

[Cite as *Krzywicki v. Gay*, 2017-Ohio-5584.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105039

TIFFANY KRZYWICKI

PLAINTIFF-APPELLANT

vs.

JAMES A. GAY

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-814873

BEFORE: Keough, A.J., E.A. Gallagher, J., and Boyle, J.

RELEASED AND JOURNALIZED: June 29, 2017

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KATHLEEN ANN KEOUGH, A.J.:

{¶1} Plaintiff-appellant, Tiffany Krzywicki (“Krzywicki”), appeals from the trial court’s judgment denying her motion to amend her complaint to assert direct claims against third-party defendant, Erin Flanagan (“Flanagan”). Finding no merit to the appeal, we affirm.

I. Facts and Procedural History

{¶2} In April 2010, Krzywicki sustained serious injuries as a result of a dog-bite incident. She retained attorney James Gay (“Gay”) to represent her in litigation regarding the incident.

{¶3} On October 2, 2013, after terminating Gay’s representation and while the underlying dog-bite case was still pending, Krzywicki filed this legal malpractice case against Gay only. The complaint alleged that Gay served as her attorney from May 21, 2011 until February 8, 2013. It further alleged that Gay failed to fully investigate the claims relating to the dog-bite incident, failed to timely file claims, and failed to include all responsible parties in the complaint that was filed on her behalf regarding the incident.

The complaint alleged that as a result of Gay’s malpractice, Krzywicki’s claims against some parties were time-barred, and she lost her right to recover against all responsible parties.

{¶4} On January 9, 2014, the trial court granted Gay leave to file a third-party complaint against Flanagan. The third-party complaint alleged that Flanagan served as co-counsel of record with Gay on the dog-bite case. It further alleged that during the

time of the alleged negligent representation, Flanagan “was primarily responsible for investigating the underlying circumstances that resulted in [Krzywicki’s] injuries,” handling discovery, and conducting depositions. The third-party complaint alleged that Flanagan was “equally or more responsible for any loss or damage proximately caused by the alleged legal malpractice,” and that she was “jointly and severally liable for any loss or damage proven by [Krzywicki].”

{¶5} In February 2014, the jury returned a verdict in favor of the defendant in the underlying dog-bite case. In May 2014, Krzywicki filed a motion to stay proceedings in this case until her appeal regarding the underlying case was resolved. In June 2014, the trial court granted her motion, ruling that the case would be placed back on the active docket upon motion.

{¶6} In January 2015, this court upheld the verdict against Krzywicki in the dog-bite case. *Krzywicki v. Galletti*, 8th Dist. Cuyahoga No. 101328, 2015-Ohio-312. Subsequently, in July 2015, the Ohio Supreme Court declined to accept jurisdiction of her appeal. *Krzywicki v. Galletti*, 143 Ohio St.3d 1418, 2015-Ohio-2911, 34 N.E.3d 931.

{¶7} Nine months later, on May 3, 2016, Krzywicki filed a motion to reactivate this case, which the trial court granted. Then, on May 18, 2016, Krzywicki filed a motion to amend her complaint to assert direct claims against Flanagan for the first time. Krzywicki attached a proposed amended complaint to her motion. The proposed amended complaint was identical to the originally filed complaint but for the addition of Flanagan

as a defendant; it simply added Flanagan as a defendant with Gay and incorporated all of the claims against Gay as to Flanagan.

{¶8} Flanagan filed a brief opposing Krzywicki's motion to amend her complaint, asserting that Krzywicki's claims against her were barred by the applicable statute of limitations for legal malpractice claims, and that she was attempting to "backdoor" those claims by adding her in an amendment to the original complaint filed against Gay.

{¶9} Gay, on the other hand, filed a motion to enforce a settlement agreement that he had reached with Krzywicki on January 2, 2015, while the case was stayed. The settlement release, a copy of which was attached to Gay's motion, stated that in consideration of \$65,000 cash from Gay, Krzywicki agreed "to dismiss the case Tiffany Krzywicki v. James A. Gay, Case No. CV-13-814873, Court of Common Pleas for Cuyahoga County, Ohio (the 'Action') with prejudice as to Gay upon execution of this Release and receipt of the consideration set forth in this release." Gay noted that Krzywicki had received the settlement monies but had not dismissed the case as agreed, and further, had made no mention of her settlement with Gay in her motion to amend her complaint. Gay asked the trial court to dismiss Krzywicki's complaint with prejudice as enforcement of the settlement agreement and to award sanctions for his having to respond to a frivolous motion.

