2020 IL App (1st) 200330

Appellate Court of Illinois, First District,
Fourth Division.

Ilhan USKUP and Timur Uskup, Plaintiffs-Appellants,
v.
Joseph C. JOHNSON, Defendant-Appellee.

No. 1-20-0330
|
December 31, 2020

Appeal from the Circuit Court of Cook County. No. 2019 L 1114, The Honorable Margaret Brennan, Judge Presiding.

Attorneys and Law Firms

Michael C. Bruck and Timothy J. McInerney, of Spellmire Bruck LLP, of Chicago, for appellants.

Michael J. Meyer and Jeremy N. Boeder, of Tribler Orpett & Meyer, P.C., of Chicago, for appellee.

OPINION

PRESIDING JUSTICE GORDON delivered the judgment of the court, with opinion.

***1** ¶ 1 Plaintiffs, Ilhan and Timur Uskup, filed a **legal malpractice** lawsuit against defendant attorney Joseph C. Johnson, based on his involvement in drafting trust documents for their deceased father. Plaintiffs alleged that attorney Johnson's drafting of the trust documents included ambiguous provisions, which caused the successor trustee to file a petition to interpret the terms of the trust (petition for construction) after the death of plaintiffs' father, incurring approximately $300,000 in legal fees. Plaintiffs alleged that these sums would have otherwise been distributed to the trust's beneficiaries, including plaintiffs. The trial court dismissed plaintiffs' **legal malpractice** action under section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2018)) for failure to state a cause of action. Plaintiffs appeal, and for the reasons that follow, we affirm the trial court's dismissal but reverse its designation of that dismissal as being "with prejudice."

¶ 2 BACKGROUND

¶ 3 As the instant appeal arises from a motion to dismiss, all facts are taken from the allegations of the complaint and the exhibits attached thereto.

¶ 4 In 1989, Ergin Uskup retained attorney Johnson's services to create the Ergin Uskup Living Trust (trust); attorney Johnson drafted the trust agreement. At the time, Ergin[1] was married to Sezgin Uskup and had three children from a prior marriage, including plaintiffs.[2] In 2011, at Ergin's request, attorney Johnson drafted a restatement of the trust agreement, which declared that the purpose of the trust included his "wish to control how my property will be left to my beneficiaries after my death." The restatement provided that, upon Ergin's death, the trust estate was to be distributed 40% to Sezgin, if she survived him; 18% to each child, if they survived him, or else to their descendants; and 6% to Ergin's brother, if he survived Ergin. The restatement further provided that, "[t]o the greatest extent possible under applicable law, it is my intention to * * * enable my Trustee to give each trust beneficiary the maximum possible benefit and enjoyment of the trust income and principal to which the beneficiary is entitled."

¶ 5 Section 4.01(d) of the restatement to the trust provided that, during his lifetime, Ergin "shall have the power to amend or revoke my Trust, in whole or in part." However, section 15.04(b) provided that, "[n]otwithstanding my right to amend this agreement, as described in Section 4.01(d), under no circumstances shall I have the right to reduce the percentage of My Trust Property that is provided in this agreement for my spouse, Sezgin, unless Sezgin approves such amendment in writing."

¶ 6 In 2015, Sezgin filed a petition for dissolution of marriage. While the dissolution proceedings were pending, on May 31, 2016, attorney Johnson drafted an amendment to the restatement (2016 amendment), which directed the trustee "to administer the above Trust Agreement in the same manner as if my wife, Sezgin G. Uskup, had died prior to the date of this Amendment." Sezgin did not consent to this amendment. Ergin died on August 7, 2016,[3] while the dissolution action was still pending.

***2** ¶ 7 On November 30, 2016, the successor trustee filed a petition to interpret the terms of the trust in case No. 2016 CH 15492 (trust litigation). The successor trustee noted the conflicts between section 4.01 of the restatement, which gave Ergin the absolute right to amend or revoke his trust; section 15.04(b), which required Sezgin's consent in order to reduce her percentage interest; and the 2016 amendment, which directed the trustee to treat Sezgin as having predeceased Ergin. The successor trustee alleged that it was unable to distribute the balance of the trust until the ambiguity was resolved.

¶ 8 In the trust litigation, Sezgin's attorneys argued that there was no ambiguity in the trust documents and that the restatement clearly required Sezgin's consent to reduce her interest. Under this interpretation, Sezgin would have received approximately $1.9 million, representing 40% of the trust estate. Plaintiffs retained their own counsel, who took the position that, while the trust documents were ambiguous, it was Ergin's intent to eliminate Sezgin's interest.

¶ 9 The trust litigation continued for nearly two years, until the trial court entered judgment on the pleadings on July 2, 2018. In its 20-page written opinion, the court noted that it had previously determined that section 15.04(b) was ambiguous. The court further noted that there was a lack of Illinois authority on the issue. The court began its analysis by finding that it had previously determined that, at the time the trust was established, Ergin intended to create a revocable trust, as he had expressly reserved the right to revoke the trust during his lifetime without the consent of a beneficiary. Consequently, the court found that the plain language of the restatement meant that prior to his death, Ergin was free to amend or change the trust at any time and for any reason. However, the court further found that it had previously determined that the presence of both section 4.01(d) and 15.04 "gave rise to more than one reasonable interpretation of [Ergin's] power to control the disposition of his Trust while seemingly limiting himself as to one method of amendment." Thus, the court found that the restatement was "patently ambiguous" on its face, reasoning:

> "As the Court set forth above, Ergin was able to use his power of revocation to revoke the Trust completely, thereby eliminating Sezgin's interest without ever setting forth such change explicitly as a new provision in the Trust Agreement. Additionally, Ergin could change the Trust Agreement in a way in which Sezgin's beneficiary interest no longer existed. Despite these potential factual circumstances, nowhere in the provisions cited by the parties does it indicate that Ergin contemplated these scenarios."

¶ 10 Examining the language of the restatement, the court found that sections 4.01(d) and 15.04(b) could operate in cohesion, finding that "while Ergin retained the right to amend any part of the Trust at any time or for whatever reason, he also expressly denoted a specific circumstance as to which he required her consent. Additionally, the plain language of Section 15.04(b) indicated that the provision was intended to operate as a special exception to his general ability to amend the Trust as he saw fit." Accordingly, since the court found that the provisions of the restatement could be reconciled, it proceeded to determine whether the 2016 amendment was valid.

¶ 11 The court found that the 2016 amendment sought to treat Sezgin as predeceased prior to the date of the amendment's execution. The court found that, "[a]s such, if Sezgin was predeceased at the time of the amendment's execution, Ergin would not have needed her written approval to amend the Trust as to her beneficiary interest, simply because the interest did not exist anymore." The court further noted that the restatement also contemplated the changing of beneficiary interests in a different provision, which provided that Sezgin would be treated as predeceased upon dissolution of their marriage, and nothing in the language of section 15.04(b) prevented Ergin from accelerating this provision, nor did it prevent Ergin from revoking the trust as a whole or any property within the trust. Therefore, the court found that the 2016 amendment was valid and operated to eliminate Sezgin's beneficiary interest.

