2016 IL App (1st) 153394-U

SIXTH DIVISION
November 18, 2016

No. 1-15-3394

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOSEPH BACHEWICZ and REVENUE SHARING CORPORATION, Plaintiffs-Appellants, v. HOLLAND & KNIGHT and C. GRANT MCCORKHILL, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 2015 L 10340[1] Honorable Raymond W. Mitchell, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 ***Held:*** In this legal malpractice case, we affirm the circuit court's order granting summary judgment in favor of the defendants.

¶ 2 Plaintiffs Joseph Bachewicz and Revenue Sharing Corporation appeal from an order of the circuit court of Cook County granting summary judgment in favor of defendants Holland & Knight and C. Grant McCorkhill on plaintiffs' legal malpractice claim against defendants. (For simplicity, we refer to the plaintiffs as "Bachewicz" and the defendants as "McCorkhill"). The

[1] Renumbered from 2008 L 1498.

circuit court granted summary judgment to McCorkhill on the basis that Bachewicz's claim was barred by the statute of limitations and statute of repose. We affirm.

¶ 3 BACKGROUND

¶ 4 The following facts are drawn from Bachewicz's pleadings, as well as depositions and affidavits submitted by both parties during summary judgment proceedings. Beginning in the mid-1990s, McCorkhill, a partner at Holland and Knight, began representing a company named Preferred Development, Inc. (Preferred). Preferred's principals were Evan Oliff and Thomas Morabito.

¶ 5 In April 2002, Oliff and Morabito entered into an oral agreement with Bachewicz to develop property for Walgreens stores in the Chicago area. Bachewicz, operating through his company Revenue Sharing Corporation (RSC), identified property sites upon which a Walgreens store could be developed. Preferred, through Oliff and Morabito, would construct the stores and then sell or lease them to Walgreens.

¶ 6 After Bachewicz, Oliff, and Morabito reached their verbal agreement, Morabito instructed Bachewicz to call McCorkhill. Bachewicz called McCorkhill in July 2002 and discussed the terms of the agreement. McCorkhill told Bachewicz to put the terms of the agreement in writing and send it to Morabito. Bachewicz then drafted a memorandum of understanding (MOU) and sent it to Morabito. Morabito then sent the draft MOU to McCorkhill. McCorkhill edited the draft MOU and sent it back to Morabito.

¶ 7 Sometime after Bachewicz spoke to McCorkhill, but before the MOU was signed, Bachewicz, Oliff, and Morabito orally agreed to include Walgreens properties in Northern Indiana, Southern Michigan, and Northwest Ohio that had been overseen by a man named Brent Circle in their agreement. According to Bachewicz, he, Oliff, and Morabito verbally agreed that

neither party would develop Walgreens property in this so-called "Circle Territory" without the others. However, in final form, the MOU did not contain any geographic exclusivity provision. Instead, it stated that Bachewicz, Oliff, and Morabito would work exclusively on a series of projects that were explicitly enumerated in a schedule attached to the MOU. The MOU provided that the schedule of exclusive sites could be amended to add additional sites. Finally, the MOU stated that it would expire two years after the last schedule amendment.

¶ 8 Bachewicz, Oliff, and Morabito signed the MOU sometime in late August or early September 2002. In December 2003, Bachewicz called McCorkhill and asked whether the schedule to the MOU needed to be updated to include a project in Decatur, Indiana. According to Bachewicz, McCorkhill "said no." From that time until February 2007, the parties worked together to complete several Walgreens projects.

¶ 9 In February 2007, Bachewicz discovered that Oliff and Morabito had been developing Walgreens properties in the Circle Territory without involving Bachewicz in the deals. At that time, Bachewicz contacted attorney Ira Gould. Gould began representing Bachewicz in February 2007. During his deposition, Bachewicz was asked to explain why he retained Gould rather than ask McCorkhill for legal advice regarding his rights against Oliff and Morabito. A colloquy central to our analysis is reproduced below:

> "Q. If you believed that Mr. McCorkhill and Holland and Knight had a duty to protect your interests in the preferred deals, why didn't you consult him when you thought that Mr. Oliff and Mr. Morabito had wrongly harmed those interests?

A. Well, Mr. Feeney, *** if Tom and Evan were doing these deals, Grant McCorkhill knew about this for a long time, a long time.

Q. That's what you believed in 2000—

* * *

THE WITNESS: Yeah. I believe he knew about it a long time ago. And the word was, I don't know if it was legal, he was in cahoots with them. This was a revelation. Hey, wait a minute. I thought this guy was mine—my lawyer for five years. And now he is doing deals behind my back under a Memorandum of Understanding which was a partnership that we had. And he is doing this behind my back. I couldn't trust these guys, and then I am going to trust him.

* * *

Q. That was your revelation in 2007?

A. You bet. I said these guys are crooks. The lawyer that represented me and them is a crook.

¶ 10 In May 2007, McCorkhill, acting on behalf of Preferred, engaged in negotiations with Gould. During the course of those negotiations, McCorkhill sent Gould an email stating that the MOU did not contain an exclusivity provision. In addition, McCorkhill stated that, assuming that the MOU had ever became effective, it expired in 2004 under its own terms. At his deposition, Bachewicz testified that after he received McCorkhill's May 2007 letter, he no longer considered McCorkhill to be his "personal attorney."

¶ 11 On February 8, 2008, Bachewicz filed a five-count complaint against Preferred, Oliff, and Morabito for fraud, breach of contract, breach of fiduciary duty, unjust enrichment, and accounting. Plaintiffs claimed that they had been (1) improperly excluded from Walgreens deals in the Circle Territory and (2) underpaid for other projects in which they had participated. On March 1, 2012, Bachewicz filed an amended complaint. The amended complaint added Holland and Knight and McCorkhill as defendants and brought claims for legal malpractice against them. Plaintiffs alleged that Holland and Knight and McCorkhill committed legal malpractice by: (1) failing to ensure that the MOU was "properly drafted" and either (a) approving the draft MOU even though it "contained latent ambiguities" and "did not accurately reflect the parties' *** oral agreements" or (b) did not tell plaintiffs that they should not sign the MOU; (2) representing plaintiffs and Preferred while laboring under a conflict of interest; and (3) failing to prevent, and actively assisting, Preferred, Oliff, and Morabito, in their effort to defraud plaintiffs.

¶ 12 Preferred, Oliff, and Morabito, as well as McCorkhill, filed separate motions to dismiss. The circuit court granted the motions in part in a single order entered in August 2012. The court dismissed Bachewicz's' claims against Preferred, Oliff, and Morabito for fraud and accounting, and the court dismissed Bachewicz's claims against McCorkhill and Holland and Knight for fraud and aiding and abetting fraud.

¶ 13 On October 30, 2013, the circuit court granted partial summary judgment in favor of Bachewicz and awarded him $874,722.44 in damages. On October 29, 2014, Bachewicz amended his complaint to add additional allegations of legal malpractice. He claimed that in the course of executing the October 30, 2013 judgment order, he discovered that on December 16 and 22, 2008, Oliff transferred his interest in two pieces of real estate that he owned to himself and his wife as tenants by the entirety. Bachewicz claimed that the transaction was perfected

"for the sole purpose of defrauding [Oliff's] creditors including Plaintiff and that the transaction "was structured by *** McCorkhill and Holland and Knight."

¶ 14 On December 15, 2014, the circuit court granted summary judgment in favor of McCorkhill on Bachewicz's legal malpractice claim, including the allegations he added to his complaint on October 29, 2014. As relevant here, the circuit court found that the claim was barred in its entirety by the statute of limitations. In addition, the court found that the claim was also barred by the statute of repose to the extent that it was predicated on acts or omissions by McCorkhill that took place prior to March 2, 2004.

¶ 15 On October 28, 2015, the circuit court entered an agreed order reflecting the fact that Bachewicz and Preferred, Oliff, and Morabito entered into a settlement agreement. Pursuant to the agreement, Bachewicz agreed to (1) vacate and hold for naught the October 30, 2013 judgment order and (2) dismiss his claims against Preferred, Oliff, and Morabito. In an order entered on November 2, 2015, the court found that the settlement had been made in good faith. The November 2 order terminated all pending claims in the case, precipitating this appeal.

¶ 16 ANALYSIS

¶ 17 We consider whether the circuit court erred by granting summary judgment in favor of McCorkhill on Bachewicz's legal malpractice claim. Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2014). Summary judgment is a "drastic means of disposing of litigation and, therefore, should be allowed only where the right of the moving party is clear and free from doubt." *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163 (2007). When ruling on a motion for summary judgment, "the trial court has a duty to

construe the record strictly against the movant and liberally in favor of the nonmoving party." *Id*. We review orders granting summary judgment *de novo*. *Id*.

¶ 18 The circuit court granted McCorkhill's motion for summary judgment on the basis that Bachewicz's legal malpractice claim was barred by the statute of limitations and statute of repose. Legal malpractice claims "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 2008). "Section 13–214.3(b) incorporates the discovery rule, 'which delays commencement of the statute of limitations until the plaintiff knew or reasonably should have known of the injury and that it may have been wrongfully caused.' " *Janousek v. Katten Muchin Rosenman LLP*, 2015 IL App (1st) 142989, ¶ 13 (quoting *Dancor International, Ltd. v. Friedman, Goldberg & Mintz*, 288 Ill. App. 3d 666, 672 (1997)).

