

No. 1-10-3838

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

**IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT**

TRAVIS THOMAS,)	Circuit Court of
)	Cook County
)	
Plaintiffs-Appellant,)	No. 10 L 05907
)	
v.)	
)	
MARIO E. UTRERAS and)	
HINSHAW & CULBERTON, LLP,)	The Honorable
)	James D. Egan,
Defendants-Appellees.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Karnezis concurred in the judgment.

ORDER

- ¶ 1 Held: Dismissal of plaintiff's legal malpractice complaint was proper where the statute of limitations period began to run when his underlying case was dismissed, he filed his legal malpractice complaint more than 2 years after the date of that dismissal, and his belief in defendant's assurances on the matter after the dismissal was not reasonable.
- ¶ 2 Appellant Travis Thomas appeals the order of the circuit court granting defendant Mario E. Utreras' motion to dismiss Thomas' legal malpractice complaint. On appeal, Thomas contends

(1) the trial court erred in determining that the dismissal of his underlying case against Dominick's Finer Foods, Inc. (Dominick's) triggered the legal malpractice statute of limitations period; and (2) Utreras should be equitably estopped from asserting the statute of limitations defense because he assured Thomas that everything was fine on appeal after the dismissal of the Dominick's case. We affirm.

¶ 3 JURISDICTION

¶ 4 The trial court entered a final judgment in the instant case on December 10, 2010, and plaintiff filed his notice of appeal on December 27, 2010. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 5 BACKGROUND

¶ 6 On January 23, 2004, Thomas filed a *pro se* employment discrimination claim in federal court against Dominick's in which he alleged that Dominick's prevented him from exercising his contractual right to claim the working hours of less tenured white employees. Thomas retained Utreras on April 13, 2004, to represent him in the lawsuit. The court later consolidated Thomas' suit into *Milam, et al. v. Dominick's Finer Foods, Inc., et al.*, 03-C-9343 (N.D. Ill.) which was brought by Thomas' colleague. Additional employees, also represented by Utreras, joined the consolidated action.¹

¶ 7 On August 22, 2006, while the Dominick's action was pending, Utreras joined the firm

¹Although other employees were also part of the underlying suit against Dominick's, for purposes of this appeal we will refer to the claims as Thomas' claims.

Hinshaw & Culbertson, LLP (Hinshaw) as a partner. Utreras informed Thomas of his intent to join Hinshaw. From September, 2006, Utreras sought extensions for filing Thomas' responses to Dominick's motions for summary judgment but he failed to meet the extended deadlines. In November, 2006, Thomas filed a *pro se* motion entitled "Motion of Conflict of Interest and Ethics" in which he expressed concerns regarding Hinshaw's representation of Safeway, Dominick's parent corporation and Utreras' commitment to a defense based practice at the firm. His complaint was referred to the Attorney Registration and Disciplinary Commission (ARDC).

¶ 8 On December 12, 2006, the court granted Dominick's motions to strike Thomas' summary judgment response filed by Utreras, and entered judgment in favor of Dominick's. Upon a motion to reconsider, the court vacated the summary judgment order in January, 2007, and reinstated Thomas' claims. Meanwhile, Hinshaw terminated Utreras' employment in January, 2007. Dominick's then filed a motion to dismiss based on lack of evidence of damages, which the trial court granted on March 3, 2008. Utreras prepared the appeal to the seventh circuit, and continually assured Thomas that the case was fine and he had done nothing improper.

¶ 9 On June 18, 2008, while the appeal was pending, Thomas filed a complaint against Utreras with the ARDC. The complaint was titled "Neglect of Racial Discrimination/ Employment Case & Breach of Fiduciary Duty to Partners at Hinshaw & Culbertson, LLP." The complaint detailed the conflict of interest created when Utreras agreed to join the partnership of Hinshaw. It detailed Utreras' ethical obligations to Hinshaw and his failure to close his solo practice once he began working for the firm. The complaint also outlined Utreras' failure to timely file Thomas' motion for summary judgment in the Dominick's case. Thomas did not

understand at the time that he had the right to terminate Utreras' representation, so he maintained his relationship with Utreras despite filing the complaint.

¶ 10 On December 9, 2009, the seventh circuit affirmed the dismissal of the Dominick's case. On January 19, 2010, the ARDC issued its stipulated findings and reprimand of Utreras. It stated that the reprimand was "for failing to act with reasonable diligence and promptness in representing [his] clients *** in a racial discrimination/employment lawsuit, which resulted in summary judgment being entered in favor of the defendants and against [his] clients." On May 18, 2010, Thomas filed this legal malpractice complaint against Utreras and Hinshaw, alleging that the ARDC's findings reprimanding Utreras showed he breached a duty to Thomas, and that his inadequate representation resulted in the district court's grant of summary judgment against him. He based his allegations against Hinshaw on vicarious liability. Thomas sought damages in excess of \$50,000 for the failure of his claim, and for emotional distress.

¶ 11 On September 7, 2010, Utreras filed a combined motion to dismiss Thomas' claim pursuant to section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2008)). Hinshaw filed a separate motion to dismiss. Utreras' section 2-619 motion alleged that the malpractice claim was time-barred. His section 2-615 motion argued that Thomas' complaint contained no allegations that his Dominick's action would have succeeded absent Utreras' representation. On December 10, 2010, the trial court granted the motion to dismiss pursuant to section 2-619, noting that "[a] cause of action for legal malpractice generally accrues upon the entry of an adverse judgment, regardless of subsequent motions to vacate that judgment." It found that all of Thomas' allegations of injury occurred during the underlying Dominick's case

which terminated on March 3, 2008, when the court granted summary judgment in favor of Dominick's. Since Thomas filed the present legal malpractice action on May 18, 2010, more than two years later, it was time-barred. The trial court also rejected Thomas' equitable estoppel arguments and dismissed the action as to both Utreras and Hinshaw.² The trial court did not reach the merits of the section 2-615 motion. Thomas filed this timely appeal.

¶ 12

ANALYSIS

¶ 13 Thomas first contends the trial court erred in determining that his malpractice claim was barred by the statute of limitations, resulting in the dismissal of his claim pursuant to section 2-619. A section 2-619 motion to dismiss admits the legal sufficiency of the complaint, but asserts an affirmative defense or other matter that defeats the claim. *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 413 (2004). Such a motion admits as true all well-pleaded facts and inferences reasonably drawn from those facts. *Porter v. Decatur Memorial Hosp.*, 227 Ill. 2d 343, 352 (2008). Furthermore, all pleadings and supporting documents are viewed in the light most favorable to the non-moving party. *Id.* We review a section 2-619 dismissal *de novo*. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006).

¶ 14 An action for legal malpractice must be brought "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 2006). The two year statute of limitations does not necessarily begin on the date the plaintiff suffered the actual injury. *Romano v. Morrisroe*, 326

²Thomas in this appeal only addresses his claims against Utreras; therefore we do not address his claims against Hinshaw.

Ill. App. 3d 26, 28 (2001). Rather, the discovery rule applies and the limitations period begins to run when the plaintiff knows or reasonably should have known "that he has been injured and that his injury was wrongfully caused." *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill. 2d 240, 249 (1994). Although the date the statute of limitations begins to run is usually a fact question, a court may determine the issue as a matter of law if the facts are undisputed and only one conclusion may be drawn from those facts. *Lucey v. Law Offices of Pretzel & Stouffer, Chtrd.*, 301 Ill. App. 3d 349, 359 (1998).

