defendant [when the defendant was not served in the time allotted] only on stipulation of the parties or when [certain conditions are met, including that the plaintiff file a motion seeking to set aside the dismissal.]"

The trial court found that plaintiff's April 19, 2010, claim was clearly barred at the time it was filed. We agree. We similarly have concluded that plaintiff's tolling arguments had no legal merit, MCR 2.114(D)(2), and plaintiff's subjective good faith was irrelevant, *Attorney General v Harkins*, 257 Mich App 564, 576; 669 NW2d 296 (2003). Based on this record, we are not left with a definite and firm conviction that a mistake was made by sanctioning plaintiff. *Guerrero*, 280 Mich App at 677. The amount of $2,225 for attorney fees as a sanction was not an abuse of discretion because it was a reasonable amount for 8.9 hours of work billed at $250 per hour. See *BJ's & Sons*, 266 Mich App at 410; *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973).

Finally, with respect to Villar's argument that plaintiff should be further sanctioned under MCR 7.216(C), Villar did not properly move for sanctions pursuant to MCR 7.211(C)(8) as required. Therefore, we decline to further sanction plaintiff.

Affirmed. As the prevailing party, Villar is entitled to tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello