2017 IL App (1st) 161046-U

FIFTH DIVISION
June 16, 2017

No. 1-16-1046

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

RICHARD AND MARLA WALSH, Plaintiffs-Appellants, v. KENNETH L. CUNNIFF, Defendant-Appellee, (Michael G. Mahoney, Mahoney & Damico, LLC, Burke Wise Morrissey Kaveny f/k/a Burke Mahoney Wise, LLC, Smith Amundsen, Defendants).	)	Appeal from the Circuit Court of Cook County No. 12 L 11469 Honorable Joan E. Powell, Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County where plaintiff's lawsuit was properly dismissed pursuant to section 2-619(a)(5) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(5) (West 2012)).

¶ 2 Plaintiffs Richard and Marla Walsh appeal from an order of the circuit court of Cook County dismissing their legal malpractice complaint against defendant Kenneth Cunniff pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)). On appeal, plaintiffs contend the trial court erred in granting defendant's motion (which he brought pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2012)) because they sufficiently alleged a cause of action for legal malpractice against defendant. In response, defendant maintains that even if the complaint were legally sufficient so as to survive a section 2-615 motion to dismiss, the cause of action was time barred by the two-year statute of limitations for legal malpractice claims. Because we find the legal malpractice action was not timely filed, we affirm.

¶ 3 BACKGROUND

¶ 4 In September 2000, Marla was a customer at a Home Depot store in Evanston, Illinois when a sign installed by Pro Active Sales fell on her head causing her to sustain a concussion. Following her injury, Marla contacted defendant who referred the matter to Mahoney, an attorney with the firm of Burke Wise Morrissey & Kaveny. Plaintiffs then retained Mahoney and Burke Wise Morrissey & Kaveny to prosecute an action on their behalf against those responsible for the sign and its installation: Home Depot USA, Inc. (Home Depot), Klein Tools, Inc., Anglin Services Unlimited, Greenlee Textron, Inc., Pro Active Sales, and Pro Sales, Inc. In an engagement letter signed by plaintiffs, defendant was referenced as the referring attorney. The engagement letter further provided that defendant was to receive 50% of the one-third contingent fee provided to Mahoney and Burke Wise Morissey & Kaveny.[1]

¶ 5 Plaintiffs filed their initial negligence action against Home Depot in June 2002 (02 L

[1] This engagement letter was not attached to the complaint and is not included in the record on appeal.

8257). The matter was subsequently dismissed and refiled against Anglin Services Unlimited, Greenlee Textron, Inc., Home Depot, Klein Tools, Inc., Pro Active Sales, and Pro Sales, Inc. (02 L 12042) (the 2002 case). On March 27, 2003, Klein Tools, Inc. was voluntarily dismissed, but the cause of action against it was refiled on March 26, 2004 (04 L 3526). On June 30, 2003, Greenlee Textron, Inc. was voluntarily dismissed. Plaintiffs refiled against Greenlee Textron, Inc. as well as Anglin Services Unlimited and Pro Active Sales on June 30, 2004 (04 L 7380). These two causes of action filed in 2004 (the 2004 cases) were subsequently consolidated with the 2002 case, which was dismissed for want of prosecution on July 18, 2005.

¶ 6 On July 17, 2006, less than a year later, plaintiffs refiled their cause of action against Home Depot USA, Pro Active Sales, and Pro Sales (06 L 7461). The plaintiffs, however, did not name Anglin Services Unlimited, Greenlee Textron, Inc., or Klein Tools, Inc. as defendants. In December 2009, Mahoney advised the plaintiffs that he was forming a new firm, Mahoney & Damico, LLC. Thereafter, Mahoney and Mahoney & Damico, LLC prosecuted plaintiffs' cause of action. After extensive litigation and just prior to trial, plaintiffs settled with Pro Active Sales for $112,500.[2] Thereafter, the matter proceeded to trial solely against Home Depot and the jury returned a verdict in favor of plaintiffs for $180,000 on February 23, 2010. Subsequently, on July 22, 2010, an order was entered dismissing the 2004 cases for want of prosecution.