{¶10} The trial court subsequently denied Krzywicki's motion to amend her complaint, stating:

Plaintiff's proposed amended complaint seeks to add an additional party, and to have the amendment relate back to comply with the statute of limitations for legal malpractice claims. * * * An amended complaint relates back to the date of the original complaint if the proper party has notice of the action and the proper party knew or should have known that he would have been sued, but for a mistake concerning his identify. See Civ.R. 15(C). However, "an amended complaint adding a party does not relate back when the plaintiff was aware of the new defendant's identify, but had previously chosen not to sue him." *Guerrero v. C.H.P., Inc.*, 8th Dist. Cuyahoga No. 87484, 2001 Ohio App. LEXIS 3606 (Aug. 16, 2001). Third-party Erin Flanagan's identity was available to plaintiff prior to the filing of the motion to amend complaint; however, plaintiff chose not to bring suit against her until now. Even if the court granted the motion to amend complaint, plaintiff's claims against third-party [Flanagan] would be barred by the statute of limitations. No tolling statute applies in this matter. * * * Accordingly, plaintiff's motion to amend complaint to add additional party, Eric Flanagan, is hereby denied, as such a claim would be futile in light of the statute of limitations for a legal malpractice claim. See R.C. 2305.11(A).

{¶11} The trial court also found that Krzywicki had settled her claims against Gay and, accordingly, it dismissed the case with prejudice. This appeal followed.

II. Law and Analysis

A. Standard of Review

{¶12} An appellate court reviews a trial court's decision to grant or deny a motion to amend a complaint for an abuse of discretion. *LAME, Inc. v. E.G. Sys.*, 8th Dist. Cuyahoga No. 101566, 2015-Ohio-686, ¶ 14, citing *Tenable Protective Servs. v. Bit E-Technologies, L.L.C.*, 8th Dist. Cuyahoga No. 89958, 2008-Ohio-4233, ¶ 26. To demonstrate an abuse of discretion in denying a motion to amend, the appellant must demonstrate that the trial court's denial was unreasonable, arbitrary, or unconscionable. *Id.*; see also *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

B. The Statute of Limitations

{¶13} For clarity, we consider Krzywicki’s second assignment of error first. In her second assignment of error, Krzywicki argues that the trial court abused its discretion in denying her motion to amend because it arbitrarily determined that her claims against Flanagan were barred by the statute of limitations. She asserts that the trial court “had no basis from which to determine when Plaintiff’s claims accrued and it was therefore inappropriate at that stage of the proceedings to conclude Plaintiff was barred by the statute of limitations.” Krzywicki’s argument is without merit because the record contains evidence that irrefutably demonstrates that the claims are time-barred.

{¶14} Under R.C. 2305.11(A), an action for malpractice “shall be commenced within one year after the cause of action accrued.” A legal malpractice claim accrues, and the one-year statute of limitations begins to run, when (1) a cognizable event occurs whereby the client discovers or should have discovered that his injury is related to his attorney’s act or non-act and is put on notice of the need to pursue any possible remedies against the attorney; or (2) the attorney-client relationship for the particular transaction or undertaking terminates, whichever occurs later. *Popovich v. Webster & Webster, L.L.P.*, 8th Dist. Cuyahoga No. 99785, 2014-Ohio-1825, ¶ 37, citing *Zimmie v. Calfee, Halter & Griswold*, 43 Ohio St.3d 54, 58, 538 N.E.2d 398 (1989), syllabus.

{¶15} Krzywicki’s proposed amended complaint admits that her attorney-client relationship with Gay and Flanagan terminated more than one year before she sought to assert her claims against Flanagan. The proposed amended complaint states, “[o]n or

about May 21, 2011 up to and including February 8, 2013, the defendants accepted and did carry out the legal representation of plaintiff * * *.” Krzywicki did not file her motion to amend her complaint, however, until May 18, 2016.

{¶16} Even assuming that Krzywicki was not aware of Flanagan’s alleged malpractice when the attorney-client relationship ended in 2013, the record in this case contains irrefutable evidence that Krzywicki’s claims against Flanagan were barred by the one-year statute of limitations because she learned of Flanagan’s alleged malpractice at least two years before filing her motion to amend.