***3** ¶ 12 The trust incurred $304,400.25 in legal expenses as a result of the trust litigation, and plaintiffs additionally incurred $29,525.65 in attorney fees that were not reimbursed by the trust.

¶ 13 On February 1, 2019, plaintiffs filed a complaint for **legal malpractice** against attorney Johnson. The complaint contained two counts, one for each plaintiff. The complaint alleged that the primary purpose of Ergin's attorney-client relationship with attorney Johnson was to benefit his trust beneficiaries, including plaintiffs, and to distribute to them the maximum benefit and enjoyment of the trust income and principal. As such, attorney Johnson owed Ergin a duty of care to properly advise him in the drafting of documents that would carry out his intent, and that duty extended to plaintiffs, Ergin's directly intended third-party beneficiaries. The complaint alleged that attorney Johnson violated his duty in the following ways:

> "a. In order to carry out Ergin's intent to eliminate Sezgin as a beneficiary of the Trust and to provide for the remaining beneficiaries, drafted the Amendment in a manner that made the Trust 'patently ambiguous' and subject to litigation;
>
> b. In order to carry out Ergin's intent to eliminate Sezgin as a beneficiary of the Trust and to provide for the remaining beneficiaries, failed to revoke and thereafter restate the Trust;
>
> c. Failed to prepare non-ambiguous estate planning documents that carried out Ergin's intent to eliminate Sezgin as a beneficiary of the Trust and to provide for the remaining beneficiaries;
>
> d. Was otherwise negligent."

The complaint alleged that, as a result of attorney Johnson's conduct, plaintiffs were damaged "in that the Trust, among other things, unnecessarily paid and incurred substantial attorneys' fees and expenses litigating the proper construction of Ergin's Trust and the rights of its beneficiaries that would have otherwise been distributed to [plaintiffs]." The complaint further alleged that plaintiffs were damaged because they personally incurred legal fees and expenses litigating the proper construction of the trust documents. Each plaintiff sought $109,126.90 in compensatory damages, plus prejudgment interest and attorney fees and costs.

¶ 14 On July 3, 2019, attorney Johnson filed a motion to dismiss the complaint under section 2-615 of the Code. Attorney Johnson noted that the trust documents he drafted had been construed both to give effect to Ergin's wishes and to increase plaintiffs' shares in the trust estate by 12% each, such that plaintiffs received a total value of over $1 million more than they would have otherwise received. Attorney Johnson claimed that the complaint should be dismissed for two reasons. First, attorney Johnson claimed that plaintiffs sustained no actionable damages because his legal work succeeded in divesting Sezgin of her beneficial interest in the trust, thereby increasing plaintiffs' own percentage interests. Additionally, attorney Johnson claimed that both of plaintiffs' claims of negligence, relating to the ambiguity of the trust documents and the alleged failure to revoke and restate the trust, were founded upon alleged conduct that could not be proven to have proximately caused plaintiffs' claimed damages. Attorney Johnson argued that plaintiffs' claims were predicated on speculating that, had the trust documents been drafted differently, Sezgin would not have challenged them and the trust would not have incurred legal fees, claims that "would require an overwhelming amount of speculation" in proving proximate cause.

***4** ¶ 15 In response, plaintiffs claimed that the entirety of the trust litigation could have been avoided if attorney Johnson had properly drafted the trust documents, meaning that they incurred actionable damages even though they " 'prevailed' " in the trust litigation. Plaintiffs further claimed that attorney Johnson's argument that the trust documents would have been challenged regardless consisted of inappropriate speculation or, at best, raised questions of fact that could not be resolved on

a motion to dismiss.

¶ 16 On September 19, 2019, the trial court entered an order granting attorney Johnson's motion to dismiss. The court found that, in the trust litigation, Sezgin argued that the 2016 amendment was ineffective because it reduced her interest without her written approval, and "[a] revocation or any other method of disinheriting Sezgin would be subject to the same challenge." The court noted that, in the trust litigation, plaintiffs argued that section 15.04(b) of the restatement permitted revocation without consent, and Sezgin argued against that point. The court found that, "[n]o matter what form the 2016 Amendment took, it would have been subject to the argument that it reduced her interest without her written approval." The court additionally found that plaintiffs prevailed in the trust litigation on a judgment on the pleadings, meaning that the court in that litigation determined that there was no genuine issue of material fact regarding the validity of the 2016 amendment. The court found that, "[a]s such, Plaintiff[s] fail[ ] to allege sufficient facts to establish that [attorney Johnson's] negligence was the proximate cause of Plaintiffs' injuries." Accordingly, the court granted the motion to dismiss with prejudice.

¶ 17 On October 15, 2019, plaintiffs filed a motion to reconsider, claiming that the trial court's dismissal was based on speculation, involved factual inferences construed against plaintiffs, and relied on factual defenses that were not appropriate for consideration on a section 2-615 motion to dismiss.

¶ 18 On January 13, 2020, the trial court entered an order denying plaintiffs' motion to reconsider. The court found that "[i]t is evident that Plaintiffs fundamentally misunderstand the basis for the Court's decision" and expressly noted that it did not rely on any extraneous factual allegations or speculation. The court explained:

> "The Court took judicial notice of [the trust litigation court's] ruling in the underlying Trust Litigation, particularly that the litigation was concluded by a 2-615 Motion for Judgment on the Pleadings. Plaintiffs prevailed in the Trust Litigation on what is essentially the earliest possible point. In light of this, Plaintiffs' theory of their case is as follows[:] despite prevailing in the underlying Trust Litigation on a 2-615 Judgment on the Pleadings, Plaintiffs incurred attorneys' fees in defending their claim to their inheritance, and had [attorney Johnson] drafted the documents differently
>
> Plaintiffs would not have incurred the same litigation expenses. This could happen in one of two ways[:] either Sezgin Uskup does not sue, or she does sue but Plaintiffs incur less costs. Neither of which is reasonable."

¶ 19 The court noted that only well-pled allegations must be taken as true and that it was not required to draw unreasonable inferences in order to sustain a pleading. As such, the court found:

> "It is simply not a reasonable inference to conclude that had [attorney Johnson] instead revoked and restated the Trust, Sezgin Uskup, a woman who stood to [lose] a substantial amount of money, would not have challenged such an action on the same grounds that she did in the Trust Litigation, particularly when it would have been subject to the same challenges as the Amendment, namely[,] that it was an attempt to reduce her interest without her consent. Nor is it reasonable to conclude that the litigation could have been won more easily, since Plaintiffs prevailed on a 2-615 Judgment on the Pleadings.
>
> ***5** The Court did not engage in speculation in issuing its prior Order, rather the Court refused to be a party to Plaintiffs' unreasonable inferences and speculation regarding the outcome of their proposed alternative method of disinheriting Sezgin Uskup."

