

STATE OF MICHIGAN  
COURT OF APPEALS

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JOHNNIE FACCHINATO and CANDICE  
FACCHINATO,

UNPUBLISHED  
February 19, 2013

Plaintiffs-Appellants,

v

No. 305129  
Macomb Circuit Court  
LC No. 2011-000137-NM

CARL F. GERDS III,

Defendant-Appellee.

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Before: JANSEN, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

In this legal malpractice case, plaintiffs appeal by right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7). We affirm.

Plaintiffs argue that the trial court erred by ruling that they should have discovered their potential legal malpractice claim against defendant as of March 17, 2010, and thus, that plaintiffs' complaint was untimely filed. We disagree.

We review de novo the trial court's decision to grant or deny summary disposition pursuant to MCR 2.116(C)(7). *Farm Bureau Mut v Combustion Research Corp*, 255 Mich App 715, 719-720; 662 NW2d 439 (2003).

In determining whether a party is entitled to judgment as a matter of law pursuant to MCR 2.116(C)(7), a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor. Where there are no factual disputes and reasonable minds cannot differ on the legal effect of the facts, the decision regarding whether a plaintiff's claim is barred by the statute of limitations is a question of law that this Court reviews de novo. [*Farm Bureau*, 255 Mich App at 720 (internal citation omitted).]

The elements of a legal malpractice claim are: (1) the existence of an attorney-client relationship, (2) the acts constituting the negligence, (3) that the negligence was the proximate cause of the injury, and (4) the fact and extent of the injury alleged. *Gebhardt v O'Rourke*, 444 Mich 535, 544; 510 NW2d 900 (1994). Generally, a legal malpractice claim must be brought within two years after the attorney discontinues providing legal services to the plaintiff, MCL

600.5805(6); MCL 600.5838(1), or “within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later,” MCL 600.5838(2).

Under the discovery rule of MCL 600.5838(2), the relevant inquiry is not whether the plaintiff knows of a “likely” cause of action. *Gebhardt*, 444 Mich at 544. “Instead, a plaintiff need only discover that he has a ‘possible’ cause of action.” *Id.* “Once a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue his claim.” *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 223; 561 NW2d 843 (1997). “The discovery rule applies to discovery of an injury, not to the discovery of a later realized consequence of the injury.” *Id.* at 223-224. Plaintiffs are not required to prove each element of the cause of action before the statute of limitations begins to run. *Id.* at 224.

Plaintiffs concede that they did not file their complaint within two years after defendant’s last legal services provided to them. Thus, the only issue here is whether plaintiffs’ complaint was timely filed pursuant to the six-month discovery rule.

On March 17, 2010, attorney Mark Fugolo met with plaintiffs. Fugolo and defendant had previously shared office space from 1981 to 2009. Plaintiffs met with Fugolo because they had entered into a real estate contract with their daughter, Michelle McClarnon, in 2007, and they were unhappy with the transaction. Plaintiffs brought the transaction documents prepared by defendant for Fugolo to look over, including the deed and the purchase agreement. Plaintiffs explained to Fugolo that the transaction involved their second home, in which their daughter was living. The purpose of the transaction was to allow plaintiffs’ daughter to continue living in the home, acquire some interest in the property, pay off plaintiffs’ mortgage on the home, and acquire a mortgage of her own on the property. Plaintiffs did not want to sell the property at the time because they did not believe they could sell it for what it was worth. In addition to their mortgage being paid off, plaintiffs also received money in the transaction.

Afterward, plaintiffs expressed dissatisfaction with the transaction. Plaintiffs met with Fugolo to learn what they could do about their daughter’s bankruptcy filing and the imminent foreclosure of her mortgage, which was now in default. Fugolo advised plaintiffs:

[F]rom what I could see, you know, from the documents [plaintiffs] brought me, her debt to [plaintiffs] was, you know, likely going to be wiped out, as was her debt to the mortgage company, and barring some reason why that debt would be nondischargeable, such as fraud or something, that no, I didn’t think [plaintiffs] had any, you know, any claim against her for those funds based on that agreement [plaintiffs] had with her.

However, Fugolo did not suggest any other ways in which the transaction could have been structured or that defendant may have committed malpractice.

Plaintiffs argue that the injury alleged in this case is not that McClarnon’s supposed debt to them would be extinguished (plaintiffs assert that McClarnon was not indebted to them). Instead, plaintiffs argue that the injury in this case is the loss of equity in their property, about which Fugolo did not advise them. We disagree with plaintiffs.

As of March 17, 2010, plaintiffs were aware that the agreement defendant drafted for them, to sell a 40.625-percent interest in their home to their daughter, would not prevent McClarnon from filing for bankruptcy and discharging her debt. Furthermore, plaintiffs were aware that McClarnon's mortgage was going into foreclosure. Therefore, as of the date of their meeting with Fugolo, plaintiffs were aware of the possible loss of equity in their property. Indeed, they knew or should have known that a foreclosure of McClarnon's mortgage would directly impact their ability to sell the property and receive their desired price. Furthermore, Fugolo specified, and plaintiffs were aware, that the documents defendant drafted in this transaction would not protect them from a loss of interest or equity in the property. In other words, plaintiffs were aware of a possible cause of their injury. We conclude that the six-month discovery rule began to run on March 17, 2010, when Fugolo made plaintiffs aware of an injury and a possible cause of the injury. See *Gebhardt*, 444 Mich at 544; see also *Solowy*, 454 Mich at 223-224. Plaintiff's complaint, filed on January 10, 2011, was untimely. The trial court properly granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(7).

Affirmed. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ Kathleen Jansen  
/s/ David H. Sawyer  
/s/ Karen M. Fort Hood