

STATE OF MICHIGAN
COURT OF APPEALS

NORMAN HUBERT, Personal Representative of the ESTATE OF ESTHER HUBERT, HILLARY SHAW, Trustee of HILLARY SHAW REVOCABLE LIVING TRUST, LINDA WINKELMAN, ROGER WINKELMAN, JACLYN WINKELMAN, JULIE WINKELMAN, WENDY LAMPERT HUBERT, NORMAN HUBERT, SANFORD H. PASSER, BRENDA W. PASSER, JAMES GINZLER, KATHRYN GOLDEN-WILLIAMS, Trustee of KATHRYN MEKLIR REVOCABLE LIVING TRUST, and IRA MONDRY,

Plaintiffs-Appellants,

v

MAYER MORGANROTH, JEFFREY B. MORGANROTH, and MORGANROTH & MORGANROTH, P.L.L.C.,

Defendants-Appellees.

UNPUBLISHED
January 24, 2013

No. 307346
Oakland Circuit Court
LC No. 2011-119836-NM

Before: HOEKSTRA, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

In this legal malpractice case, plaintiffs appeal as of right the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) (expiration of the statute of limitations). Because we conclude there are factual questions that must be resolved in order to determine whether plaintiffs' complaint is time-barred, we reverse and remand for further proceedings.

Plaintiffs' legal malpractice claims are based on defendants' representation of plaintiffs in an action commenced on April 20, 2001. Defendants filed a complaint on behalf of plaintiffs to recover about \$3.7 million contributed by plaintiffs to a Ponzi scheme created by Robert J. Ball and Stanley G. Feldman. The complaint alleged fraud, misrepresentation, violation of Michigan securities laws, breach of fiduciary duty, conversion, innocent misrepresentation, negligent misrepresentation, breach of contract, account stated, and unjust enrichment.

Defendants pursued plaintiffs' claims, and on April 17, 2002, defendants obtained a default judgment against Ball for \$11,737,908.72, plus post-judgment interest, in favor of plaintiffs. In September 2006, plaintiffs entered into a settlement and release agreement with Feldman. Part of the settlement agreement was a consent judgment against Feldman in favor of plaintiffs for \$2.2 million. The trial court entered the consent judgment on September 26, 2006.

After entry of the consent judgment, defendants represented plaintiffs in various collection efforts regarding the default judgment and the consent judgment. Defendants were unable to recover any substantial amount of money, and on June 17, 2011, plaintiffs filed a complaint alleging that defendants committed legal malpractice in their representation of plaintiffs. In response to plaintiffs' complaint, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(7). Defendants argued that summary disposition was appropriate because plaintiffs' complaint was time-barred by the applicable two-year statute of limitations. Defendants maintained that their representation of plaintiffs in the original action ended on September 26, 2006, after the entry of the consent judgment, and that plaintiffs then hired them for discrete, post-judgment collection tasks separate from the original representation. Defendants maintained that April 16, 2009, was the last day that they provided legal services to plaintiffs. Defendants submitted their billing statement records and affidavits executed by Mayer Morganroth, Jeffrey Morganroth, and Jill Gurfinkel, an attorney at Morganroth & Morganroth, in support of their contentions. Defendants' affidavits all stated that representation of plaintiffs before and after the entry of the consent judgment in September 2006 was separate, and that no legal work was performed for plaintiffs after April 18, 2009.

Plaintiffs responded to defendants' motion for summary disposition and argued that defendants' representation of plaintiffs was continuous before and after the entry of the consent judgment. Plaintiffs further maintained defendants' represented plaintiffs through September 18, 2009. Thus, their complaint, filed on June 17, 2011, was within the two-year statute of limitations for legal malpractice cases. Plaintiffs also supported their contentions with affidavits executed by each plaintiff. Plaintiffs also relied on defendants' billing statement records. Plaintiffs' affidavits stated that defendants never limited the scope or duration of their representation of plaintiffs, and that the representation was continuous before and after entry of the consent judgment in September 2006. Plaintiffs' affidavits further describe the legal advice and work allegedly performed by defendants until September 18, 2009. Plaintiffs argued that the billing statement records contained entries through September 18, 2009, and that the records therefore supported their position that defendants continued to represent plaintiffs until that date. Defendants noted that the billing statement records show that the last day plaintiffs were charged was April 16, 2009, and that the entries after that date represented tasks that were performed as a courtesy to plaintiffs and not legal work.