¶ 20 Plaintiffs timely filed a notice of appeal, and this appeal follows.

¶ 21 ANALYSIS

¶ 22 On appeal, plaintiffs claim that the trial court erred in dismissing their complaint because they sufficiently stated a cause of action for **legal malpractice**. A motion to dismiss under section 2-615 of the Code challenges the legal sufficiency of the complaint by alleging defects on its face. *Young v. Bryco Arms*, 213 Ill. 2d 433, 440 (2004); *Wakulich v. Mraz*, 203 Ill. 2d

223, 228 (2003). The critical inquiry is whether the allegations in the complaint are sufficient to state a cause of action upon which relief may be granted. *Wakulich*, 203 Ill. 2d at 228. In making this determination, all well-pleaded facts in the complaint and all reasonable inferences that may be drawn from those facts are taken as true. *Young*, 213 Ill. 2d at 441. In addition, we construe the allegations in the complaint in the light most favorable to the plaintiff. *Young*, 213 Ill. 2d at 441. We review *de novo* an order granting a section 2-615 motion to dismiss. *Young*, 213 Ill. 2d at 440; *Wakulich*, 203 Ill. 2d at 228. *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). We may affirm on any basis appearing in the record, whether or not the trial court relied on that basis or its reasoning was correct. *Ray Dancer, Inc. v. DMC Corp.*, 230 Ill. App. 3d 40, 50 (1992).

¶ 23 As an initial matter, in considering whether the trial court properly dismissed plaintiffs' complaint, it is helpful to briefly explain the basis for the underlying trust litigation and attorney Johnson's role in the process. As noted, the trust litigation revolved around interpretation of Ergin's trust—specifically, the 2011 restatement and the 2016 amendment. Once a trust is created and property is transferred into the trust, the trustee holds legal title to the property while the beneficiary holds the equitable title. *Shakman v. Department of Revenue*, 2019 IL App (1st) 182197, ¶ 26. However, the trustee's holding of legal title to the property and his actions with respect to that property are determined by the instrument that creates the trust, and the trustee must manage the trust and its property in accordance with the terms of the trust. *Shakman*, 2019 IL App (1st) 182197, ¶ 26. Thus, "the trustee's role with respect to the trust makes his position unique from that of a natural person, whose actions are not restrained by a trust instrument." *Shakman*, 2019 IL App (1st) 182197, ¶ 26.

¶ 24 "[A]s the name implies, a revocable trust may be revoked at the pleasure of the settlor." *Shakman*, 2019 IL App (1st) 182197, ¶ 27. However, the power of revocation must generally be expressly provided for in the trust document. *Shakman*, 2019 IL App (1st) 182197, ¶ 27. Similarly, the settlor of a revocable trust has the power to modify the trust in accordance with the trust's language. *Shakman*, 2019 IL App (1st) 182197, ¶ 27.

¶ 25 In the case of Ergin's trust, section 4.01(d) of the restatement provided that, during his lifetime, Ergin "shall have the power to amend or revoke my Trust, in whole or in part." As the trial court in the trust litigation found, this language expressed Ergin's intent that the trust be a revocable trust. However, section 15.04(b) limited the extent of Ergin's power by providing that, "[n]otwithstanding my right to amend this agreement, as described in Section 4.01(d), under no circumstances shall I have the right to reduce the percentage of My Trust Property that is provided in this agreement for my spouse, Sezgin, unless Sezgin approves such amendment in writing." As the court found in the trust litigation, the presence of both of these provisions created an ambiguity, as there was more than one reasonable interpretation of Ergin's intent with respect to Sezgin's interest. Adding to the level of complication, the 2016 amendment set forth Ergin's desire to treat Sezgin as having died prior to the date of the amendment, leading to the question of whether this amendment complied with the terms set forth in the restatement. The interplay between these three provisions led to the trust litigation, and it is attorney Johnson's actions in drafting these documents that plaintiffs allege led to their malpractice action. With this background, we turn, then, to considering whether plaintiff's complaint stated a cause of action for **legal malpractice**.

***6** ¶ 26 "In an action for **legal malpractice** the plaintiff must plead and prove that: the defendant attorney owed the plaintiff a duty of due care arising from the attorney-client relationship; that the defendant breached that duty; and that as a proximate result, the plaintiff suffered injury [citation] in the form of actual damages [citation]." *Governmental Interinsurance Exchange v. Judge*, 221 Ill. 2d 195, 199 (2006); *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 306 (2005). Our supreme court has explained that "[t]he injury in a **legal malpractice** action is not a personal injury [citation], nor is it the attorney's negligent act itself [citation]. Rather, it is a pecuniary injury to an intangible property interest caused by the lawyer's negligent act or omission." *Northern Illinois Emergency Physicians*, 216 Ill. 2d at 306. Thus, for purposes of a **legal malpractice** action, a client is not considered to be injured until he has suffered a loss for which he may seek monetary damages, and the fact that an attorney may have breached a duty of care is not, in itself, sufficient to sustain a cause of action. *Northern Illinois Emergency Physicians*, 216 Ill. 2d at 306. "Even if negligence on the part of the attorney is established, no action will lie against the attorney unless that negligence proximately caused damage to the client. [Citation.] The existence of actual damages is therefore essential to a viable cause of action for **legal malpractice**." *Northern Illinois Emergency Physicians*, 216 Ill. 2d at 306-07.

¶ 27 In the case at bar, the trial court's dismissal was based on finding that plaintiffs had not pleaded sufficient facts to show that attorney Johnson's conduct was the proximate cause of any injury to plaintiffs. Accordingly, we begin our analysis by examining the issues of proximate cause and damages.

¶ 28 In a **legal malpractice** action, damages are never presumed, and must be "affirmatively established by the aggrieved client." *Northern Illinois Emergency Physicians*, 216 Ill. 2d at 307. "Unless the client can demonstrate that he has sustained a monetary loss as the result of some negligent act on the lawyer's part, his cause of action cannot succeed." *Northern Illinois Emergency Physicians*, 216 Ill. 2d at 307. However, demonstrating the existence of damages requires "more than supposition or conjecture," and where damages are speculative, no cause of action for malpractice exists. *Northern Illinois Emergency Physicians*, 216 Ill. 2d at 307.