¶ 15 Generally, a plaintiff should reasonably become aware that he has been injured by his attorney's actions when a judgment has been entered against him in the underlying action, even if posttrial motions or appeals remain pending. *Zupan v. Berman*, 142 Ill. App. 3d 396, 399 (1986); *Belden v. Emmerman*, 203 Ill. App. 3d 265, 270 (1990). This reasoning holds true especially when the malpractice complaint is based on conduct that occurred during the underlying case, since "the element of damage was known or should have been known" to the plaintiff on the date of the adverse judgment. *Belden*, 203 Ill. App. 3d at 270. In such situations, the plaintiff's knowledge of the elements of the malpractice action can be established as a matter of law. *Id.*

¶ 16 Here, the relevant facts are not in dispute. Thomas' malpractice complaint alleged that Utreras continued to represent him after becoming a partner at Hinshaw despite a potential conflict of interest. As a result, Utreras failed to assert a retaliatory demotion claim within the statute of limitations period, failed to conduct sufficient discovery, failed to present adequate expert testimony concerning damages, failed to disclose disagreements with Thomas which compromised settlement agreement negotiations, and failed to preserve a sufficient record for

appeal. These allegations pertained to Utreras' conduct during the Dominick's case and when the district court dismissed the action on March 3, 2008, Thomas reasonably should have known that he may have suffered wrongful injury. See *Belden*, 203 Ill. App. 3d at 270. Accordingly, Thomas had until March 3, 2010, to file his malpractice complaint against Utreras. He did not file this action, however, until May 18, 2010, after the statute of limitations period had expired. Therefore, his suit was time-barred and the trial court properly dismissed it pursuant to section 2-619.

¶ 17 Thomas disagrees, arguing that the issue here should not be determined as a matter of law because other dates could have triggered the limitations period. He posits that the proper date on which the statute of limitations began to run was December 9, 2009, the date the seventh circuit court of appeals affirmed the dismissal of his underlying action. Before the seventh circuit had rendered its decision, he reasons, his damages were nonexistent and a malpractice claim would have needlessly wasted judicial resources. As support, he cites *York Woods Community Assn. v. O'Brien*, 353 Ill. App. 3d 293 (2004), *Jackson Jordan*, and *Lucey*.³

¶ 18 Despite Thomas' contention, these cases do not contradict the general rule in Illinois that a cause of action for legal malpractice accrues on the date an adverse judgment, settlement, or

³In his reply brief, Thomas cites cases from other jurisdictions to support his argument that a cause of action for legal malpractice does not accrue until the decision on appeal has been rendered. See *Northwestern Nat'l Ins. Co. v. Osborne*, 573 F. Supp. 1045 (E.D. Ky 1983), *Amfac Distribution Corp. v. Miller*, 673 P.2d 795 (Ariz. Ct. App. 1983), and *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154 (Tex. 1991). However, where Illinois case law is on point regarding an issue, we need not look to other states for guidance. *Graham v. Commonwealth Edison Co.*, 318 Ill. App. 3d 736, 744 (2000).

dismissal has been entered against the plaintiff in the underlying suit. *Warnock v. Karm Winand & Patterson*, 376 Ill. App. 3d 364, 371-72 (2007). In *York Woods*, the trial court had ruled in the plaintiff's favor and the appellate court's reversal of the trial court's judgment was the first adverse ruling against the plaintiff. *York Woods*, 353 Ill. App. 3d at 299. In *Jackson Jordan*, the court found that although earlier events could have been the trigger date, the latest date would have been when the "appeals court rendered the *first* ruling adverse to Jackson." (Emphasis added.) *Jackson Jordan*, 158 Ill. 2d at 250-51. In *Lucey*, the court determined that the malpractice suit was premature because the underlying claim had not yet been resolved and thus the plaintiff had not suffered any adverse consequences. *Lucey*, 301 Ill. App. 3d at 353. Here, even though Thomas subsequently filed an appeal with the seventh circuit, the district court's March 3, 2008, dismissal of Thomas' discrimination claim was the first adverse ruling against him. Therefore, the statute of limitations period began to run on March 3, 2008. See *Belden*, 203 Ill. App. 3d at 269 (limitations period began to run on the date of the adverse settlement order, not on the date the appellate court affirmed the order).

