Saldi v. Diamond, No. 164-8-05 Oecv (Teachout, J., July 31, 2006)

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STATE OF VERMONT

ORANGE COUNTY, S.S.

Ronald L. Saldi, Sr., *Plaintiff*,	)	Orange Superior Court
v.	)	Docket No. 164-8-05 Oecv
M. Jerome Diamond, *Defendant*.	)	

DECISION AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This legal malpractice matter is before the Court on Defendant M. Jerome Diamond's Motion for Judgment on the Pleadings. However, because both parties presented facts outside the pleadings, the motion has been treated as one for summary judgment. V.R.C.P. 12 (c); *Lueders v. Lueders*, 152 Vt. 171, 172 (1989). Defendant is represented by James C. Gallagher, Esq.; Plaintiff is represented by Stephen J. Craddock, Esq.

The issue presented by Defendant's motion is whether Plaintiff's cause of action against Defendant for attorney malpractice is barred by the statute of limitations, and more narrowly, whether the accrual date of Plaintiff's cause of action occurred before or after August 30, 1999.[1] Plaintiff argues that summary judgment is inappropriate at this time because there are issues of

[1] Plaintiff filed his complaint for malpractice on August 30, 2005. Given 12 V.S.A. § 511's six-year limitations period, the disposition of this motion is dependent on whether the cause of action accrued before or after August 30, 1999.

genuine and material fact that affect the accrual date of the cause of action. In the alternative, Plaintiff argues that his cause of action accrued in 2001, thus rendering his 2005 suit for malpractice timely and lawful. The Court concludes that Plaintiff's malpractice claims are barred by statute of limitations for the reasons set forth below.

Undisputed Facts

Defendant M. Jerome Diamond represented Plaintiff Ronald Saldi, Sr., and his company International Collection Services, Inc. ("ICS"), a debt collection agency, from 1988 to 1993 in a consumer fraud action brought by the State of Vermont against ICS. Plaintiff was the owner and president of ICS. At the advice of Defendant, Plaintiff agreed to settle the consumer fraud action pursuant to a Consent Decree, which was signed by ICS and Plaintiff in June of 1993. Plaintiff alleges that it was during the time leading up to the Consent Decree that Defendant provided Plaintiff with the erroneous and negligent legal advice which is the subject of this case. Specifically, Plaintiff alleges that he relied on Defendant's erroneous and negligent legal advice in deciding to settle the consumer fraud case and sign the Consent Decree.

The Consent Decree outlined a judgment against ICS in the amount of $400,000 to be paid to the State over ten years. As part of the Consent Decree, Plaintiff agreed to be the guarantor of ICS's performance under the Consent Decree, and signed the Consent Decree to that effect. Paragraph 2 of the Consent Decree provided that:

> Ronald Saldi, Jr., president and owner of ICS, is subject to the Court's jurisdiction as a guarantor of ICS's obligations under this Consent Decree and, as a guarantor only, shall be bound by all of the terms of this Consent Decree. In this Consent Decree, the term "Guarantor" refers to Ronald Saldi, Sr., in his capacity as a guarantor of ICS's obligations under this Consent Decree.

Paragraph 6 of the Consent Decree further provided that:

> In the event that ICS does not pay to the State of Vermont one or more of the installment payments in the amount or at the time required by Paragraph , above, Guarantor shall make such payment within 10 days of its due date . . . In the event that Guarantor is obligated to make a payment or do some act under this paragraph or under subparagraphs 4a through 4d above (relating to refunds, payments and furnishings to clients of ICS) but fails to do so, or fails to do so with the time period required herein, the entire balance of the judgment due under

> this Consent Decree shall immediately become due and payable in full, and the State of Vermont shall thereupon be entitled to foreclose on all of the secured property described in Paragraph 7 . . .

ICS's performance under the Consent Decree was secured by a mortgage on three parcels of real estate Plaintiff and his wife had transferred to their children.

On November 4, 1994, after ICS and Plaintiff failed to make payment on the third installment required by the Consent Decree, the State of Vermont filed suit against Plaintiff and his wife and children to foreclose on the mortgage securing Plaintiff's promise as guarantor. The State complained that ICS and Plaintiff had failed to make timely payment on the third installment required by the Consent Decree, and requested that the Court "[a]ssess an appropriate judgment against the Defendants [which included Plaintiff] in the event of a deficiency."

On December 6, 1994, Plaintiff's present counsel, Mr. Stephen J. Craddock, Esq., filed an answer to the State's foreclosure complaint. In his Answer, Plaintiff admitted that he was guarantor of the payment provision of the Consent Decree and contested the issue of a deficiency judgment.

On March 26, 1999, the Court issued a Corrected Consolidated Judgment Order and Decree of Foreclosure and Order for Public Sale ("Corrected Order"). The Corrected Order determined that the debt owed to the State by Plaintiff was $475,250.51; $300,000 principal, $134,925.84 interest, and $40,324.67 costs. The Corrected Order also provided for continuing, per diem interest on the debt owed by Plaintiff to the State.

