2014 IL App (3d) 130322-U

Order filed March 19, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

HOLLY T. SCHNEIDER,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
Plaintiff-Appellant,	)	Rock Island County, Illinois,
	)	
v.	)	Appeal No. 3-13-0322
	)	Circuit No. 12-LM-139
ARTHUR R. WINSTEIN, WINSTEIN,	)	
KAVENSKY & CUNNINGHAM, LLC.	)	
	)	Honorable Dana McReynolds,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justice Schmidt concurred in the judgment.
Justice O'Brien specially concurred.

ORDER

¶ 1 *Held:* In a legal malpractice action, the trial court improperly entered summary judgment in favor of defendants after finding plaintiff's complaint was not timely with respect to the two-year statute of limitations.

¶ 2 Plaintiff, Holly Schneider, appeals from the trial court's order granting summary judgment in favor of defendants, attorney Arthur Winstein, and the law firm of Winstein Kavensky & Cunningham, LLC. The trial court found the two-year statute of limitations barred

the potential malpractice claims against defendants. See 735 ILCS 5/13-214.3(b) (West 2010). Plaintiff argues on appeal the trial court improperly granted summary judgment because she did not become aware of defendants' professional negligence, at the earliest, until March 16, 2010, the date the trial court denied her motion *nunc pro tunc*. Plaintiff similarly argues the trial court's denial of her motion to reconsider the summary judgment ruling also constituted error. We reverse the trial court's denial of plaintiff's motion to reconsider.

¶ 3 FACTS

¶ 4 On March 15, 2012, plaintiff, Holly Schneider, filed a complaint against defendants, Arthur Winstein, individually, and the law firm of Winstein, Kavensky & Cunningham, seeking $25,000.00 in damages, plus attorney fees and costs. Plaintiff's complaint alleged one count of breach of contract/fiduciary duty, and, alternatively, one count of professional negligence, both counts stemming from plaintiff's divorce proceedings.

¶ 5 Plaintiff's complaint alleged the following facts. Plaintiff, through her attorney at the time, Douglas Scovil, filed a dissolution of marriage action on January 8, 2008. According to the complaint, the parties engaged in settlement negotiations on September 19, 2008, and agreed to the following distribution, as read into the record before the court:

> "From the Husband's share of the proceeds [from the sale of property in Missouri], he will pay to the wife $50,000 as and for a property settlement, less 50 percent of the mortgage, taxes, insurance, and utilities he paid from October 1st of 2008 until the closing date of the property."

¶ 6 On February 18, 2009, plaintiff hired attorney Winstein to represent her in the ongoing divorce proceedings. Thereafter, Winstein approved the language incorporated into the judgment of dissolution of marriage as drafted by plaintiff's husband's attorney. Judge Michael

Meersman approved and entered the judgment of dissolution on April 29, 2009. The order contained the following language:

> "After payment of necessary expenses associated with closing and retirement of the home's mortgage indebtedness, Holly shall receive the first $50,000.00 of the net proceeds generated from the sale of the Missouri property, provided, however, that [husband] shall be reimbursed from that sum (and it shall therefore constitute a reduction in this separate $50,000.00 share) an amount equal to 50% of the real estate taxes, insurance, mortgage principal and interest, and utility expenses which [husband] has paid for the Missouri property from October 1, 2008, through and until the date of sale."

¶ 7 On May 27, 2009, attorney Winstein filed a "Motion to Vacate or Amend the Judgment of Dissolution" as it related to a separate provision involving jewelry and also filed a separate "Motion to Amend and/or in the Alternative to Clarify" requesting the court to clarify the method of sale of the Missouri property. On October 5, 2009, the trial court entered an "Order Concerning Residual Matters," which included an exhibit, signed and approved by attorney Winstein, indicating plaintiff should receive the "first $50,000.00" of the net proceeds from the sale of the property.

¶ 8 On February 22, 2010, Integrity Land Title Company prepared a preliminary HUD-1 Settlement Statement in anticipation of the February 24, 2010, closing of the Missouri property. The HUD-1 statement indicated, under "Settlement Charges," that plaintiff should receive $50,000 as "Proceeds per Divorce Decree." The remaining net proceeds would then be divided equally between plaintiff and her husband, causing plaintiff to receive $25,000.00, rather than the full $50,000.00 she expected. According to the complaint, plaintiff "initially became aware

of the impact of the Judgment of Dissolution on her property settlement" when she received the proposed settlement statement for the sale of the Missouri home on or around February 22, 2010.