¶ 29 "A successful **legal malpractice** claim places the plaintiff in the same position that she would have occupied but for the attorney's negligence." *Nettleton v. Stogsdill*, 387 Ill. App. 3d 743, 749 (2008). Generally, in cases involving litigation, a plaintiff must prove a " 'case within a case' " in order to establish **legal malpractice**, as "no **legal malpractice** exists unless the attorney's negligence resulted in the loss of an underlying cause of action." *Judge*, 221 Ill. 2d at 200. Proving damages requires establishing what the result should have been, absent the attorney's negligence. *Union Planters Bank, N.A. v. Thompson Coburn LLP*, 402 Ill. App. 3d 317, 344 (2010).

¶ 30 However, in cases involving transaction-based malpractice, "proving a case-within-a-case is not always required * * * where damages can otherwise be established." *Union Planters Bank*, 402 Ill. App. 3d at 344. For instance, "[i]f a client suffers damage because of the happening of a foreseeable risk of which he or she was not informed, the attorney may be liable. In such a case, the attorney's liability is not predicated upon the impropriety of the chosen course of action, but rather upon the failure to inform the client sufficiently to enable him or her to voluntarily accept the risk attendant thereto." *Metrick v. Chatz*, 266 Ill. App. 3d 649, 653-54 (1994). To establish the element of proximate cause in such a case, the client must plead and prove that had the undisclosed risk been known, he or she would not have accepted the risk and consented to the recommended course of action. *Metrick*, 266 Ill. App. 3d at 655. "Such is not the case, however, when the course of action the attorney recommends is in itself improper under the circumstances presented. If an attorney's advice falls below the standard of reasonable legal services, any damages which proximately flow from the client's acceptance of that advice are recoverable in a negligence action against the attorney." *Metrick*, 266 Ill. App. 3d at 655.

***7** ¶ 31 In the case at bar, plaintiffs claim that, due to attorney Johnson's conduct in drafting the trust documents, the trust incurred attorney fees in trust litigation, which would not have been required had (1) attorney Johnson drafted a nonambiguous trust and restatement and (2) attorney Johnson had revoked the restatement instead of amending it in 2016 in order to divest Sezgin from her interest. We agree with the trial court that plaintiffs fail to plead facts to demonstrate that attorney Johnson's conduct proximately caused them to incur damages. We note that, in response to the trial court's dismissal, in their briefing before the trial court and before this court, plaintiffs repeatedly argue that the trial court engaged in inappropriate speculation in dismissing their complaint.

¶ 32 However, as the trial court found, plaintiffs have it exactly backwards. They, as the parties bringing the action, have the burden of pleading, and ultimately proving, the elements of their claim. See *Judge*, 221 Ill. 2d at 199 (the plaintiff must plead and prove the elements of a **legal malpractice** claim). "It is the plaintiff's burden to plead facts which, if true, establish a proximate causal relationship between the negligence of the attorney and the damages alleged to have been suffered as a consequence thereof." *Metrick*, 266 Ill. App. 3d at 654.

¶ 33 In the case at bar, plaintiffs are alleging that their damages consist of the attorney fees incurred by the trust, and by them individually, as a result of the trust litigation. The court in *Nettleton* explained the circumstances in which attorney fees are recoverable as damages in **legal malpractice** actions, and we find its discussion instructive here. As the *Nettleton* court explained, "[a] plaintiff in a **legal malpractice** case may recover attorney fees when the fees constitute an ordinary loss resulting from the attorney's negligence." *Nettleton*, 387 Ill. App. 3d at 749. This follows from the principle that a successful **legal malpractice** claim places the plaintiff in the same position that she would have occupied but for the attorney's negligence. *Nettleton*, 387 Ill. App. 3d at 749. Thus, where a plaintiff alleges that the defendant's negligence caused her to lose her cause of action or to receive a smaller award than she would have otherwise received, an award of damages equal to the amount she did not receive as a result of the defendant's negligence is necessary to place the plaintiff in the same position that she would have occupied absent the negligence. *Nettleton*, 387 Ill. App. 3d at 752. Consequently, in such a case, "courts require the plaintiff to demonstrate that but for the defendant's negligence she would have received a larger award than she otherwise did." *Nettleton*, 387 Ill. App. 3d at 752.

¶ 34 However, where a plaintiff alleges that the defendant's negligence caused her to incur attorney fees, an award of damages equal to the amount of attorney fees she would not have had to spend but for the defendant's negligence is necessary to place the plaintiff in the same position she would have occupied had the defendant not been negligent. *Nettleton*, 387 Ill. App. 3d at 752. "[J]ust as a plaintiff who allege[d] a loss of her cause of action or a larger award must show that she would have received a larger award but for the defendant's negligence [citation], a plaintiff alleging incurment of attorney fees as a result of the defendant's negligence must demonstrate that she would not have incurred the claimed fees in the absence of the defendant's negligence." *Nettleton*, 387 Ill. App. 3d at 752. As the *Nettleton* court explained, "[s]uch a rule is necessary because, to allow a plaintiff to recover attorney fees she would have incurred even in the absence of the defendant's negligence would place the plaintiff in a position better than that she would have occupied had the defendant not been negligent." *Nettleton*, 387 Ill. App. 3d at 752.

***8** ¶ 35 In sum, then, "[a] **legal malpractice** plaintiff may recover as actual damages the attorney fees incurred as a result of the defendant's malpractice, so long as the plaintiff can demonstrate she would not have incurred the fees in the absence of the defendant's negligence." *Nettleton*, 387 Ill. App. 3d at 753. Thus, in the case at bar, plaintiffs were required to demonstrate that, if attorney Johnson had drafted the trust documents differently, they—and the trust—would not have incurred the attorney fees that they are claiming as damages. No such allegation appears in the complaint. Plaintiffs do not allege that, absent the negligent drafting, there would have been no trust litigation. Nor do plaintiffs allege that, even if there was litigation, it would have resulted in fewer attorney fees. Instead, plaintiffs simply make a blanket allegation that "[h]ad [attorney Johnson] complied with [his] duty of care and otherwise not been negligent, [plaintiffs] would not have been damaged as aforesaid." We agree with the trial court that such an allegation is not sufficient to demonstrate that they would not have incurred the attorney fees absent attorney Johnson's negligence.

¶ 36 However, we must emphasize that a dismissal under section 2-615 of the Code occurs at the earliest stages of the litigation. The critical inquiry in deciding such a motion is whether the allegations in the complaint are sufficient to state a cause of action upon which relief may be granted. *Wakulich*, 203 Ill. 2d at 228. A dismissal under section 2-615 of the Code should be made with prejudice "only where it is clearly apparent that the plaintiffs can prove no set of facts entitling recovery." *Norabuena v. Medtronic, Inc.*, 2017 IL App (1st) 162928, ¶ 39. Here, we have concluded that the trial court properly determined that the complaint, as presently drafted, does not contain sufficient allegations to state a cause of action for **legal malpractice**. However, plaintiffs did not have the opportunity to amend their complaint to attempt to remedy any deficiencies, and when the trial court granted the motion to dismiss with prejudice, plaintiffs lost such an opportunity. In the case at bar, we are unwilling to say that plaintiffs would be unable to draft their complaint in such a way as to properly allege such a cause of action. If a plaintiff can state a cause of action by amending his complaint, dismissal with prejudice should not be granted. *Buffa v. Haideri*, 362 Ill. App. 3d 532, 540 (2005). Accordingly, while we affirm the trial court's dismissal, we reverse the designation of that dismissal as "with prejudice." We take no position on whether plaintiffs will succeed in any attempt to amend their complaint, but plaintiffs should be afforded the opportunity to try to correct any deficiencies in their complaint, should they choose to do so.