{¶17} A cognizable event is an event sufficient to apprise a reasonable person that in the course of legal representation, his attorney committed an improper act. *Zimmie* at 58; *Spencer v. McGill*, 87 Ohio App.3d 267, 278, 622 N.E.2d 7 (8th Dist.1993). An individual need not be fully aware of the extent of his legal malpractice injuries; knowledge of a potential problem starts the statute to run, even when one does not know all the details. *Griggs v. Bookwalter*, 2d Dist. Montgomery No. 21220, 2006-Ohio-5392, ¶ 20.

{¶18} Here, it is apparent that Krzywicki and her counsel were aware of potential legal malpractice claims against Flanagan as of January 9, 2014, when Gay filed his third-party complaint against Flanagan asserting that she was responsible for any alleged malpractice. As noted above, the third-party complaint asserted that Flanagan was co-counsel of record and “primarily responsible for investigating the underlying circumstances,” handling discovery, and taking depositions, and that she was “jointly and

severally liable for any loss or damage proven to [Krzywicki].” Moreover, Gay’s motion seeking leave to file the third-party complaint specifically stated that “Gay contends that [Flanagan] is the attorney representing [Krzywicki] that engaged in the allegedly negligent conduct.” It could not be more clear that as of the filing of the third-party complaint, Krzywicki discovered or should have discovered that she might have a malpractice claim against Flanagan.

{¶19} Even assuming, however, that Gay’s third-party complaint was insufficient to put Krzywicki on notice of Flanagan’s alleged malpractice, the record is clear that Krzywicki knew of any potential claims against Flanagan by January 2, 2015, when she signed the settlement release with Gay. Paragraph 1.2 of the release specifically provides that it does not cover Krzywicki’s claims against Flanagan: “The release and discharge shall also apply to Gay’s attorneys, representatives, employees * * * except that this Release does not cover any claims Krzywicki may have against Erin Flanagan, Esq.” Significantly, in her brief in opposition to Gay’s motion to enforce the settlement agreement, Krzywicki admitted that she knew of her claims against Flanagan when she signed the release, stating “[t]he Plaintiff learned of the direct cause of action she has against Defendant Flanagan during the settlement discussions with Mr. Gay, and during the stay that was imposed upon this case.”

{¶20} Despite this knowledge, Krzywicki did not file her motion to amend her complaint to add her claims against Flanagan until May 3, 2016, well over two years from the date of Gay’s third-party complaint against Flanagan, and over 16 months from the

time she executed the settlement release. In light of the irrefutable evidence in the record, the trial court did not abuse its discretion in finding that Krzywicki's legal malpractice claims against Flanagan were time-barred because she was aware of Flanagan's alleged malpractice more than one year prior to asserting those claims. Krzywicki's second assignment of error is therefore overruled.

C. Ohio Civil Rules 14 and 15

{¶21} In her first assignment of error, Krzywicki contends that the trial court erred in denying her motion to amend. She asserts that she was permitted to assert her claims against Flanagan pursuant to Civ.R. 14, and the trial court therefore erred in applying Civ.R. 15 in denying her motion.

{¶22} Krzywicki points to the language of Civ.R. 14(A), which allows a defendant, under certain circumstances, to bring a third-party complaint against a person not a party to an action, and provides that thereafter, "the plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff * * *." She contends that because Gay timely filed a third-party complaint against Flanagan, she was entitled to amend her complaint to assert her own claims against Flanagan — regardless of the timing of those claims. In short, Krzywicki contends that because Gay made Flanagan a third-party defendant prior to the expiration of the statute of limitations, under Civ.R. 14(A), she could assert her claims against Flanagan at any time, even after the expiration of the limitations statute.

{¶23} Krzywicki cites to no authority to support her argument because there is none. Civ.R. 14 does not suggest that statutes of limitations are not applicable to claims brought by a plaintiff against third-party defendants, or that they are somehow tolled until the plaintiff asserts his direct claim against the third-party defendant.

{¶24} *Strong v. Wiggs*, 3d Dist. Allen No. 1-83-5, 1984 Ohio App. LEXIS 8910 (Feb. 23, 1984), cited by Flanagan, demonstrates this point. In *Strong*, the plaintiffs filed timely personal injury claims against the operator of a motor vehicle involved in an accident with the plaintiffs (Tortfeasor 1). Before the expiration of the statute of limitations regarding those claims, Tortfeasor 1 filed a third-party claim against a second motorist (Tortfeasor 2), seeking contribution and indemnification on the theory that Tortfeasor 2 had caused the accident. After the expiration of the statute of limitations, the plaintiffs filed an amended complaint asserting direct claims against Tortfeasor 2 for the first time.