These contrasting versions of the scope and duration of defendants' representation of plaintiffs were presented to the trial court at the October 19, 2011 hearing regarding defendants' motion for summary disposition pursuant to MCR 2.116(C)(7). The trial court issued its opinion and order granting defendants' motion for summary disposition under MCR 2.116(C)(7) on October 21, 2011. The trial court found that defendants' representation of plaintiffs would have had to continue until at least June 17, 2009 in order for plaintiffs' malpractice action to be timely because there is a two-year statute of limitations for legal malpractice claims and plaintiffs' malpractice complaint was filed on June 17, 2011. The trial court stated that it "thoroughly

reviewed the parties' briefs and supporting documentation under applicable law," and concluded that "based on the evidence defendants' representation of plaintiffs in the Meklir case ended on September 26, 2006, the date of entry of the consent judgment." The trial court further concluded that the legal services provided after the entry of the consent judgment were not continuous with the original Meklir case, and were instead separate matters that did not extend the limitations period for any claims arising out of the Meklir case. The trial court also concluded that even if the representation before and after the consent judgment was continuous, plaintiffs' complaint was not timely because the documentary evidence established that defendants' representation of plaintiffs ended on April 16, 2009. Plaintiffs now appeal the trial court's order dismissing their malpractice claims as untimely.

We review a trial court's decision on a motion for summary disposition *de novo*, viewing the evidence in the light most favorable to the nonmoving party. *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006). Pursuant to MCR 2.116(C)(7), summary disposition is appropriate if a claim is barred by the applicable statute of limitations. A motion pursuant to MCR 2.116(C)(7) may be supported by affidavits, depositions, admissions, or other documentary evidence so long as the evidence would be admissible. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The allegations set forth in the complaint must be accepted as true unless contradicted by other evidence. *Id.* "In the absence of a disputed fact, whether a cause of action is barred by the statute of limitations is a question of law subject to review *de novo*." *Kloian v Schwartz*, 272 Mich App 232, 235; 725 NW2d 671 (2006).

Statutes of limitations are enacted for two primary purposes: (1) to encourage plaintiffs to diligently pursue claims and (2) to protect defendants from having to defend against stale and fraudulent claims. *Wright v Rinaldo*, 279 Mich App 526, 533; 761 NW2d 114 (2008). The limitations period for a legal malpractice claim is two years. MCL 600.5805(6). Malpractice actions not commenced within the time prescribed are barred. MCL 600.5838(2). Thus, "[p]ursuant to MCL 600.5805(6) and MCL 600.5838(2), a plaintiff must file a legal malpractice action within two years of the attorney's last day of service to the plaintiff or within six months of when the plaintiff discovered or should have discovered the claim, whichever is later."¹ *Wright*, 279 Mich App at 534. The accrual of a claim for professional malpractice is governed by MCL 600.5838(1), which provides:

[A] claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.

This Court has developed several rules for determining exactly when an attorney "discontinues serving the plaintiff in a professional . . . capacity." *Kloian*, 272 Mich App at 237. Specifically, this Court has held that an attorney discontinues serving a client when the attorney is "relieved of that obligation by the client or the court." *Id.* (citation omitted). Retention of

¹ The discovery rule set forth in MCL 600.5838 is not at issue in this case.

alternate counsel by a client also discontinues the previous attorney's professional service. *Id.* (citation omitted). However, this Court has further recognized that these specific rules do not always adequately serve to measure the accrual of a claim within the meaning of MCL 600.5838(1), and that certain factual situations do not permit application of specific rules. *Id.* at 237-238. When the circumstances of a case do not fit neatly into a specific rule, a legal malpractice claim accrues "on the attorney's 'last day of professional service in the matter out of which the claim for malpractice arose.'" *Id.* at 238, quoting *Gebhardt v O'Rourke*, 444 Mich 535, 543; 510 NW2d 900 (1994). Put differently, "this Court has held that when an attorney is not dismissed by the court or the client, and substitute counsel is not retained, the attorney's service discontinues upon completion of a specific legal service that the lawyer was retained to perform." *Kloian*, 272 Mich App at 238 (quotation marks and citation omitted).

Further, once an attorney has discontinued serving a plaintiff, additional acts by the attorney will not postpone the accrual of a legal malpractice claim. *Bauer v Ferriby & Houston, PC*, 235 Mich App 536, 539; 599 NW2d 493 (1999). Finally, the fact that an attorney later represents the same client in a separate matter does not extend the period of limitations. *Balcom v Zambon*, 254 Mich App 470, 484, 658 NW2d 156 (2002) (finding a legal malpractice claim untimely despite later representation in related civil action because the alleged malpractice arose out of a criminal action that concluded more than two years before the malpractice action was filed).