¶ 7 On October 9, 2012, plaintiffs filed the instant one-count legal malpractice action against defendant and other parties not subject to this appeal. Plaintiffs specifically alleged that defendant, in his capacity as the referring attorney, was negligent in the underlying litigation for: (1) allowing viable defendants Anglin Service Unlimited, Klein Tools, Inc, and Greenlee Textron, Inc. to be dismissed for want of prosecution in 2010 without the informed consent of

[2] It is unclear from the record whether Pro Sales, Inc. was also included in this settlement.

plaintiffs; (2) failing to refer them to competent counsel capable of litigating their matter to verdict; (3) failing to supervise the work of referral counsel; (4) failing to adequately prepare for trial, including the preparation of witnesses; (5) failing to disclose Mahoney's known medical and psychological condition to them; (6) failing to communicate with them in accordance with Rule 1.4 of the Illinois Rules of Professional Conduct; and (7) failing to enter into a referral agreement with Mahoney in accordance with Rule 1.5 of the Illinois Rules of Professional Conduct. Plaintiffs further alleged but for these breaches of the standard of care, they would have retained counsel that would have been adequately prepared. Plaintiffs also complained that while counsel sought 6 million dollars in damages, the jury returned a verdict of only $180,000. Thus, because of the negligence they alleged the jury returned a verdict for far less than what would have been obtained by competent counsel and as a result they also incurred additional expenses and legal costs.

¶ 8 Regarding the alleged incompetence during trial, plaintiffs asserted that Mahoney and Mahoney & Damico "did little, if anything, to prepare any of the witnesses, including Richard and Marla Walsh. As a result those witnesses were not prepared to testify." In addition, Mahoney was unprepared to cross examine Home Depot's only witness where the cross-examination consisted only of pointing out the fees that Home Depot's witness charged for his engagement.

¶ 9 On March 11, 2013, defendant filed a combined motion to dismiss under section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2012)) asserting: (1) the claim should be dismissed under section 2-619(a)(5) (735 ILCS 5/2-619(a)(5) (West 2012)) because it was barred by the two-year statute of limitations provided in section 13-214.3(b) (735 ILCS 5/13-214.3(b) (West 2012)); and (2) the claim should alternatively be dismissed under

section 2-615 (735 ILCS 5/2-615 (West 2012)) because plaintiff failed to allege sufficient facts to state a cause of action.

¶ 10 After the motion was fully briefed and argued, the circuit court granted defendant's motion to dismiss with prejudice finding the claims in the complaint were insufficient to state a cause of action. Plaintiffs then filed a motion to reconsider, which was also denied. This appeal followed.

¶ 11 ANALYSIS

¶ 12 Plaintiffs maintain that the circuit court erred in dismissing their complaint with prejudice because they sufficiently plead a cause of action for legal malpractice. We observe that while the circuit court dismissed plaintiffs' complaint on the basis that it did not, and could not, state a cause of action for legal malpractice, we may affirm for any basis that appears in the record. *Joyce v. DLA Piper Rudnick Gray Cary LLP*, 382 Ill. App. 3d 632, 638 (2008).

¶ 13 Defendant here presented a hybrid motion to dismiss under section 2-619.1 of the Code, citing both sections 2-615 and 2-619 of the Code. 735 ILCS 5/2-619.1 (West 2012). Our review of an order granting a motion to dismiss is *de novo*, whether that motion is brought pursuant to sections 2-615 or 2-619 of the Code. *Phelps v. Land of Lincoln Legal Assistance Foundation, Inc.*, 2016 IL App (5th) 150380, ¶ 11. Under *de novo* review, we perform the same analysis that a circuit court would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 14 Generally, a section 2-615 motion challenges the legal sufficiency of a complaint by alleging defects apparent on its face. 735 ILCS 5/2-615 (West 2012); *In re Estate of Powell*, 2014 IL 115997, ¶ 12. In analyzing a section 2-615 motion, the court must determine whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Phelps*, 2016 IL App (5th)