{¶25} The appellate court held that the trial court had properly dismissed the plaintiffs' complaint against Tortfeasor 2 because it was barred by the applicable statute of limitations. The fact that Tortfeasor 2 had been named as a third-party defendant prior to the expiration of the statute of limitations did not permit the plaintiffs to file direct claims against him after the expiration of the statute of limitations. *Id.* at 7.

{¶26} Similarly, in *Ehlert v. W. Res. Port Auth.*, 11th Dist. Trumbull No. 2002-T-0096, 2003-Ohio-5354, the plaintiff suffered injuries while a passenger on a airplane that crashed upon landing at a local airport. The plaintiff timely asserted claims

against the pilot, the plane owner, and the airport operator. All three defendants answered. Later, the plane owner amended its answer to include a cross-claim against the airport operator. On appeal, the appellate court affirmed the trial court's judgment that the cross-claim was untimely due to the expiration of the statute of limitations. The court reached this result despite the fact that the cross-claim arose out of the same facts and circumstances that gave rise to the plaintiff's complaint, and even though the airport operator had been a party to the case since the filing of the plaintiff's complaint. *Id.* at ¶ 11.

{¶27} Thus, Ohio case law makes clear that Kryzwicki cannot assert untimely claims against Flanagan under Civ.R. 14(A) merely because Gay timely filed a third-party complaint against her. Moreover, Civ.R. 14 does not alter the application of Civ.R. 15 regarding when an amended complaint may be used to assert a claim. Civ.R. 15 provides that “[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth * * * in the original pleading, the amendment relates back to the date of the original pleading.”

{¶28} Here, the trial court correctly determined that by filing an amended complaint that included both Gay and Flanagan as defendants, Krzywicki was attempting to avoid the expiration of the statute of limitations by having the amended complaint relate back to the date of filing of the original complaint. But “Civ.R. 15(C) does not allow for the adding of a new party to an original action under the relation back doctrine after the statute of limitations has expired.” *Estate of Finley v. Cleveland Metroparks*,

189 Ohio App.3d 139, 2010-Ohio-4013, 937 N.E.2d 645, ¶ 20 (8th Dist.). As this court stated in *Bykova v. Szucs*, 8th Dist. Cuyahoga No. 87629, 2006-Ohio-6424, ¶ 4, “when a new party is added, a new cause of action is created and will not relate back to the date of filing the original action for statute of limitations purposes.”

{¶29} The primary purpose of Civ.R.15(C) is to preserve actions that through mistaken identity or misnomer have been filed against the wrong person. *Estate of Finley* at ¶ 16, citing *Littleton v. Good Samaritan Hosp. & Health Ctr.*, 39 Ohio St.3d 86, 101, 529 N.E.2d 449 (1988). Thus, the rule may be used to substitute an incorrectly named defendant with the correct one. *Id.* at ¶ 20. “The rule may not be employed,” however, “to assert a claim against an additional party while retaining a party against whom a claim was asserted in the original pleading.” *Kraly v. Vannewkirk*, 69 Ohio St.3d 627, 635 N.E.2d 323 (1994), paragraph one of the syllabus.

{¶30} That is exactly what Krzywicki was attempting to do here. Despite her settlement with Gay, Krzywicki sought to file an amended complaint that retained him as a defendant but added Flanagan as a new party, using the relation back doctrine to avoid the expiration of the one-year statute of limitations against Flanagan. Neither Civ.R. 14(A) nor 15(C), nor any other rule of civil procedure, permit her to do so. Accordingly, the trial court did not abuse its discretion in denying her motion to amend her complaint, and the first assignment of error is overruled.

{¶31} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, ADMINISTRATIVE JUDGE

EILEEN A. GALLAGHER, J., and
MARY J. BOYLE, J., CONCUR

KEY WORDS:

105039

Motion to Amend Complaint; Statute of Limitations; Third-Party Defendant; Civ.R. 14; Civ.R. 15. - Trial court did not abuse its discretion in denying plaintiff's motion to amend complaint to assert direct claims against a third-party defendant where the claims were barred by the statute of limitations; neither Civ.R. 14 nor Civ.R. 15 permitted plaintiff to assert time-barred claims.