¶ 37 CONCLUSION

¶ 38 For the reasons set forth above, the trial court properly dismissed plaintiffs' complaint where plaintiffs failed to allege facts demonstrating that attorney Johnson's alleged malpractice proximately caused them damages. However, we reverse the trial court's designation of that dismissal as "with prejudice."

¶ 39 Affirmed in part and reversed in part.

Justices Lampkin and Reyes concurred in the judgment and opinion.

All Citations

--- N.E.3d ----, 2020 IL App (1st) 200330, 2020 WL 7863365

Footnotes

[1] As all parties share the same surname, we refer to them by their first names when discussing them.

[2] The third child, Ela, is not a named party and does not appear to have had any involvement in the instant litigation.

[3] The complaint mistakenly lists August 17, 2015, as the date of Ergin's death.

2020 IL App (1st) 191409

Appellate Court of Illinois, First District,
Fourth Division.

Arie ZWEIG, Individually and as Trustee of the Arie Zweig Self Declaration of Trust Dated June 28, 1990,
Plaintiff-Appellant,
v.
Gerald MILLER and Vanasco, Genelly & Miller, Defendants-Appellees.

No. 1-19-1409
|
Opinion filed December 31, 2020

Appeal from the Circuit Court of Cook County. No. 17 L 2837, Honorable Brigid M. McGrath, Judge, presiding.

Attorneys and Law Firms

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Adam R. Vaught, Terrance P. McAvoy, and Steven R. Bonanno, of Hinshaw & Culbertson LLP, of Chicago, for appellees.

OPINION

JUSTICE LAMPKIN delivered the judgment of the court, with opinion.

***1** ¶ 1 This appeal arose from the **legal malpractice** action that plaintiff, Arie Zweig, individually and as trustee of the Arie Zweig Self Declaration of Trust Dated June 28, 1990, filed against defendants, Gerald Miller and Vanasco, Genelly & Miller. The trial court granted summary judgment in favor of defendants based on the court's determination that plaintiff's **legal malpractice** claim was barred by the two-year statute of limitations set forth in section 13-214.3(b) of the Code of Civil Procedure (Code) (735 ILCS 5/13-214.3(b) (West 2016)).

¶ 2 On appeal, plaintiff argues that his malpractice action was timely filed within two years of the date he settled the underlying litigation that involved a business investment where defendants had represented him. Specifically, plaintiff argues that his malpractice cause of action accrued when that underlying litigation settled because he did not suffer a pecuniary loss until the settlement occurred. He also argues that filing his malpractice action before the settlement would have been premature and contrary to the strong policy rationale against "prophylactic malpractice cases," wherein the **legal malpractice** case is completely dependent on the outcome of the pending underlying case. Alternatively, plaintiff argues that a genuine issue of material fact exists regarding when he knew or should have known of his injury.

¶ 3 For the reasons that follow, we hold that summary judgment in favor of defendants was proper because plaintiff failed to file his complaint within the two-year statute of limitations, which began to run, at the latest, when he knew, as a matter of law, of his injury and that it was wrongfully caused, *i.e.*, when he incurred legal fees directly caused by hiring additional

counsel to attempt to achieve a result in the underlying case that was not achieved during defendants' representation. Accordingly, we affirm the judgment of the trial court.[1]

¶ 4 I. BACKGROUND

¶ 5 In December 2010, plaintiff Zweig and his wife had dinner with their close friends, Mr. and Mrs. Bozorgi, who discussed an investment opportunity. The Bozorgis asked plaintiff to join them in a partnership, Bedford Med, LLC (Bedford), to build an ambulatory surgical center and medical office building. They asked him to invest $2 million for a 40% membership, which would be increased to 49% when the project was finished. Bedford was owned by a holding company, which was owned by four members of the Bozorgi family. Plaintiff forwarded the materials for the investment to his counsel, defendants Miller and Vanasco, Genelly & Miller, whom plaintiff had retained for his business transactions for over 20 years. One document of the materials included exhibit D, which provided:

> "The Company shall distribute (in preference to any other Distribution) up to [redacted] as and when the Company receives such funds from the Investor upon the issuance of Membership Interests by the Company to the Investor (whether in a single issuance or in a series of issuances). Upon each such preferential Distribution to Magna, Investor's and Magna's Capital Contributions shall be deemed to be adjusted on a dollar for dollar basis and Magna's and Investor's Percentage Interests shall be adjusted accordingly."

***2** ¶ 6 In his deposition, plaintiff explained that English was not his native language, so he relied on defendants to adequately review the documents, advise him about the implications of the documents he would sign, and recommend any amendments so that the agreement reflected his intentions.

¶ 7 However, Miller stated in his deposition that ever since his initial representation of plaintiff in 1986, plaintiff always made his own business decisions and never sought investment advice or any financial analysis of any proposed or actual investments from defendants. Regarding the Bedford investment, plaintiff told Miller that he was contributing capital investment funds to increase the equity in Bedford, not to purchase shares of stock. Plaintiff said it was a "done deal" with his great friends and he wanted Miller to review only the issue of what kind of management control plaintiff would have as a minority owner in Bedford. The nature, scope and extent of plaintiff's engagement of defendants was limited to reviewing plaintiff's management authority. Plaintiff personally handled all other aspects of the investment on his own. Based on their long relationship, where plaintiff would negotiate defendant's invoices to remove charges for services he deemed unnecessary or not requested, Miller reviewed just the management provisions of the agreement and found them to be "pretty standard" and thought they "looked fine." Miller also looked at the contribution agreement and transfer provisions that would affect plaintiff's ability to use his trust.

¶ 8 In 2011, plaintiff signed the documents and submitted his investment funds. He did not communicate with Miller concerning the Bedford investment until mid-2013, when plaintiff mentioned an unchallenged real estate assessment regarding Bedford and that he had not received its financial and tax information.