¶ 19 Thomas also argues that he is a high school educated grocery clerk with no legal training who could not have known that Utreras caused him wrongful injury until the seventh circuit affirmed the dismissal of his underlying case. He points out that he never specifically alleged in his complaints to the district court or ARDC that Utreras' conduct caused the dismissal of his underlying case. However, Thomas need not know for certain that Utreras engaged in negligent conduct before the statute of limitations begins to run. *Zupan*, 142 Ill. App. 3d at 399. Rather, the limitations period begins when a plaintiff becomes aware "that an injury has occurred and

that it was wrongfully caused." *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 171 (1981). At that point, the injured party bears the burden "to inquire further as to the existence of a cause of action." *Witherell v. Weimer*, 85 Ill. 2d 146, 156 (1981).

¶ 20 The record indicates that despite his high school education and background, Thomas suspected that Utreras began to perform below par as his attorney after joining Hinshaw. Utreras joined Hinshaw on August 22, 2006. Thomas had reservations about Utreras' professional conduct as early as November, 2006, when he filed a *pro se* complaint regarding a possible conflict of interest. On June 18, 2008, a little more than three months after his underlying case was dismissed by the district court, Thomas filed a complaint with the ARDC which contained many of the same allegations about Utreras' conflict of interest and professional conduct found in his malpractice claim. Filing of the ARDC claim clearly indicated Thomas' belief that he may have been harmed by the questionable conduct of his attorney. See *Kheirkhavash v. Baniassadi*, 407 Ill. App. 3d 171, 179 (2011). "Even if [Thomas] had not been absolutely certain of [his] grounds for a malpractice action at that time, based upon [his] awareness, [he] had 'an obligation to inquire further to determine whether an actionable wrong was committed. *** [O]nce it reasonably appears that an injury was wrongfully caused, the party may not slumber on his rights.'" *Zupan*, 142 Ill. App. 3d at 399, quoting *Nolan*, 85 Ill. 2d at 171.

¶ 21 Thomas further contends that the doctrine of equitable estoppel precludes Utreras from asserting the statute of limitations defense here. For Thomas to prevail on his estoppel argument, he must show that he "relied on acts or representations of [Utreras] which caused [him] to refrain from filing suit within the applicable statute of limitations." *Kheirkhavash*, 407 Ill. App. 3d at

182 (quoting *Leffler v. Engler, Zoghlin, & Mann, Ltd.*, 157 Ill. App. 3d 718, 722-23 (1987)). His reliance, however, must have been reasonable. *Jackson Jordan*, 158 Ill. 2d at 252.

¶ 22 Thomas, citing *Jackson Jordan*, argues that he did not file his malpractice claim after the dismissal because he reasonably relied on Utreras' "persistent assurances" that everything was fine on appeal, and that Utreras had done nothing wrong. He argues that it was reasonable for him to believe Utreras because he did succeed in getting the case reinstated in 2007 after a summary judgment. Unlike the plaintiff in *Jackson Jordan*, however, Thomas' own actions belie the notion that he reasonably relied on Utreras' assurances. As discussed above, Thomas knew enough to file a complaint concerning the ethics of Utreras' conduct in November, 2006, prior to the dismissal of his case. He filed another complaint with the ARDC in June, 2008, shortly after his case was dismissed and despite Utreras' assurances that everything was fine. He filed the complaint because he wanted Utreras to be held accountable for putting his own career development above his clients' interests. Given Thomas' concerns about Utreras' conduct, any reliance he may have placed in Utreras' assurances after the dismissal cannot be deemed reasonable.

¶ 23 Moreover, despite Utreras' assurances, the seventh circuit affirmed the dismissal on December 9, 2009, approximately three months before the statute of limitations period expired. At that point, given Thomas' prior concerns, it should have been immediately clear to him that he may have suffered injury as a result of Utreras' conduct. Also, Thomas had already filed a complaint with the ARDC on June 18, 2008, which contained many of the same allegations found in his malpractice complaint. Three months would have provided more than enough time

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in which to file his malpractice cause of action. The doctrine of equitable estoppel does not apply "if defendant's conduct terminated within ample time to allow the plaintiff an opportunity to file a cause of action within the limitation period." *Kheirkhavash*, 407 Ill. App. 3d at 182, quoting *Barrat v. Goldberg*, 296 Ill. App. 3d 252, 259 (1998).

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

¶ 25 Affirmed.