2014 IL App (1st) 131523-U

SIXTH DIVISION
July 11, 2014

No. 1-13-1523

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

	)	Appeal from the
ROSE ANNE GODBOLD,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellant,	)	
	)	
v.	)	No. 12 L 7094
	)	
KARLIN & FLEISHER, LLC n/k/a KARLIN,	)	
FLEISHER & FALKENBERG, LLC,	)	Honorable
	)	Kathy M. Flanagan,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's section 2-619(a)(5) dismissal of the legal malpractice action was affirmed where the complaint was filed over two years after the adverse final judgment in the underlying suit was entered.

¶ 2 Plaintiff, Rose Anne Godbold (Godbold), appeals the circuit court's dismissal of her legal malpractice complaint pursuant to section 2-619(a)(5) of the Code of Civil Procedure (Code) (735 ILCS 2-619(a)(5) (West 2012)) as untimely under the two-year statute of limitations in

section 13-214.3(b) of the Code (735 ILCS 5/13-214.3(b) (West 2012)). Plaintiff's legal malpractice action against defendant, Karlin & Fleisher, LLC n/k/a Karlin, Fleisher & Falkenberg (Karlin), was premised on Karlin's failure to timely file her medical negligence action against Advocate Health and Hospitals Corp. d/b/a/ Advocate Medical Group (AMG) and Brian McMahon (McMahon), resulting in the dismissal of that action on May 7, 2010. Thereafter, plaintiff appealed the dismissal of the medical negligence action, and we affirmed the dismissal. *Godbolt v. Advocate Health and Hospitals Corp.*, No. 1-10-1321 (June 17, 2011) (unpublished pursuant to Supreme Court Rule 23). On June 25, 2012, more than two years after the dismissal of the medical malpractice action, plaintiff filed the instant legal malpractice complaint, the dismissal of which she now appeals.

¶ 3 On appeal, plaintiff contends the circuit court improperly dismissed her legal malpractice action because the statute of limitations period was tolled pending the determination of the appeal in the underlying medical negligence action. For the reasons which follow, we affirm the determination of the circuit court.

¶ 4 I. BACKGROUND

¶ 5 On June 1, 2009, plaintiff filed a medical negligence complaint, which is the basis for her current allegations of legal malpractice. In the underlying medical malpractice action defendant Karlin represented plaintiff. In that lawsuit, plaintiff sought recovery from defendants AMG and McMahon for allegedly failing to diagnose her Hodgkin's disease from a Positron Emission Tomography (PET) scan at AMG conducted by McMahon on February 4, 2005. In August or September 2005, plaintiff learned that protocols were not followed in the administration of the scan and the results were fraudulently concealed. While plaintiff was aware of the negligent and fraudulent acts of AMG and McMahon in August or September of 2005, she did not know she

was injured as a result of those acts until June 18, 2007.

¶ 6 AMG and McMahon moved to dismiss the medical negligence action. On May 7, 2010, the circuit court partially granted the motion with prejudice, finding five of the eight counts in plaintiff's complaint to be untimely as plaintiff admitted to discovery of the fraud and her claim within a reasonable amount of time before the expiration of the four-year repose period under section 13-212 of the Code (735 ILCS 5/13–212 (West 2006)).[1] The circuit court further determined that the five-year repose period in section 13-215 of the Code (735 ILCS 5/13-215 (West 2006)) did not apply to toll the repose period. The circuit court included a Rule 304(a) finding in its order. Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). Plaintiff appealed, and we affirmed the circuit court's determination in *Godbolt v. Advocate Health and Hospitals Corp.*, No. 1-10-1321 (June 17, 2011) (unpublished pursuant to Supreme Court Rule 23).