150380, ¶ 11. A section 2-615 motion admits as true all well-pleaded facts, but not conclusions of law or factual conclusions that are unsupported by allegations of specific facts. *Id.*

¶ 15 In contrast, a motion to dismiss pursuant to section 2-619 (735 ILCS 5/2-619 (West 2012)) admits the legal sufficiency of the complaint, but asserts certain defects, defenses, or other affirmative matters that appear on the face of the complaint or are established by external submissions that act to defeat the claim. *Wallace v. Smyth*, 203 Ill. 2d 441, 447 (2002). Specifically, subsection (a)(5) of section 2-619 allows dismissal when "the action was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2012). In ruling on a section 2-619 motion, all pleadings and supporting documents must be construed in a light most favorable to the nonmoving party, and the motion should be granted only where no material facts are in dispute and the defendant is entitled to dismissal as a matter of law. *Kheirkhahvash v. Baniassadi*, 407 Ill. App. 3d 171, 176 (2011); *Mayfield v. ACME Barrel Company*, 258 Ill. App. 3d 32, 34 (1994). In this instance, we find the issue of plaintiffs' compliance with the statute of limitations to be dispositive.

¶ 16 Plaintiffs assert that their legal malpractice claim was not barred by the statute of limitations because it was not until early 2012 when they were successful in obtaining their legal file from Mahoney that they became aware of their injury; specifically, that Mahoney failed to consult a medical expert and allowed Anglin Service Unlimited, Klein Tools, Inc, and Greenlee Textron, Inc. to be dismissed in 2010 without their consent. Plaintiffs, however, do not address when they became aware of the negligence specifically alleged in the complaint; that, Mahoney was negligent for failing to (1) prepare any of the witnesses, including Richard and Marla Walsh, and (2) failing to properly cross-examine Home Depot's witness. In addition, plaintiffs argue that after the jury verdict, Mahoney provided them with reassurances and that for several months

thereafter, Mahoney "repeatedly told the Walshes he wanted to retry the case." Plaintiffs maintain that these reassurances served to toll the statute of limitations. See *Butler v. Mayer, Brown & Platt*, 301 Ill. App. 3d 919, 924 (1998).

¶ 17 Defendant disagrees. He maintains that plaintiffs knew or reasonably should have known of their injury on February 23, 2010, the date when the jury returned the $180,000 verdict plaintiffs claim was too low.

¶ 18 An action for legal malpractice must be commenced within two years from the time the plaintiff "knew or reasonably should have known of the injury for which damages are sought." 735 ILCS 5/13-214.3(b) (West 2012). To be considered injured, a legal client must suffer a loss for which he or she may seek monetary damages. *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 306 (2005). Generally, that loss will not occur until the plaintiff has suffered an adverse judgment, settlement, or dismissal of the underlying action caused by the attorney's alleged negligence. *Lucey v. Law Offices of Pretzel & Stouffer, Chartered*, 301 Ill. App. 3d 349, 356 (1998). "[A] plaintiff is injured at the time an adverse judgment is entered, even if the amount of damages is uncertain or the judgment might be later reversed." *Butler*, 301 Ill. App. 3d at 923 (citing *Belden v. Emmerman*, 203 Ill. App. 3d 265, 270 (1990); *Zupan v. Berman*, 142 Ill. App. 3d 396, 399 (1986)). The statute of limitations may even commence prior to an adverse judgment being entered. See *Nelson v. Padgitt*, 2016 IL App (1st) 160571, ¶ 15 (the plaintiff should have known of his injury when he was terminated under the employment agreement negotiated for him by the attorney).

¶ 19 This statute of limitations incorporates the " 'discovery rule,' " under which the "limitations period begins to run only when 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, 146 (1981)). The term "wrongfully caused" does not require actual knowledge to trigger the limitations period, nor does the plaintiff need knowledge of a specific defendant's negligent conduct or knowledge of the existence of a malpractice claim. *SK Partners I, LP v. Metro Consultants, Inc.*, 408 Ill. App. 3d 127, 130 (2011). Instead, the limitations period begins when the plaintiff has a reasonable belief that the injury was caused by the lawyer's wrongful conduct and the plaintiff, therefore, has an obligation to inquire further. *Nelson*, 2016 IL App (1st) 160571, ¶ 12; *Dancor International, Ltd. v. Friedman, Goldberg & Mintz*, 288 Ill. App. 3d 666, 673 (1997).