On appeal, plaintiffs raise two related claims. First, plaintiffs claim that defendants' representation of them was continuous before and after the entry of the consent judgment, and that accordingly, the collection activities that occurred after the entry of the consent judgment were part of the original representation, which began in 2000. Plaintiffs also claim that defendants continued to represent them through September 2009, and that the trial court ignored the evidence when it concluded that defendants' representation of plaintiffs ended on April 16, 2009.

Here, we conclude that there are questions of fact that must be resolved before we can make a determination about whether plaintiffs' complaint is time-barred by the statute of limitations. First, the parties presented conflicting evidence in regard to whether defendants' representation of plaintiffs was continuous before and after the entry of the consent judgment in September 2006. There is no written retainer agreement in this case, and the parties agree that the representation agreement was made orally. Plaintiffs claim in their affidavits that defendants orally represented that they would pursue the lawsuit as well as recovery and collection of the money. Defendants maintain in their affidavits that their representation of plaintiffs ended after the consent judgment was entered, resolving all remaining claims and closing the case. If plaintiffs' version of the representation agreement is believed then defendants' representation of plaintiffs in the post-consent judgment collection activities was a continuation of the original representation. However, if defendants' version is believed, then defendants' later representation of plaintiffs constituted separate and discrete representation. Accordingly, a fact-finder must make a credibility determination based on these competing versions of the representation agreement before the scope of defendants' representation can be determined.

Similarly, the parties present conflicting evidence in regard to whether defendants' representation of plaintiffs ended on April 16, 2009 or on September 18, 2009. Both parties

focus their claims on what occurred during a meeting held on June 26, 2009. If defendants' affidavits are believed, no legal services were performed at the June 26, 2009 meeting, and the purpose of the meeting was merely to pass along the results of the LSS Consulting investigation and to determine whether plaintiffs wanted to hire defendants to perform any additional legal work in regard to the collection efforts. Defendants also state that at the meeting plaintiffs declined any additional legal representation, and informed defendants that plaintiffs would take over all collection efforts. Defendants maintain that after the meeting the only work they did in regard to plaintiffs' case was to make arrangements to give plaintiffs access to the files and to convey other relevant information to plaintiffs so plaintiffs could pursue their own claims. Thus, according to defendants' version of the facts, plaintiffs' complaint was not timely filed. However, if plaintiffs' affidavits are believed, legal services were provided at the June 26, 2009 meeting, and thus, defendants' representation of plaintiffs continued at least until that date, and plaintiffs' complaint was timely filed. Plaintiffs state in their affidavits that at the June 26, 2009 meeting, defendants advised plaintiffs in regard to the additional steps defendants would take to collect on the default and consent judgments, and that specifically, defendants indicated they would take additional depositions and would continue to represent plaintiffs despite the fact that Feldman moved to Florida. Thus, determination of the legal question regarding the timeliness of plaintiffs' complaint depends on the resolution of these disputed facts.

Therefore, we conclude that the trial court erred by granting summary disposition under MCR 2.116(C)(7), and that instead, the trial court should have proceeded under MCR 2.116(I)(3), which provides that a trial court may order an immediate trial if a motion for summary disposition is made under MCR 2.116(C)(1) through (7) to resolve disputed issues of fact. *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 505; 739 NW2d 656 (2007). MCR 2.116(I)(3) provides:

A court may, under proper circumstances, order immediate trial to resolve any disputed issue of fact, and judgment may be entered forthwith if the proofs show that a party is entitled to judgment on the facts as determined by the court. An immediate trial may be ordered if the grounds asserted are based on subrules (C)(1) through (C)(6), or if the motion is based on subrule (C)(7) and a jury trial as of right has not been demanded on or before the date set for hearing. If the motion is based on subrule (C)(7) and a jury trial has been demanded, the court may order immediate trial, but must afford the parties a jury trial as to issues raised by the motion as to which there is a right to trial by jury.

Plaintiffs' complaint includes a jury demand. Thus, in this case, the trial court should have denied defendants' motion for summary disposition and could have ordered an immediate jury trial to resolve the questions of fact necessary for resolution of defendants' motion under MCR 2.116(C)(7). MCR 2.116(I)(3). See also *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280, 288-289; 731 NW2d 29 (2007).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto
/s/ Jane M. Beckering