2018 IL App (2d) 170614-U
No. 2-17-0614
Order filed March 12, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

RAMESH ANNE,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 17-L-68
	)	
MARC ALTENBERNT,	)	Honorable
	)	Susan Clancy Boles,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed as untimely plaintiff's legal-malpractice claim, as the limitations period began no later than when plaintiff hired a new attorney in the underlying case, after the entry of judgment, to pursue relief that defendant allegedly had failed to secure.

¶ 2 Plaintiff, Ramesh Anne, filed a legal malpractice complaint against defendant, attorney Marc Altenbernt, who had represented him in the suit dissolving plaintiff's marriage. He appeals a judgment dismissing his complaint (see 735 ILCS 5/2-619(a)(5) (West 2016)) as barred by the two-year statute of limitations (735 ILCS 5/13-214.3(b) (West 2016)). We affirm.

¶ 3 On February 10, 2017, plaintiff filed a two-count complaint. Count I, for malpractice, alleged the following facts. On or about April 1, 2014, plaintiff retained defendant to represent him in a pending suit to dissolve his marriage to Padmasree Anne (Anne). At the time, both parties had accumulated retirement benefits in their 11-year marriage. Anne was a state employee, and she had a defined-benefit plan through the State Employees' Retirement System (SERS). As such, it would provide her a fixed monthly payment upon her retirement. Under Illinois law, in a dissolution-of-marriage proceeding, a defined-benefit plan can be treated in one of two ways. If actuarial evidence is presented, the court may divide the present value of the plan. Otherwise, the court may divide the future value of the plan, based on the length of the marriage and the dollar amount of future benefits.

¶ 4 Count I alleged further as follows. At trial, Anne introduced exhibits detailing the SERS plan, including a printout from SERS. It stated that, as of June 30, 2013, Anne had contributed $37,877.72 to her account and her estimated retirement benefit was $2520 per month, payable as of June 1, 2021. This exhibit was entered into evidence. Defendant did not introduce any evidence relating to Anne's retirement benefits and did not present any evidence or argument to inform the court that the SERS account was a defined-benefit plan. On December 30, 2014, the court dissolved the marriage. On June 15, 2015, it completed the judgment by dividing the marital property equally. However, because defendant did not inform the court of the character of Anne's SERS plan, the judgment failed to account for the future monthly payments to her. As a result, it valued the SERS plan at only $40,000.

¶ 5 Count I alleged that, but for defendant's inaction, plaintiff would have been awarded 50% of Anne's monthly annuity payments beginning in June 2021. Based on his life expectancy of 16 years past 2021, plaintiff was deprived of $241,920 in marital property. Alternatively,

because defendant failed to introduce evidence or argument that Anne's account was a defined-benefit plan with a present value of $869,357.66 (according to calculations attached to the complaint), plaintiff was denied marital property worth $434,678.83.

¶ 6 Count I alleged that defendant had been negligent in failing to conduct discovery to determine the nature and extent of Anne's retirement accounts; failing to ascertain the present value of the SERS account; failing to present evidence or argument on the character of the account; and failing to present evidence or argument on either the present value of the account or the value of the future payments to Anne.

¶ 7 Count II of the complaint was for breach of contract. It rested on the same allegations as count I but asserted that defendant had breached his employment agreement by his various failures. On both counts, plaintiff requested damages of either half the present value of Anne's SERS account or the value of half of Anne's future payments, based on his life expectancy.

¶ 8 Defendant moved to dismiss the complaint (see 735 ILCS 5/2-619(a)(5) (West 2016)), contending that count I was barred by the statute of limitations for attorney malpractice, which states that a complaint must be filed "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). Defendant contended that, more than two years before he filed his complaint, plaintiff knew or should have known sufficient facts to inquire further into whether an actionable wrong had been committed. Specifically, plaintiff had been present at trial in December 2014, and the final judgment had been issued on January 15, 2015. Thus, no later than January 15, 2015, plaintiff was aware, or should have been aware, that the SERS plan existed; that it would pay Anne $2520 per month starting June 1, 2021, for as long as she lived;

and that the court had awarded him only $20,000 as his share of the account. Therefore, defendant reasoned, the limitations period began no later than January 15, 2015.

¶ 9 Defendant also contended that count II was improper because plaintiff could not simultaneously pursue claims for legal malpractice and breach of contract based on the same facts (see *Majumdar v. Lurie*, 274 Ill. App. 3d 267, 273-74 (1995)).

¶ 10 Plaintiff responded as follows. When a limitations period starts is ordinarily a question of fact. Plaintiff did not see the signed judgment until January 20, 2015. From reading it, he would not have known that Anne's SERS account was a defined-benefit plan or that the trial court had to apportion it in any particular way. The judgment merely stated that the account was worth $40,000. Plaintiff did not know and could not have known that the annuity payments had not been factored into the judgment. It was only when his new attorney filed a motion to reconsider, on February 13, 2015, that she explained to him that there had been a share of marital property—50% of the monthly payments—that he was not going to receive. And only after a "pre-trial conference" on April 22, 2015, in which the judge informed both parties that defendant had not told the court that the SERS account was a defined-benefit plan, did plaintiff learn from his new attorney that defendant's negligence had caused the trial court to err. Thus, the complaint had been timely filed on February 10, 2017.[1]

[1] Plaintiff also contended that the proper limitations period was five years, because defendant had fraudulently concealed his negligence from plaintiff. See 735 ILCS 5/13-215 (West 2016). However, defendant's reply pointed out that plaintiff had not pleaded fraudulent concealment and that his response alleged no facts that would amount to fraudulent concealment. On appeal, plaintiff does not contend that the judgment can be reversed on this basis.