On August 30, 2005, Plaintiff filed the present case for attorney malpractice. Plaintiff alleged that Defendant was negligent in his representation of Plaintiff in connection with Plaintiff's decision to settle the consumer fraud matter and agree to the terms of the Consent Decree. Specifically, Plaintiff alleges that Defendant was negligent in advising him that he would not be personally liable as guarantor of ICS's judgment and that he would not be responsible as guarantor for any deficiency or interest accrued on the judgment against ICS.

Conclusions

Summary judgment is appropriate if, taking all the allegations of the nonmoving party as true, there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. V.R.C.P. 56 (c)

Plaintiff claims that Defendant was negligent by giving him faulty legal advice that he relied on when he signed the June 29, 1993 Consent Decree. Specifically, Plaintiff claims that Defendant's malpractice consisted of: (1) advising him to become personal guarantor of the ICS obligation, (2) advising him that the State could not pursue him for the judgment if it foreclosed against the mortgaged properties to collect the debt, and (3) failing to advise him that his obligation as guarantor included interest that accrued on an ongoing basis. Thus, the alleged malpractice occurred prior to June 29, 1993. The issue raised by Defendant's motion is when the cause of action accrued.

Legal malpractice actions are subject to a six-year limitations period. 12 V.S.A. § 511; see *Fitzgerald v. Congleton*, 155 Vt. 283, 293 (1990) (holding that legal malpractice actions alleging economic losses fall under § 511's six-year limitations period). Such actions are subject to the discovery rule, *Howard Bank v. Estate of Pope*, 156 Vt. 537, 538-39 (1991), which the Supreme Court has held commences the limitations period "when the plaintiff has or should have discovered both the injury and the fact that it *may* have been caused by the defendant's negligence or other breach of duty," see *Rodrigue v. Valco Enterprises, Inc.,* 169 Vt. 539, 541 (1999) (mem.) (emphasis in original); see also *Agency of Natural Resources v. Towns*, 168 Vt. 449, 452 (1998) (mem.) ("a cause of action is generally said to accrue upon the discovery of facts constituting the basis of the cause of action *or* the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery.") (citing *Union Sch. Dis. v. Lench*, 134 Vt. 424, 427 (1976)) (emphasis in original).

Plaintiff correctly points out that as a general matter the date of accrual under Vermont's discovery rule is a question of fact for the jury. *Howard Bank*, 156 Vt. at 539; *Towns*, 168 Vt. at 454. However, summary judgment is appropriate if there is no material factual dispute and no reasonable factfinder could differ in finding for defendant. *Rodrigue*, 169 Vt. at 541 (citing *Ware v. Gifford Mem'l Hosp.*, 664 F.Supp. 169, 171 (D. Vt. 1987)); see *Galfetti v. Berg, Carmoli & Kent Real Estate Corp.*, 171 Vt. 523, 526 (2000) (mem.) (deciding date of accrual as a matter of law).

Plaintiff argues that there is a genuine and material issue of fact about the date on which he knew that he was personally liable for the Consent Decree, including any deficiency and accrued interest on the judgment against ICS. The Court concludes that, viewing the possible evidence in the light most favorable to the Plaintiff, the accrual date could be different for each

of the three grounds for Plaintiff's alleged negligence, because the discovery rule could apply to each of those grounds in a different manner. Nonetheless, any claim based on any of the three grounds is barred by the statute of limitations for the reasons set forth below.

Advice to assume guarantor liability

It is undisputable that Plaintiff signed the Consent Decree as its guarantor. By signing the Consent Decree, Plaintiff memorialized his intention to be the guarantor of ICS's obligations under the Consent Decree and to be bound by all its terms. See *Hyland's Estate v. Foote's Estate*, 106 Vt. 1, 3 (1933) (stating the principle that by signing a contract "the law implies such an intention and prescribes the liability assumed"); *Vermont Development Credit Corp. v. Kitchel***,** 149 Vt. 421, 430-31 (1988) ("a guarantor is a person whose obligation is very close legally to that of the maker of the note, since the guarantor is liable for another's defaulted debt," and is required to pay when the primary obligor does not.)

The Consent Decree outlines a judgment against ICS in the amount of $400,000 to be paid over ten years. The terms of the Consent Decree further provide that in the event of non-payment by ICS, Plaintiff, as guarantor, would make payment. Thus, the terms of the Consent Decree itself put Plaintiff on notice that he was responsible for the $400,000 judgment against ICS.

The Consent Decree further provides that if Plaintiff, as guarantor, becomes responsible for payment, but does not perform, then the entire balance of the judgment would become immediately due and the State would be entitled to foreclose on the real property securing Plaintiff's promise as guarantor. The Consent Decree did not, however, alter Plaintiff's role as guarantor. Thus, even though Plaintiff's promise was secured by a mortgage on real property, in the event of nonpayment by ICS, Plaintiff remained liable for the $400,000 judgment against ICS in accordance with the terms of the Consent Decree.