¶ 20 We further acknowledge that ordinarily the time when a party becomes charged with the requisite knowledge to maintain a cause of action for legal malpractice is a question of fact. *Butler*, 301 Ill. App. 3d at 922 (citing *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill. 2d 240, 250 (1994)). However, when a plaintiff should have discovered his injury can be decided as a matter of law where the undisputed facts allow for only one conclusion. *Id.*

¶ 21 In their complaint, plaintiffs allege defendant, as the referring attorney, was legally and financially responsible for the matter, including Mahoney's negligent conduct. Plaintiffs allege Mahoney was negligent for failing to (1) prepare any of the witnesses, including Richard and Marla Walsh, and (2) failing to properly cross-examine Home Depot's witness. These allegedly negligent acts are ones that plaintiffs knew or should have known at the time the jury verdict was entered on February 23, 2010. After plaintiffs testified and once the verdict was rendered, plaintiffs were aware that Mahoney had not adequately prepared them to testify. Further, plaintiffs were cognizant that Mahoney's representation was lacking when, as they allege, Mahoney's cross-examination of Home Depot's expert witness was inadequate. Thus, plaintiffs knew or should have known of their attorneys' wrongful conduct when the jury verdict was

rendered and therefore had an obligation to inquire further. See *Nelson*, 2016 IL App (1st) 160571, ¶ 12. We conclude that the undisputed facts allow for only one conclusion; February 23, 2010, was the date an adverse judgment was entered against plaintiffs. Accordingly, plaintiffs' lawsuit, filed on October 9, 2012, was untimely and is barred by the two-year statute of limitations. See 735 ILCS 5/13-214.3(b) (West 2012).

¶ 22 We further observe that plaintiffs also based their legal malpractice claim against defendant in part on Mahoney and Mahoney & Damico, LLC allowing Anglin Service Unlimited, Klein Tools, Inc., and Greenlee Textron, Inc. to be dismissed for want of prosecution in 2010 without plaintiffs' informed consent. Plaintiffs' legal malpractice complaint alleged that in 2004 cases were filed against these entities and were subsequently dismissed for want of prosecution in June 2010. While neither party raises any argument regarding whether this specific claim is barred by the statute of limitations on appeal, we will consider the issue and, for the reasons set forth herein, uphold the dismissal of plaintiffs' complaint as it relates to defendant in its entirety.

¶ 23 Our well-established case law provides that when a matter is dismissed for want of prosecution, it is not a final order that would trigger the statute of limitations for a legal malpractice action. See *Britelights, Inc. v. Gooch*, 305 Ill. App. 3d 322, 325 (1999). This is because when a dismissal for want of prosecution is entered, it is done so without prejudice and the plaintiff has one year to refile. *Id.* A dismissal for want of prosecution only becomes an adverse judgment if the plaintiff fails to refile the matter within one year. *Id.* Thus, it follows that had the 2004 cases been dismissed for want of prosecution in 2010 and plaintiff failed to refile within the one-year time period, the statute of limitations as to those matters would commence running in June 2011 and plaintiffs' legal malpractice complaint filed on October 9,

2012, would have been, in part, timely filed.

¶ 24 At first blush this particular claim of legal malpractice appears to be timely filed. We may, however, take judicial notice of the online docket of the clerk of the circuit court of Cook County. *Wells Fargo Bank, N.A. v. Simpson*, 2015 IL App (1st) 142925, ¶ 24 n. 4; Ill. R. Evid. 201 (eff. Jan. 1, 2011) (when appropriate, a court may take judicial notice, whether requested or not, at any stage of the proceedings); *Walsh v. Union Oil Co. of California*, 53 Ill. 2d 295, 299 (1972) (a court may take judicial notice of other proceedings in other courts under certain circumstances). A review of the circuit court's online docket reveals that the facts as alleged in the complaint are not complete. Plaintiffs failed to set forth the full procedural history of the underlying litigation; namely, that on November 29, 2004, both case no. 04 L 3526 and case no. 04 L 3526 were consolidated with case no. 02 L 12042. Subsequently, case no. 02 L 12042 was dismissed on July 18, 2005, but no such entries were included in the docket statements for case nos. 04 L 3526 and 04 L 7380.