¶ 9 On September 25, 2013, plaintiff and Miller met with the Bozorgis and their attorney to discuss management and tax issues involving Bedford. At that meeting, plaintiff and Miller were shocked when the Bozorgis' counsel disclosed that plaintiff's investment had been taken out of Bedford and distributed to the Bozorgi holding company members. Plaintiff and Miller objected, stating that plaintiff's investment was a capital contribution, not a purchase and sale, and the Bozorgis had no authority to distribute that investment. The Bozorgis, however, asserted they had a clear right under exhibit D to take the money out.

¶ 10 According to Miller's deposition, he argued at the meeting that the contract was a contribution agreement and pointed out contract provisions that prohibited the distribution and required management approval of anything in exhibit D, which referred to only $1.6 million. The meeting became very acrimonious. Plaintiff said the Bozorgis were stealing and cheating him and he never would have agreed to such a deal. Mr. Bozorgi suggested they could sit down and resolve the problem, but

his daughter remained entrenched. The meeting ended shortly thereafter. Miller walked to the parking garage with plaintiff and his wife, and plaintiff said he would try to talk to Mr. Bozorgi and "see what's going on here." Plaintiff asked Miller to talk to the Bozorgis' counsel. Miller had not read or seen exhibit D before that meeting.

***3** ¶ 11 In his deposition, plaintiff said Miller assured him that the Bozorgis had breached their contract, which prohibited the transfer of his investment. Plaintiff trusted Miller and believed the transfer was some mistake by Mr. Bozorgi's daughter and would be resolved soon. A few days after the meeting, plaintiff spoke to a business colleague who was an experienced real estate developer. When the colleague read exhibit D, he said, "Oh my God, how did you sign those things?" and told plaintiff he never should have signed the agreement. Then plaintiff gave his wife exhibit D to read, and she told him he should not have invested because exhibit D stated that the holding company would take his money.

¶ 12 Plaintiff, Miller, the Bozorgis, and their counsel had several discussions and eventually seemed to reach an agreement to resolve the matter. However, after Miller drafted a settlement agreement in the spring of 2014, the Bozorgis refused to sign it.

¶ 13 On August 8, 2014, plaintiff sued the Bozorgi holding company members and other related entities and individuals (the holding company actions), alleging breach of contract, breach of fiduciary duty, and a statutory violation. Plaintiff sought an accounting, the return of his investment and damages he suffered from his involvement with Bedford. Plaintiff hired other counsel to handle the holding company actions because defendants were not litigators. The first payment of legal fees to plaintiff's other counsel in the holding company actions was made by December 12, 2014, in the amount of $55,721.20. The holding company actions eventually consisted of four cases in court and an arbitration forum. Defendants' involvement in the holding company actions was limited to consulting and reviewing briefs.

¶ 14 On July 1, 2015, plaintiff and defendants entered an agreement to toll the statute of limitations for any malpractice action plaintiff might have against defendants. Specifically, they agreed to toll the limitation period for six months or the remainder of any applicable limitations period, whichever was longer, following the entry of final non-appealable judgments in all the holding company actions or the execution of a settlement agreement that fully and finally settled the holding company actions.

¶ 15 On September 15, 2016, the parties settled the holding company actions. Ultimately, plaintiff's other counsel in the holding company actions were paid over $2 million. All of those payments were made by R.A. Zweig, Inc., which was an S corporation wholly owned by plaintiff.

¶ 16 Defendants continued to work for plaintiff until well into 2016, when plaintiff terminated the relationship, stating that he was sending his legal work to a family member's law firm.

¶ 17 According to plaintiff's deposition, Miller told him at some point that he was very sorry about the case and did not read the contract himself but instead delegated the matter to one of his associates. Plaintiff said Miller had been a close friend and attended family events, so it was a hard and uncomfortable decision to sue him. However, if Miller had explained the implications of exhibit D, plaintiff never would have invested in Bedford and would have avoided the substantial financial losses and aggravation of the holding company litigation.

¶ 18 In Miller's deposition, he testified that plaintiff told him shortly after the September 25, 2013, meeting that he should have "caught" exhibit D. Miller responded that he did what plaintiff asked him to do, the Bozorgis did not have the right to transfer the funds, and hopefully they could get this fixed. Plaintiff then said that people were saying he should sue Miller. Miller asked him what he was talking about and why he would do that, and plaintiff responded that he would be going after the insurance, not after Miller. Plaintiff then retained other counsel to handle the Bedford matter, and Miller was "pretty much out of the loop" after drafting the settlement agreement in the spring of 2014. After plaintiff sued the Bozorgis in August 2014, plaintiff again complained to Miller that he should have "caught" exhibit D, and Miller responded, "How would I have seen that? I just did what you asked me to do." Miller never apologized to plaintiff for his work involving Bedford and continued working for plaintiff well into 2016. Miller testified that if he had seen exhibit D during his review of the management provisions, it might have caused him to look at other provisions in the agreement, but he probably would not have been concerned because there were enough provisions already in the agreement that prevented the transfer of plaintiff's investment funds out of Bedford.

***4** ¶ 19 On March 17, 2017, *i.e.*, six months and one day following the settlement, plaintiff filed this malpractice action against defendants, alleging they breached their standard of care when they failed to adequately review the 2011 investment documents and their implications, advise him that the transaction amounted to a purchase of a portion of the holding company's equity in Bedford rather than a capital contribution to Bedford, and request changes to the documents to prevent the distribution of plaintiff's investment to the members of the holding company. Plaintiff also alleged he would not have invested in Bedford if defendants had properly advised him. Finally, plaintiff alleged that defendants' negligence caused him to incur attorney fees in the holding company actions and opportunity costs resulting from the loss of use of his $2 million investment.

¶ 20 Defendants moved for summary judgment, arguing the malpractice action was time-barred because (1) the statute of limitations began to run on September 25, 2013, when plaintiff learned that his investment had been distributed and defendants purportedly failed to adequately review the contract and advise him about the implications of exhibit D, (2) at the latest, plaintiff's malpractice action accrued as a matter of law when he sued the holding company members on August 8, 2014, (3) the statute of limitations for the malpractice action expired before the holding company actions settled on September 15, 2016, (4) the tolling agreement provided that plaintiff had six months from the September 15, 2016, settlement to file his malpractice action, and (5) plaintiff did not file his malpractice action until March 17, 2017, which was six months and one day after the settlement. Defendants also argued that plaintiff had no recoverable damages because R.A. Zweig, Inc., a separate corporate entity that was not a plaintiff, had paid the legal fees incurred in the holding company actions and Illinois law does not allow recovery to a **legal malpractice** plaintiff for the loss of use of funds.

¶ 21 Plaintiff responded that his malpractice action was timely filed because it did not accrue until he suffered an actual pecuniary injury, which occurred when the holding company actions settled on September 15, 2016. According to plaintiff, before that settlement occurred, any pecuniary injury he suffered as a result of defendants' malpractice was speculative because he could have succeeded on his claims in the underlying holding company actions. Moreover, concurrently pursuing his claims against the holding company and malpractice action against defendants would have forced him to take inconsistent positions regarding the interpretation of exhibit D and thereby undermine his claims in the holding company actions. Plaintiff also argued that the legal fees constituted his damages because he was the sole shareholder of the pass-through S corporation that paid the legal fees[2] and that he could recover for the loss of use of his funds because the holding company actions included equitable claims.