Even if there were arguably some disagreement about whether Plaintiff's obligation as guarantor would be extinguished in the event the State pursued foreclosure, the terms of the Consent Decree were sufficient to put Plaintiff on notice of that issue. The undisputable facts establish that Plaintiff discovered, or should have discovered, at the time he signed the Consent Decree that Defendant's advice to him to assume guarantor liability could result in financial injury to him, and that such harm may have been caused by the defendant's negligence or other

breach of duty. See *Rodrigue*,169 Vt. at 541 (limitations period commences "when the plaintiff has or should have discovered both the injury and the fact that it *may* have been caused by the defendant's negligence or other breach of duty.").

As the president and owner of ICS, a debt collection company, Plaintiff should have known that any alleged advice from Defendant to the effect that Plaintiff would not be personally liable under the Consent Decree, which he signed as guarantor, was highly suspect. The standard is not subjective, however. The question is whether a reasonable person had information sufficient to provide notice of a possible claim against Defendant. Any reasonable person, upon signing the Consent Decree as guarantor, was on notice by its terms that it exposed the signer to personal liability for the obligation. No reasonable factfinder could find otherwise. See *Ware*, 664 F.Supp. at 171 (in discovery rule context "summary judgment should be denied . . . unless no reasonable factfinders could differ on the outcome."). Plaintiff had sufficient information to put him on notice of a cause of action. See *Towns*, 168 Vt. at 452 (1998) (mem.) ("a cause of action is generally said to accrue upon the discovery of facts constituting the basis of the cause of action *or* the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery.") (emphasis in original).

The Court concludes that Plaintiff knew, or had sufficient information to know, as of June 29, 1993, that Defendant's advice on whether he was personally liable as guarantor of the judgment against ICS might result in financial consequences for him that could give rise to a malpractice claim. Therefore, to the extent Plaintiff's malpractice claim is based on Defendant's alleged erroneous legal advice to assume guarantor liability under the Consent Decree, it is barred by the statute of limitations. 12 V.S.A. § 511.

<u>Advice that Plaintiff would not be liable for deficiency following foreclosure</u>

Plaintiff's cause of action based on Defendant's alleged negligent advice to Plaintiff as to whether or not Plaintiff was responsible for a deficiency after foreclosure of the mortgage also accrued on the date of the Consent Decree, as there were no terms of the decree that limited Plaintiff's obligation as guarantor in the event of foreclosure.

Even assuming that Plaintiff's evidence might be that Defendant assured Plaintiff that notwithstanding Consent Decree terms, Plaintiff would have no liability in the event of foreclosure, the cause of action accrued no later than December 6,1994 when Plaintiff answered

the State's foreclosure complaint. The State, in its complaint, asked the Court to "[a]ssess an appropriate judgment against [Plaintiff] in the event of a deficiency." In answering the complaint, Plaintiff conceded that he was guarantor of the judgment against ICS and that he, or at least his attorney, had reviewed the Consent Decree and the foreclosure complaint.

These undisputed facts establish that Plaintiff "had information, or should have obtained information, sufficient to put a reasonable person on notice that a particular defendant may have been liable for the plaintiff's injuries." *Rodrigue*, 169 Vt. at 541. The law is clear that notice to an agent is imputed to its principal. See *Solomon v. Design Development, Inc.,* 143 Vt. 128, 131 (1983) ("notice to an agent is notice to the principal . . .regardless of whether the agent actually communicated his knowledge [to the principal]."). In this case, Plaintiff's attorney was on notice that the State was seeking payment from Plaintiff in the event of a deficiency. That notice is imputed from Plaintiff's counsel to Plaintiff, thereby providing Plaintiff with "information . . . sufficient to put a reasonable person on notice that a particular defendant may have been liable for the plaintiff's injuries." *Rodrigue*, 169 Vt. at 541. Since the claim based on this ground, giving all possible benefit to the Plaintiff, accrued on December 6, 1994, and the case was filed on August 30, 2005, Plaintiff's cause of action based on this advice is barred by the statute of limitations.

Failure to advise of liability for accrual of interest

Finally, Plaintiff's cause of action, to the extent it is based on Defendant's alleged failure to advise Plaintiff that his obligation as guarantor included responsibility for ongoing interest, also accrued on the date of the Consent Decree, as a guarantor's obligation inherently includes accrual of interest on an unpaid debt, and there were no terms otherwise limiting that obligation.

Even assuming that Plaintiff's evidence would be that Defendant assured Plaintiff that he would not be responsible for ongoing interest, notwithstanding the terms of the Consent Decree and the absence of any limitation of the guarantor's obligation as to interest, the cause of action accrued at the latest when the Court issued the Corrected Order on March 26, 1999. The written terms of the Corrected Order specifically provide for ongoing accrual of interest, and were sufficient to put Plaintiff, and or his attorney, on notice that Plaintiff's debt to the State included principal, costs and interest, and that per diem interest was accruing on that debt. Thus, at the time the Corrected Order issued, Plaintiff "had information . . . sufficient to put a reasonable

person on notice that a particular defendant may have been liable for the plaintiff's injuries." *Rodrigue*, 169 Vt. at 541. To the extent Plaintiff's malpractice action is based on this ground, the cause of action is barred by the statute of limitations.

ORDER

Based on the foregoing, Defendant's Motion for Summary Judgment is *granted.*

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Hon. Mary Miles Teachout
Presiding Judge