¶ 7 On June 25, 2012, plaintiff filed the present legal malpractice complaint against defendant Karlin. The complaint alleged she retained defendant to represent her in the aforementioned medical negligence action against AMG and McMahon based on their failure to sufficiently diagnose her Hodgkin's disease. On November 10, 2008, defendant provided plaintiff with a retainer agreement and requested she sign medical authorizations and submit a draft for $2,500 payable to defendant. On November 15, 2008, defendant undertook the representation of plaintiff. The complaint further alleged that by virtue of this representation, defendant had a duty to represent plaintiff in an action against AMG and McMahon and that defendant would perform this representation in "a timely, non-negligent, responsible, competent,

[1] In addition to AMG and McMahon, plaintiff's medical negligence complaint named as defendants Advocate Health and Hospitals Corp. d/b/a Advocate Christ Hospital and Medical Center, Robert N. Stein, M.D., and Associates in Medical Oncology, S.C.

and zealous fashion, all while exercising ordinary skill and knowledge." On February 13, 2009, however, defendant advised plaintiff in writing that they " 'are declining to represent you [ROSE ANNE] in connection with a possible medical negligence action you may have * * * it is our opinion that any claim you may have had is barred by the statute of repose.' "

The complaint asserted that as a direct and proximate result of defendant's negligent acts or omissions plaintiff was denied, by court orders, from pursuing a cause of action against AMG and McMahon. Plaintiff sought a sum in damages in excess of $50,000.

¶ 8 On August 30, 2012, pursuant to a motion to consolidate filed by plaintiff, the circuit court consolidated the legal malpractice cause of action with the remaining counts of the underlying medical negligence cause of action for discovery purposes.

¶ 9 On September 14, 2012, defendant filed a motion to dismiss pursuant to section 2-619(a)(5) of the Code as well as a memorandum of law in support of the motion. Defendant asserted that plaintiff's legal malpractice claim was subject to section 13-214.3(b) of the Code, which required plaintiff to file her complaint within two years from the date she knew or reasonably should have known of the injury for which she seeks damages. Defendant asserted that the accrual date in the context of a legal malpractice cause of action is typically the date of a final, adverse judgment against the client. Defendant maintained plaintiff's injury accrued on May 7, 2010, when the circuit court dismissed the underlying medical negligence claim against AMG and McMahon with prejudice and found the order to be final and appealable under Rule 304(a). Accordingly, plaintiff had two years from May 7, 2010, to file a legal malpractice action. Plaintiff filed her complaint on June 25, 2012, more than two years after her injury accrued. Consequently, her legal malpractice complaint should be dismissed with prejudice.

¶ 10 In response, plaintiff contended that her damages were only speculative at this time, as

her medical negligence claims remained pending against three other defendants. Thus, her legal malpractice action had not accrued and the claim was premature. Plaintiff asserted that once she fails to recover damages in her pending medical malpractice cause of action the legal malpractice action will be ripe. Accordingly, plaintiff requested the legal malpractice action be stayed until the resolution of the medical negligence matter.

¶ 11 In reply, defendant maintained that plaintiff's legal malpractice cause of action was not timely filed within the two-year statute of limitations period due to the fact a final order was entered in the matter on May 7, 2010, and the complaint was filed on June 25, 2012. This constituted an adverse judgment which triggered the running of the statute of limitations period. Defendant further asserted that plaintiff had distinct claims against AMG and McMahon which were dismissed with prejudice. The claims against AMG and McMahon differed from those asserted against the other defendants in the pending medical negligence cause of action. Accordingly, the legal malpractice claim is ripe, but is time-barred by the statute of limitations.

¶ 12 On April 10, 2013, the circuit court granted defendant's motion to dismiss pursuant to section 2-619(a)(5) of the Code with prejudice. On May 9, 2013, plaintiff timely filed this notice of appeal pursuant to Supreme Court Rules 301 and 303. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. June 4, 2008).

¶ 13 ANALYSIS

¶ 14 On appeal, plaintiff contends that the trial court erred in dismissing her suit as time-barred under the two-year statute of limitations for legal malpractice actions. 735 ILCS 5/13-214.3(b) (West 2012). We review a dismissal under section 2-619 *de novo* (*Butler v. Mayer, Brown and Platt*, 301 Ill. App. 3d 919, 922, (1998)), bearing in mind that, in ruling on a section 2-619 motion, the court must accept as true all well-pleaded facts and reasonable inferences that

can reasonably be drawn therefrom (*Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 85 (1995)).