¶ 22 The trial court granted summary judgment in favor of defendants, finding that plaintiff failed to file his **legal malpractice** action within the two-year limitation period of its accrual, which occurred when he suspected that the members of the holding company had defrauded him. Specifically, the court found that the two-year limitation period was triggered at the September 25, 2013, meeting because plaintiff realized that his injury was wrongfully caused when he and Miller were shocked to learn that plaintiff's investment was taken out of Bedford, Miller admitted that he did not review exhibit D, plaintiff suspected that the members of the holding company had defrauded him, and defendants investigated the breach of contract issue. Plaintiff appealed.

¶ 23 II. ANALYSIS

***5** ¶ 24 Summary judgment is proper where the pleadings, admissions, depositions, and affidavits on file demonstrate there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2016). All evidence is construed strictly against the moving party and liberally in favor of the nonmoving party. *Buenz v. Frontline Transportation Co.*, 227 Ill. 2d 302, 308 (2008). Summary judgment is a drastic measure that should only be granted if the movant's right thereto is clear and free from doubt. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). We review a trial court's decision granting summary judgment *de novo*. *Id.*; see *Thomas v. Weatherguard Construction Co.*, 2015 IL App (1st) 142785, ¶ 63 (*de novo* consideration means the reviewing court performs the same analysis that a trial court would perform). The reviewing court may affirm the circuit court's grant of summary judgment on any basis appearing in the record. *Gallaher v. Hasbrouk*, 2013 IL App (1st) 122969, ¶ 17.

¶ 25 A claim for **legal** **malpractice** requires (1) an attorney-client relationship, (2) a duty arising from that relationship, (3) a breach of that duty, and (4) actual damages or injury proximately caused by the breach. *Romano v. Morrisroe*, 326 Ill. App. 3d 26, 28 (2001). Section 13-214.3(b) of the Code provides that

> "[a]n action for damages based on tort, contract, or otherwise * * * against an attorney arising out of an act or omission in the performance of professional services * * * must be commenced within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought." 735 ILCS 5/13-214.3(b) (West 2016).

Section 13-214.3(b) incorporates the discovery rule, which delays commencement of the statute of limitations until the plaintiff " 'knows or reasonably should know of his injury and also knows or reasonably should know that it was wrongfully caused.' " *Morris v. Margulis*, 197 Ill. 2d 28, 35-36 (2001) (quoting *Witherell v. Weimer*, 85 Ill. 2d 146, 156 (1981)).

¶ 26 Knowledge that an injury has been wrongfully caused "does not mean knowledge of a specific defendant's negligent conduct or knowledge of the existence of a cause of action." (Internal quotation marks omitted.) *Carlson v. Fish*, 2015 IL App (1st) 140526, ¶ 23. "A person knows or reasonably should know an injury is 'wrongfully caused' when he or she possesses sufficient information concerning an injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved." *Id.* Once a party knows or reasonably should know both of his injury and that it was wrongfully caused, "the burden is upon the injured person to inquire further as to the existence of a cause of action." (Internal quotation marks omitted.) *Id.*

¶ 27 Plaintiff argues that defendants were not entitled to summary judgment on his malpractice action because the two-year statute of limitations period did not commence until he settled the underlying holding company actions on September 15, 2016, at which time he suffered an actual pecuniary injury. Plaintiff argues that if he had commenced his malpractice claim before the September 2016 settlement, the case would have been subject to dismissal as premature. Furthermore, pursuing his malpractice claim against defendants while the underlying holding company actions were pending would have required him to take inconsistent positions regarding the interpretation of exhibit D and the appropriateness of defendants' conduct in adequately reviewing that document. Alternatively, plaintiff argues that a genuine issue of material fact exists regarding when he knew or should have known of his injury and that it was wrongfully caused because he trusted defendants, who had represented him for 30 years, and believed Miller's assertion that the contract prohibited the Bozorgis from taking plaintiff's investment funds out of Bedford.

***6** ¶ 28 Defendants argue that summary judgment in their favor was proper because plaintiff's malpractice action accrued on September 25, 2013, when plaintiff was shocked to discover that his investment funds had been distributed. At that time, plaintiff knew he had been harmed and that at least the Bozorgi holding company members had harmed him. Defendants argue that plaintiff did not have to be aware that defendants' purported malpractice caused his harm to trigger the statute of limitations on his malpractice action; he had to be aware only that he was wrongfully harmed. Furthermore, shortly after September 25, 2013, plaintiff's colleague and wife told him that exhibit D allowed his investment funds to be distributed. Because plaintiff's malpractice action was premised on the theory that defendants failed to advise him about the effect of exhibit D, his malpractice action accrued at that time.

¶ 29 Defendants contend that the tolling agreement determined whether plaintiff's malpractice action was timely because the statute of limitations had already expired when the underlying holding company actions settled. The tolling agreement provided that plaintiff had to file his malpractice action six months after that settlement, but he missed that deadline by one day. Further, defendants argue that plaintiff has no actionable damages because the 2016 settlement made him whole regarding his $2 million investment and another entity besides plaintiff paid the attorney fees plaintiff incurred in the underlying holding company actions. Defendants also argue that plaintiff is not entitled to damages for the loss of use of his investment funds because that relief would constitute prejudgment interest, which is not recoverable.

¶ 30 The statute of limitations for a **legal** **malpractice** claim does not begin to run when the attorney allegedly commits a negligent act but only when the plaintiff realizes an injury as a result of that negligence. *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 90 (1995). To be considered injured, a legal client must suffer a loss for which he may seek monetary damages. *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 306 (2005). If the damages are as yet "speculative," then the cause of action has not yet accrued, and the malpractice suit is premature. *Lucey v. Law Offices of Pretzel & Stouffer, Chartered*, 301 Ill. App. 3d 349, 353 (1998). Damages are speculative only if

their existence is uncertain, not if the amount is uncertain or yet to be fully determined. *Northern Illinois Emergency Physicians*, 216 Ill. 2d at 307. Generally, the legal client's loss for which he may seek damages will not occur until he has suffered an adverse judgment, settlement, or dismissal of the underlying action caused by the attorney's alleged negligence. *Lucey*, 301 Ill. App. 3d at 356. However, a malpractice claim can accrue before an adverse judgment if it is "plainly obvious * * * that [the plaintiff] has been injured as the result of professional negligence or where an attorney's neglect is a direct cause of the legal expense incurred by the plaintiff." (Internal quotation marks omitted.) *Estate of Bass v. Katten*, 375 Ill. App. 3d 62, 70 (2007).