¶ 19 Actual knowledge is not required. *Id*.; see *SK Partners I, LP v. Metro Consultants, Inc.*, 408 Ill. App. 3d 127, 130 (2011) ("[U]nder the discovery rule, a statute of limitations may run despite the *lack* of actual knowledge of negligent conduct." (Emphasis in original.)). Similarly, "[k]nowledge 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.' " *Id*. (quoting *Castello v. Kalis*, 352 Ill. App. 3d 736, 744 (2004)). Rather, under the discovery rule, the limitations period will begin to run "when the purportedly injured party 'has a reasonable belief that the injury was caused by wrongful conduct, thereby creating an obligation to inquire further on that issue.' " *Janousek*, 2015 IL App (1st) 142989, ¶ 13 (quoting *Dancor*, 288 Ill. App. 3d at 673). And, this court has explained, "[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 had

occurred." *Id*. (quoting *Hoffman v. Orthopedic Systems, Inc.*, 327 Ill. App. 3d 1004, 1011 (2002). "The question of when a party knew or should have known both of an injury and its probable wrongful cause is one of fact, unless the facts are undisputed and only one conclusion may be drawn from them." *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 171 (1981).

¶ 20 In this case, there is no genuine issue of material fact as to whether Bachewicz "knew or reasonably should have known" that the injuries he claims he suffered in his original complaint were caused by McCorkhill's alleged malpractice. During his deposition, Bachewicz testified that in February 2007, he became aware that Oliff and Morabito had been developing Walgreens projects in a manner that Bachewicz believed violated the MOU. At that time, Bachewicz retained attorney Ira Gould because he had a "revelation" that McCorkhill was "a crook" who was "in cahoots" with Oliff and Morabito and "doing deals" with them "behind [Bachewicz's] back." Thus, by Bachewicz's own admission, he knew as early as February 2007 that the injuries he alleged in his original complaint were wrongfully caused by McCorkhill. Accordingly, the statute of limitations for his legal malpractice claim began to run in February 2007.

¶ 21 Undaunted by his admission, Bachewicz contends that the limitations period did not begin to run until July 1, 2013, when he was allowed to view "certain documents" that were produced in discovery by McCorkhill that enabled Bachewicz to calculate the exact extent of his pecuniary injury. We disagree. To be sure, "[a]ctual damages are an essential element of a cause of action for legal malpractice because absent damages no cause of action has accrued." *Brite Lights, Inc. v. Gooch*, 305 Ill. App. 3d 322, 325 (1999). "Where the mere possibility of harm exists or damages are otherwise speculative, actual damages are absent and no cause of action for malpractice yet exists." *Northern Illinois Emergency Physicians v. Landau, Omahana*

& Kopka, Ltd., 216 Ill. 2d 294, 307 (2005). Damages are speculative, however, only when "their existence itself is uncertain, not if the amount is uncertain or yet to be fully determined." *Id.*; see *Profit Management*, 309 Ill. App. 3d at 309.

¶ 22 Bachewicz filed his original complaint against Preferred, Oliff, and Morabito in February 2008. He alleged that he had been damaged by their act of (1) developing specifically enumerated projects behind his back and improperly paying or withholding payment for specifically enumerated deals. As of February 2007, Bachewicz by his own admission knew or had reason to believe that McCorkhill was "in cahoots" with Oliff and Morabito. In his amended complaint, Bachewicz alleged that McCorkhill committed malpractice by, among other things, failing to prevent and actively assisting Preferred, Oliff, and Morabito's scheme to defraud him. Since Bachewicz understood the nature, if not the full extent, of his pecuniary injury from the scheme in February 2008, and he knew or reasonably believed that McCorkhill assisted in the scheme as of February 2007, Bachewicz cannot seriously contend that damages arising from McCorkhill's conduct were speculative until July 2013, when he was able to place a precise dollar amount on his injuries.

¶ 23 Bachewicz's argument suffers a more fundamental flaw: Bachewicz has failed, both in this court and in the court below, to identify the specific documents upon which his argument is predicated. At summary judgment, once the moving party produced evidence tending to show that no genuine issue of material fact exists, "the burden of production shifts to the nonmoving party, who must then present some factual basis that would arguably entitle it to judgment as a matter of law." *Colburn v. Mario Tricoci Hair Salons & Day Spas, Inc.*, 2012 IL App (2d) 110624, ¶ 33. "At this point, the nonmovant cannot rest on its pleadings to raise genuine issues of material fact." *Triple R Development, LLC v. Golfview Apartments I, L.P.*, 2012 IL App (4th)

100956, ¶ 12. Nor may the non-moving party rely on conjecture, speculation, or innuendo. See *Smith v. Tri-R Vending*, 249 Ill. App. 3d 654, 657 (1993).