¶ 15 At issue in this appeal is whether the filing of the appeal in the underlying medical malpractice action tolled the statute of limitations for the legal malpractice action against defendant. Plaintiff contends that as a matter of public policy, it is beneficial to all parties that the statute of limitations be tolled until the appeal in the underlying medical negligence action is resolved. Plaintiff maintains filing a legal malpractice complaint while the underlying matter is on appeal is a waste of judicial resources and harms the attorney-client relationship. Plaintiff further asserts that a successful appeal in the underlying action would moot the cause of action against defendant for legal malpractice.

¶ 16 A plaintiff in a legal malpractice action must plead that: (1) its attorney owed a duty of care arising from the attorney-client relationship; (2) the defendant-attorney breached that duty; and (3) as a proximate result of defendant's breach, the plaintiff suffered actual damages or injury. *Brite Lights, Inc. v. Gooch*, 305 Ill. App. 3d 322, 325 (1999). Actual damages are an essential element of a cause of action for legal malpractice because absent damages, no cause of action has accrued. *Palmros v. Barcelona*, 284 Ill. App. 3d 642, 646 (1996). Thus, a plaintiff is injured for purposes of legal malpractice, and the statute of limitations period begins to run, when a plaintiff has suffered a loss for which it may seek damages. *Id.* at 646-47. A suit for legal malpractice 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 2012). A "legal malpractice plaintiff does not have the burden to prove the exhaustion of all avenues of appeal on the underlying claim in order to state a legal malpractice claim." *Bloome v. Wiseman, Shaikewitz, McGivern, Wahl, Flavin & Hesi, P.C.*, 279

Ill. App. 3d 469, 475 (1996); see *Belden v. Emmerman*, 203 Ill. App. 3d 265, 270 (1990); *Zupan v. Berman*, 142 Ill. App. 3d 396, 398-99 (1986).

¶ 17 The parties agree that May 7, 2010, was the date the legal malpractice action accrued as it was the date the dismissal with prejudice in the underlying medical negligence action was entered by the circuit court. Plaintiff asserts that her only issue on appeal is whether the filing of the appeal in the underlying medical negligence action tolled the statute of limitations for the legal malpractice action. Accordingly, we turn to address plaintiff's contention.

¶ 18 Plaintiff asserts it is against the "policy of judicial economy" to allow the underlying medical negligence action to be appealed and simultaneously require the plaintiff to file a legal malpractice claim. Plaintiff relies on *Lucey v. Law Offices of Pretzel & Stouffer, Chartered*, 301 Ill. App. 3d 349 (1998), to support her position. In *Lucey*, the plaintiff was employed by The Chicago Corporation, which was in the business of providing advice and brokerage services. *Id.* at 351. The plaintiff intended to resign from The Chicago Corporation to start his own firm. *Id.* Prior to his resignation, the plaintiff sought advice from the defendant law firm regarding whether it would be legal for him to solicit one of The Chicago Corporation's clients at an upcoming meeting. *Id.* The defendant law firm advised the plaintiff that he could attend the meeting and announce his intention to leave The Chicago Corporation, so long as the plaintiff attended in his individual capacity and paid for the trip himself. *Id.* In reliance on this advice, the plaintiff attended the meeting, announced his intention to leave The Chicago Corporation, and resigned days later. *Id.* The client transferred its portfolio from The Chicago Corporation to the plaintiff shortly thereafter, and The Chicago Corporation sued the plaintiff. *Id.* at 352. The plaintiff initially retained the defendant law firm to defend him in the suit, but later retained different counsel. *Id.*