¶ 25 Section 2-1006 of the Code of Civil Procedure provides, "[a]n action may be severed, and actions pending in the same court may be consolidated, as an aid to convenience, whenever it can be done without prejudice to a substantial right." 735 ILCS 5/2-1006 (West 2012). Illinois courts have recognized three distinct forms of consolidation: (1) where several actions are pending involving the same subject matter, the court may stay proceedings in all but one of the cases and determine whether the disposition of one action may settle the others; (2) where several actions involve an inquiry into the same event in its general aspects, the actions may be tied together, but with separate docket entries, verdicts, and judgments, the consolidation being limited to a joint trial; and (3) where several actions are pending that might have been brought as a single action, the cases may be merged into one action, thereby losing their individual

identities, to be disposed of as one suit. *Busch v. Mison*, 385 Ill. App. 3d 620, 624 (2008); *Shannon v. Stookey*, 59 Ill. App. 3d 573, 577 (1978).

¶ 26 The consolidation here was clearly of the third type. The defendants named in the 2004 cases were initially named in the 2002 case and the 2004 cases raised subject matter that was identical to the 2002 case. See *Busch*, 385 Ill. App. 3d at 624. In addition, there is no indication in the record that the lawsuits were to be considered as separate causes of action thereby preserving any relevant distinction among the three cases. See *cf. Stone v. City of Belvidere*, 39 Ill. App. 3d 829, 833-34 (1976). Thus, when the trial court entered an order dismissing the 2002 case, under the caption "Walsh v. Home Depot, et al," the 2004 cases were also dismissed.

¶ 27 The docket entries for each of those cases, however, provide us with support for our conclusion that the 2004 cases were dismissed along with the 2002 case in July 2005. First, the docket indicates that the 2004 matters were continued for a case management conference to July 18, 2005, but no entry was made in the 2004 case dockets for that date. Second, the docket provides that no subsequent entries were made in those cases between July 2005 and June 2010 when the matters were dismissed for want of prosecution. The lack of entries in the docketing statements for the 2004 cases until June 2010 and the fact those cases were consolidated and continued to the date the 2002 case was dismissed supports our conclusion that the 2004 cases had been merged through consolidation with the 2002 case and were also dismissed on July 18, 2005.

¶ 28 Moreover, Illinois courts have stated that where an action has not been merged by consolidation a trial court has a duty to *sua sponte* order a severance. See *Klein v. Steel City National Bank*, 212 Ill. App. 3d 629, 634 (1991). The fact such an order was not entered here strongly supports our conclusion that the three cases were merged and then disposed of together

in the July 18, 2005, order.

¶ 29 Based on these facts, we conclude that plaintiffs were aware that Anglin Services Unlimited, Klein Tools, Inc., and Greenlee Textron, Inc. were not named as defendants in the 2006 complaint. The matter then proceeded to trial and judgment solely against Home Depot in February 2010. Accordingly, plaintiffs knew or reasonably should have known that claims against these particular defendants were not being sought as early as 2006 and as late as February 23, 2010, when the jury rendered its verdict only against Home Depot. Accordingly, this portion of plaintiffs' complaint is also time barred. See 735 ILCS 5/13-214.3(b) (West 2012).

¶ 30 In sum, we conclude plaintiffs' legal malpractice complaint was untimely filed and is barred by the two-year statute of limitations. See *id.*

¶ 31 CONCLUSION

¶ 32 For the reasons stated above, we affirm the judgment of the circuit court of Cook County.

¶ 33 Affirmed.