¶ 24 McCorkhill carried his evidentiary burden by obtaining Bachewicz's testimony, citing it in his motion, and attaching the testimony to his motion as an exhibit. Bachewicz has, in contrast, abdicated his burden. In the court below, Bachewicz claimed in his opposition to summary judgment that an "exhibit 56" contained 2000 documents which his forensic accountant reviewed that enabled Bachewicz to "determine specific damages." In his opposition, however, he did not identify what the documents were or explain their contents. And the record strongly suggests that Bachewicz never attached the documents or otherwise produced the documents in the course of opposing McCorkhill's motion for summary judgment. In his reply brief in the court below, McCorkhill claimed that Bachewicz did not "attach *** or even describe" the documents, and he explained that exhibit 56 "appear[ed]" to merely consist of "unauthenticated copies of the photocopy vendor's[2] labels for the boxes containing the July 2013 production." Exhibit 56, whatever it contained, is absent from the record on appeal.

¶ 25 Before this court, Bachewicz has not produced any competent evidence which would enable us to find the existence of a genuine issue of material fact. He again claims that his limitations period did not begin to run until he viewed "certain documents" in July 2013. In support of that statement, Bachewicz cites a portion of the record containing the segment of his opposition to summary judgment in which he refers to exhibit 56. But, just as he did in the court below, Bachewicz has neither identified what the documents were nor explained their contents. Thus, to the extent Bachewicz's argument is predicated on the contents of the documents comprising exhibit 56, we must presume that the trial court's decision was in conformity with the

[2] Apparently referring to an outside legal copy service which assisted Bachewicz during discovery.

law in light of the facts and evidence. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 394-94 (1984). Based on the foregoing, we find that the circuit court properly granted summary judgment to McCorkhill on Bachewicz's legal malpractice claim for all acts of alleged malpractice taking place between 2002 and February 2007.

¶ 26 That leaves one loose end to tie up. In the October 29, 2014 amendment to his amended complaint, Bachewicz claimed that in December 2008, McCorkhill committed an additional act of malpractice by assisting Oliff in perfecting a fraudulent transfer of real property from Oliff to Oliff and his wife as tenants by the entirety in order to render Oliff judgment-proof. According to Bachewicz, he did not learn that McCorkhill engaged in that conduct until he initiated proceedings to collect on an October 30, 2013 money judgment against Oliff. Bachewicz contends that McCorkhill's conduct violated Illinois Rule of Professional Conduct 1.9.

¶ 27 The circuit court held that Bachewicz's allegations regarding the December 2008 property transfer "cannot sustain a malpractice cause of action." We agree. It is well established that "the rules of legal ethics, while relevant to the standard of care in a legal malpractice suit, [citation], do not establish a separate duty or cause of action in tort." *Skorek v. Pryzbylo*, 256 Ill. App. 3d 288, 291 (1993); see *Nagy v. Beckley*, 218 Ill. App. 3d 875, 881 ("[W]hile rules of legal ethics may be relevant to the standard of care in a legal malpractice suit [citations], they are not an independent font of tort liability."). The plaintiff must still plead and prove all of the other elements of a legal malpractice claim, including the existence of an attorney-client relationship. See *Skorek*, 256 Ill. App. 3d at 290.

¶ 28 In this case, the parties strongly dispute whether McCorkhill ever entered into an attorney-client relationship with Bachewicz. We need not resolve that dispute. Assuming for the sake of argument that such a relationship did exist, Bachewicz's deposition testimony established

that the attorney-client relationship terminated no later than May 2007. As stated, during his deposition, Bachewicz testified that he learned in February 2007 that Oliff and Morabito were doing business deals behind his back and that McCorkhill was "in cahoots" with them. In response, Bachewicz retained attorney Ira Gould, who negotiated with McCorkhill on Bachewicz's behalf. In the course of those negotiations, McCorkhill told Gould in May 2007 e-mail that the MOU (1) did not have an exclusivity provision and (2) expired in 2004.

¶ 29 At his deposition, Bachewicz testified that as a result of McCorkhill's May 2007 e-mail to Gould, he no longer considered McCorkhill to be his attorney. According to Bachewicz's complaint, McCorkhill did not perfect the property transfer which formed the basis for his additional allegation of malpractice until December 2008, approximately 19 months after his alleged attorney-client relationship with McCorkhill ended. Because McCorkhill did not assist Oliff with the property transfer until long after his alleged attorney-client relationship with Bachewicz ended, that conduct cannot support a legal malpractice claim. The circuit court's decision to grant summary judgment in favor of McCorkhill was therefore correct.

¶ 30 CONCLUSION

¶ 31 We affirm the circuit court's order granting summary judgment in favor of McCorkhill.

¶ 32 Affirmed.