¶ 19 While the Chicago Corporation litigation was pending, the plaintiff, now represented by new attorneys, filed a legal malpractice action against the defendant law firm. *Id.* The circuit court dismissed the plaintiff's legal malpractice action, holding that the malpractice action was premature. *Id.* at 353. The appellate court agreed and affirmed the circuit court's judgment, as the plaintiff's had not yet incurred any damages. *Id.* The *Lucey* court noted that "a cause of action for legal malpractice does not accrue until a plaintiff discovers, or within a reasonable time should discover, his injury and incurs damages directly attributable to counsel's neglect." *Id.* (citing *Goran v. Glieberman*, 276 Ill. App. 3d 590, 594-95 (1995)). The court further explained that as a result, "a cause of action for legal malpractice will rarely accrue prior to the entry of an adverse judgment, settlement, or dismissal of the underlying action in which plaintiff has become entangled due to the purportedly negligent advice of his attorney." *Id.* at 356. The court in *Lucey* acknowledged only one possible exception to the rule requiring a judgment, settlement, or dismissal of the underlying action prior to the accrual of a malpractice claim, *i.e.*, "where it is plainly obvious, prior to any adverse ruling against the plaintiff, that he has been injured as the result of professional negligence." *Id.* at 358.

¶ 20 The *Lucey* court then stated in *dicta*:

> "[s]ound policy reasons exist in opposition to a rule which would require the client [to] file a provisional malpractice action against his attorney whenever the attorney's legal advice has been challenged. Among them are judicial economy and preservation of the attorney-client relationship. As our supreme court recognized in *Jackson Jordan:*
>
> 'The mere assertion of a contrary claim or the filing of a lawsuit [by a third party] [a]re [*sic*] not, in and of themselves, sufficiently compelling to induce [a] client to seek a

second legal opinion. Meritless claims and nuisance lawsuits are, after all, a fairly commonplace occurrence. It would be a strange rule if every client were required to seek a second legal opinion whenever it found itself threatened with a lawsuit.' [Citation.]" *Id.* at 357 (citing *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill. 2d 240, 253 (1994)).

¶ 21 Plaintiff's reliance on *Lucey* to support her judicial economy argument is misplaced. In *Lucey*, the plaintiff's legal malpractice action never accrued, and the court determined it was not a case "where it is plainly obvious, prior to any adverse ruling against the plaintiff, that he has been injured as the result of professional negligence." *Id.* at 358. Accordingly, it was against the interests of judicial economy to file and litigate such a cause of action. *Id.* at 357. In the present case, however, the parties do not dispute that an adverse judgment was entered against plaintiff on May 7, 2010. As an adverse judgment had been entered, plaintiff knew of the injury caused by defendant and that the statute of limitations commenced. Thus, the filing of a complaint for legal malpractice after that date would not be a "meritless claim" or a "nuisance lawsuit." See *id.*

¶ 22 Plaintiff further relies on *Blue Water Partners, Inc. v. Mason, Foley and Lardner*, 2012 IL App (1st) 102165, to support this contention; however, *Blue Water Partners* merely recites what we held in *Lucey*, that "[p]ublic policy favors such a delay [in filing a legal malpractice complaint] to permit a determination as to whether the advice of counsel was in fact negligent." *Id.* ¶ 59 (citing *Lucey*, 301 Ill. App. 3d at 356).

¶ 23 Plaintiff also contends that *Austin's Rack, Inc. v. Gordon & Glickson, P.C.*, 145 Ill. App. 3d 500 (1986), is directly on point, as it held that without a determination from the appellate court in the underlying action, the legal malpractice action had not yet accrued. We disagree with plaintiff's assessment of the holding. The issue in *Austin's Rack* was whether we had jurisdiction to hear the appeal. *Id.* at 501-502. We concluded we did not, as the order being

appealed was not a final order since it did not contain Rule 304(a) language and was dismissed without prejudice. *Id.* at 502. Although we stated in *dicta* that the cause of action for legal malpractice had not yet accrued because the matter was currently pending on appeal (*Id.* at 503), we note that this opinion was rendered four years prior to our opinion in *Belden*, in which we held 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 an appeal remains pending. *Belden*, 203 Ill. App. 3d at 270.