¶ 11 Plaintiff's response attached an affidavit in which he stated the following. On January 19, 2015, plaintiff, who was wondering about the soundness of the judgment in other respects, first met with his new attorney and showed her an unsigned copy of the proposed judgment. She told him that she would need a trial transcript to understand what had happened. Plaintiff called defendant's office; on January 20, 2015, defendant e-mailed him a copy of the signed judgment. On January 27, 2015, "after many telephones [*sic*] calls and emails later," plaintiff retained his new attorney. Not until February 12, 2015, when his new attorney told him that "the judge had made a big mistake and that we needed to hurry up and ask her to correct it," did plaintiff know that he had not received all his rights. "At that time, [plaintiff] thought the judge would see her mistake and fix it." On February 13, 2015, his new attorney filed the motion to reconsider. On April 22, 2015, after his new attorney and Anne's attorney had met with the judge in private, plaintiff first learned that the judge's mistake had resulted from defendant's failure to "show her at the trial" that plaintiff had rights in Anne's retirement payments.

¶ 12 In reply, defendant argued as follows. Plaintiff had not denied that count II was improper and must be dismissed with prejudice. As to count I, plaintiff had stated that he met with his current attorney on January 20, 2015, and retained her a week later. This demonstrated that, more than two years before he filed his action, plaintiff was on notice of a potential injury.

¶ 13 After hearing arguments, the court noted that, on January 27, 2015, after numerous telephone calls and e-mails back and forth, plaintiff decided to hire his new attorney. The court reasoned that, by this time, plaintiff had a reasonable belief that he had been injured by defendant's wrongful conduct. Thus, his complaint was untimely. The court dismissed plaintiff's complaint. He timely appealed.

¶ 14 On appeal, plaintiff argues that when the limitations period started to run was an issue of fact that should not have been decided on a motion to dismiss. On our *de novo* review (see *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 368 (2003)), we disagree.

¶ 15 The statute of limitations for attorney malpractice incorporates the discovery rule: an action must be filed within two years of when the plaintiff "knew or reasonably should have known of the injury for which damages are sought." 735 ILCS 5/13-214.3(b) (West 2016). Thus, the period begins when the plaintiff knows enough about his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved. *Carlson v. Fish*, 2015 IL App (1st) 140526, ¶ 23; *Butler v. Mayer, Brown & Platt*, 301 Ill. App. 3d 919, 923 (1998). Actual knowledge is not required. *Carlson*, 2015 IL App (1st) 140526, ¶ 23. Generally, the injury does not occur until the plaintiff has suffered an adverse judgment, settlement, or dismissal in the underlying action. *Nelson v. Padgitt*, 2016 IL App (1st) 160571, ¶ 13. When the period begins is usually a question of fact, but can be decided as a matter of law if the facts allow only one conclusion. *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill. 2d 240, 250 (1994).

¶ 16 Plaintiff argues in large measure that there is reason to infer that he did not know until less than two years before he filed his malpractice suit that he had suffered the injury at issue (the loss of his 50% share of the actual benefits (or present value) of Anne's SERS plan). He relies on the statements in his affidavit to this effect. As noted, however, the test is not when the plaintiff actually knew of his injury but when he knew or *should have known* sufficient facts to place him on inquiry. Moreover, although plaintiff is correct that the mere entry of an adverse judgment does not necessarily start the limitations period, that general proposition does not resolve the present case. Here, we agree with the trial court that, as a matter of law, plaintiff's duty of inquiry began no later than January 27, 2015, when he retained his new attorney.

¶ 17 Ironically, the very egregiousness of defendant's alleged oversight shows that plaintiff should have recognized the problem early on. Defendant failed to see that the judgment shortchanged plaintiff because it ignored clear evidence from the trial (assuming of course that the facts as plaintiff alleged were correct and complete). Equally remarkably (again assuming plaintiff's version of the facts), the trial court failed to process the same evidence. (According to plaintiff, the trial judge later admitted as much.) The evidence to which we refer was Anne's exhibit, duly admitted and known to both parties and their attorneys. It stated plainly that her SERS plan would pay her $2520 per month from the date of her retirement, as early as June 1, 2021, for as long as she lived. Plaintiff attended the trial and was able to read the judgment in light of the plain meaning of the exhibit, which required no legal expertise to understand. Doing so would have alerted even a layperson to the likelihood that the trial court had grossly undervalued the pension at $40,000, which would cover well under two years' payments.

¶ 18 That defendant and the judge missed this evidence did not mean that plaintiff and his new attorney should not have been aware of it, and its implications, shortly after the judgment. Under the discovery rule, the oversights of others did not excuse plaintiff from his duty to inquire based on the available facts. And, at least after he and his prospective new attorney had spent approximately a week examining the judgment, corresponding about it, and resolving on the need for plaintiff to obtain new counsel, that duty was triggered.

¶ 19 The parties cite various cases that they contend control here. These cases were decided on their particular facts, as this case must be, and we find it unnecessary to discuss them.

¶ 20 The judgment of the circuit court of Kane County is affirmed.

¶ 21 Affirmed.