¶ 31 According to the record, plaintiff had retained defendants and asked them to review documents for a business investment where plaintiff would make a capital contribution in Bedford in exchange for a minority ownership interest in it. In 2011, plaintiff signed the documents and invested $2 million in Bedford. On September 25, 2013, plaintiff and Miller discovered that, contrary to plaintiff's intentions, his investment had been distributed to the members of Bedford's holding company, who cited the provisions of exhibit D as their authority to take those funds. Miller did not review exhibit D, however, he assured plaintiff that the transfer of his investment funds was a breach of contract. During the following week, plaintiff spoke about the implications of exhibit D with his business colleague and his wife, who both told him that he should not have signed the agreement because exhibit D allowed Bedford to transfer any funds he invested to the holding company.

***7** ¶ 32 Plaintiff, after hiring other attorneys, commenced the underlying holding company actions on August 8, 2014. These attorneys were first paid by December 12, 2014. On July 1, 2015, plaintiff and defendants entered an agreement to toll the statute of limitations for any **legal malpractice** action. Plaintiff settled the holding company actions on September 15, 2016, and sued defendants for malpractice on March 17, 2017.

¶ 33 Construing the evidence strictly against defendants and in favor of plaintiff, we find that there was no genuine issue as to any material fact and that defendants were entitled to judgment because plaintiff's malpractice claim accrued, at the latest and as a matter of law, by December 12, 2014, which was when he was aware of defendants' purported neglect and was injured. By then, plaintiff knew that the dispute about the interpretation of exhibit D, which document he alleged defendants negligently failed to review, advise him about, and recommend amendments to, directly caused plaintiff's legal expenses in the underlying holding company actions since plaintiff had to retain other counsel to litigate and arbitrate the holding company actions in an effort to achieve the result plaintiff initially sought through defendants' representation in the 2011 transaction. *Compare Goran v. Glieberman*, 276 Ill. App. 3d 590, 596 (1995) (the plaintiff's **legal malpractice** cause of action accrued when she incurred attorney fees of $1297 to fix the defendant attorney's errors because the plaintiff had to hire substitute counsel to redo the record on appeal and brief that were struck by the appellate court for technical defects), with *Warnock v. Karm Winand & Patterson*, 376 Ill. App. 3d 364, 369-70 (2007) (where plaintiffs could not have known that the letter agreements for a real estate sale drafted by their attorney were faulty until the trial court granted defendants' motion for summary judgment, the limitations period did not begin to run until the adverse judgment was entered), and *York Woods Community Ass'n v. O'Brien*, 353 Ill. App. 3d 293, 299 (2004) (when the plaintiff incurred the additional attorney fees, it was not yet clear that those fees were directly attributable to former counsel's alleged neglect, so the plaintiff's malpractice action did not accrue until the court decided in the underlying litigation that former counsel's incorporation of plaintiff had failed).

¶ 34 Plaintiff cites *Lucey*, 301 Ill. App. 3d 349, to support his claim that filing his malpractice lawsuit before the settlement of the holding company actions would have been premature. In *Lucey*, the plaintiff started his own brokerage firm and consulted a law firm to determine whether he could solicit his former employer's clients. The plaintiff followed the law firm's advice, and a main client of his former employer transferred its account to the plaintiff's firm. The former employer sued the plaintiff for the loss of the account, and while that action was pending, the plaintiff filed a **legal malpractice** action against the law firm he consulted, alleging he had received inaccurate advice. This court held that the plaintiff's malpractice action was premature and subject to dismissal without prejudice on statute of limitations grounds because, under the circumstances, his damages were speculative and no cause of action for malpractice could be said to exist since it was not clear that he had been injured as the result of professional negligence. *Id.* at 353, 355, 358. His damages were only a mere potentiality until the underlying litigation with his former employer was resolved. *Id.* at 359.

***8** ¶ 35 The holding in *Lucey* is inapposite to this case. Plaintiff was not sued for any alleged negligence by defendants. Unlike *Lucey*, where it was unclear that the attorneys had provided any negligent service to the plaintiff, here, plaintiff Zweig argued that defendant's negligence was a direct cause of the legal expenses he incurred to rectify the damage he sustained when the holding company distributed his $2 million. Furthermore, the possibility of plaintiff's success in the underlying

holding company actions would not have negated the injury caused by defendants' alleged malpractice, namely, incurring additional attorney fees by having to hire litigation counsel to compel the holding company members to return plaintiff's transferred investment funds. Consequently, the policy rationale against "prophylactic malpractice cases," as mentioned in *York Woods Community Ass'n*, 353 Ill. App. 3d at 299, is not a factor in this case.

¶ 36 Finally, plaintiff argues that pursuing his malpractice action against defendants while his claims in the holding company actions were still pending would have forced him to take inconsistent positions regarding the interpretation of exhibit D and thereby undermined his claims in the holding company actions. Plaintiff's argument is not persuasive. As is commonly done in the context of **legal malpractice** actions, the parties entered into an agreement that tolled the statute of limitations pending the outcome of the underlying litigation. Consequently, plaintiff avoided the quandary of taking inconsistent positions regarding the interpretation of exhibit D.

¶ 37 III. CONCLUSION

¶ 38 We conclude that the statute of limitations for plaintiff's **legal malpractice** claim commenced at the latest and as a matter of law by December 12, 2014, the date he first paid attorney fees to other counsel in the underlying holding company actions to attempt to avoid the effect of defendants' alleged error regarding exhibit D in the Bedford investment. As a result, plaintiff's lawsuit, filed on March 17, 2017, failed to comply with the two-year statute of limitations. Consequently, the parties' tolling agreement, which required plaintiff to file his malpractice lawsuit within six months of the September 15, 2016, settlement of the holding company actions, determined whether plaintiff's malpractice action was timely filed. Because it was filed six months and one day after the settlement, the lawsuit was not timely. Accordingly, we conclude that the trial court properly granted summary judgment in favor of defendants.

¶ 39 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 40 Affirmed.

Presiding Justice Gordon and Justice Reyes concurred in the judgment and opinion.

All Citations

--- N.E.3d ----, 2020 IL App (1st) 191409, 2020 WL 7863345

Footnotes

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

[2] Plaintiff states that, as an S corporation, any profits R.A. Zweig, Inc. generated passed through directly to his personal income, and R.A. Zweig, Inc.'s direct payment of his personal expenses was treated as a distribution of profits to him. See 26 U.S.C. §§ 1368, 1375(d) (2012); *Attebury v. United States*, 430 F.2d 1162, 1166-67 (5th Cir. 1970); *Steinberg v. Buczynski*, 40 F.3d 890, 891-92 (7th Cir. 1994).