¶ 24 Plaintiff asserts *Belden* is inapplicable as it did not consider the argument that "the more logical start date for the legal malpractice limitations period is the date on which the underlying case is affirmed by the appellate court." We disagree. In *Belden*, we considered whether the plaintiffs' legal malpractice cause of action accrued after the appellate court affirmed the dismissal of the underlying action and denied rehearing. There, the plaintiffs retained the attorney-defendants to represent them in a lease dispute, which was dismissed with prejudice pursuant to a settlement order entered on July 15, 1982. *Id.* at 266-67. Thereafter, the plaintiffs appealed. The appeal was affirmed on December 18, 1984, and on January 22, 1985, rehearing was denied. On August 7, 1987, the plaintiffs' filed their legal malpractice action against the defendants. On March 31, 1989, the circuit court dismissed the complaint with prejudice based on the statute of limitations bar.[2]

¶ 25 On appeal, the plaintiffs asserted the element of damages was not present until January 22, 1985, when the appellate court denied rehearing and, therefore, their complaint was timely

[2] The operative statute in *Belden* was a five-year statute of limitations pursuant to Ill. Rev. Stat 1983, ch. 110, par. 13-205 (eff. July 1, 1982). In 1991, our legislature added the current two-year statute of limitations. P.A. 86-1371, § 1 (eff. Jan. 1, 1991).

filed. *Id.* at 269. We concluded, however, that the plaintiffs' argument was unpersuasive, as the alleged breach of duty was known to them and actionable the date the settlement order was entered by the trial court. *Id.* at 270. At that point the "plaintiffs' knowledge of the elements of this cause of action was established as a matter of law." *Id.* We further pointed out plaintiffs waited over two-and-a-half years after the affirmance to file their legal malpractice action and that the plaintiffs "had ample time to bring this action within the period prescribed by law." *Id.*

¶ 26 Finally, plaintiff's reliance on *Amfac Distribution Corporation v. Miller*, 673 P. 2d 795 (Ariz. Ct. App. 1983), *approved as supplemented*, 673 P. 2d 792 (Ariz. 1983), for the proposition that the legal malpractice statute of limitations commenced on the date the appeal in the underlying case is decided is misplaced, as decisions from other jurisdictions are not binding on this court. *Travel 100 Group, Inc. v. Mediterranean Shipping Co. (USA) Inc.*, 383 Ill. App. 3d 149, 157 (2008). Furthermore, a vast number of other jurisdictions apply the rule as explained in *Belden*, that the statute of limitations commences when the adverse judgment is entered by the circuit court regardless of whether the matter is subsequently appealed. See *Beesley v. Van Doren*, 873 P. 2d 1280, 1282 n. 1 (Alaska 1994) (and cases cited therein).

¶ 27 In the present case, the statute of limitations for legal malpractice commenced on May 7, 2010, the date the trial court dismissed the underlying medical negligence action with prejudice and entered a Rule 304(a) finding, notwithstanding any possibility of later modification of that order by the circuit court or any possibility that it might be erroneous and reversed on appeal. See *Hermitage Corp.*, 166 Ill. 2d at 87 (statute of limitations began when the circuit court issued the adverse final order, notwithstanding the possibility that a motion to reconsider could later be granted); *Belden*, 203 Ill. App. 3d at 269 (statute of limitations began when the circuit court issued the adverse final order, notwithstanding possibility that circuit court order could have

been reversed on appeal); *Zupan*, 142 Ill. App. 3d at 396 (statute of limitations began when the circuit court issued the adverse final order, notwithstanding posttrial motions and subsequent appeal). Plaintiff had two years from the date of the adverse judgment to file her legal malpractice complaint. Plaintiff chose not to file her complaint until June 25, 2012, more than two years after the adverse judgment was entered. Based on our established case law, the filing of a subsequent appeal in the underlying medical negligence action did not toll the statute of limitations for the legal malpractice action. See *Belden*, 203 Ill. App. 3d at 269; *Bloome*, 279 Ill. App. 3d at 475; *Zupan*, 142 Ill. App. 3d at 398-99. Moreover, we note that plaintiff had ample time after the dismissal of the underlying medical negligence action appeal in June 2011 to file her legal malpractice action. See *Belden*, 203 Ill. App. 3d at 270. Accordingly, plaintiff's legal malpractice complaint was untimely and the circuit court properly dismissed plaintiff's complaint with prejudice.

¶ 28 CONCLUSION

¶ 29 For the above reasons we affirm the determination of the circuit court.

¶ 30 Affirmed.