¶ 9 Around February 22, 2010, plaintiff contacted attorney Winstein regarding the proposed division of the Missouri property proceeds, but Winstein declined to help her, stating it was a "real estate matter." On the same date, plaintiff retained new counsel to handle the issue concerning the closing of the Missouri home and the distribution of the proceeds from the sale. Subsequently retained counsel contacted the title company, which informed him it was obligated to follow the language provided in the judgment of dissolution. Subsequently retained counsel met with attorney Winstein, who declined to offer assistance in the matter, but signed a motion to substitute attorneys.

¶ 10 On February 26, 2010, subsequently retained counsel filed a motion for the entry of an order *nunc pro tunc*, requesting the court to clarify the language in the judgment of dissolution, as it pertained to the distribution of the Missouri property proceeds and a Rolex watch. After a hearing on March 16, 2010, Judge James Mesich entered an order granting the motion in part, regarding the return of a Rolex watch, but denied the motion as to the issue regarding the distribution of the proceeds from the sale of the Missouri property. When denying the motion *nunc pro tunc*, the court stated that "on October 5th [2009] there was an agreed order that was submitted to me, and that agreed order had the same payment provision provided in the original judgment." The court continued that there had been "at least two prior times when the lawyers have presented orders that have been approved providing for the distribution of proceeds in the fashion [husband's divorce attorney] suggests should happen, and I'm not going to change it today based on that." As a result of the trial court's denial of the motion for the entry of an order *nunc pro tunc*, plaintiff "became aware that the drafting error in the Judgment of Dissolution of

Marriage approved by Attorney Winstein was not in fact an error which could be corrected by correcting the language of the original Order."

¶ 11 Count I of plaintiff's complaint in this case, the breach of contract/fiduciary duty claim, alleged attorney Winstein "breached his fiduciary duty to exercise a reasonable degree of care and skill to provide competent representation" by: failing to determine the implications of the difference in language between "$50,000.00 out of the husband's share" and "the first $50,000.00;" reviewing the terms of the judgment for purpose of filing a posttrial motion; failing to discover the negative impact of the clause on plaintiff; and declining to represent plaintiff in resolving the issue. As a result of attorney Winstein's conduct, plaintiff received a reduction of $25,000 in her share of the net proceeds from the sale of the Missouri property and incurred attorney fees.

¶ 12 Count II, the professional negligence claim, alternatively alleged defendants were "negligent in the performance of the legal services rendered to Plaintiff" by failing to review: the draft of the Judgment of Dissolution of Marriage for language consistent with the terms of the agreed settlement; all of the terms of the judgment for purposes of filing a posttrial motion; and to file or to protect plaintiff rights regarding the sale of the Missouri property. As a result of defendant's professional negligence, plaintiff was deprived of $25,000 from the sale of the Missouri home and incurred attorney fees.

¶ 13 Defendants filed an answer to plaintiff's complaint on April 27, 2012. After conducting plaintiff's discovery deposition, defendants moved to amend their answer on August 23, 2012, by raising an affirmative defense claiming plaintiff filed her complaint beyond the applicable statute of limitations. The trial court allowed defendants' motion and defendants' filed an amended answer on September 4, 2012.

¶ 14 On December 20, 2012, defendants filed a Motion for Summary Judgment arguing the two-year statute of limitations, set forth in 735 ILCS 5/13-214.3(b) (West 2010), barred both counts of plaintiff's complaint because plaintiff knew, or reasonably should have known, of her claimed injury more than two years before the date she filed her complaint on March 15, 2012. Specifically, defendants argued plaintiff "admitted that, in February 2010, she believed the discrepancy between what was said at the September 2008 [settlement] hearing and what was in the April 2009 Judgment of Dissolution was an error that Winstein had made. *** Indeed, the plaintiff 'inquired further' into her belief that the discrepancy was wrongfully caused by retaining new counsel to attempt to modify the Judgment of Dissolution of Marriage in February 2010." Accordingly, defendants asserted that the "latest date on which the plaintiff knew or should have known that she suffered an injury which was wrongfully caused was in February 2010, more than two years prior to the date she filed her Complaint." Defendants attached, to their motion for summary judgment, a copy of the transcript of plaintiff's August 20, 2012, discovery deposition. During her discovery deposition, plaintiff provided the following testimony:

> "Q [by defense counsel]: When you were about to close [on the Missouri property] and you called up Mr. Winstein and said you've got to stop this closing, did you realize at that time that there was a discrepancy between what you had discussed in court in October [*sic*] 2008 and what was in the judgment for dissolution that was entered in April of 2009?
>
> A [by plaintiff]: Yes.
>
> Q: Okay. And did you consider that to be an error that Mr. Winstein had made?
>
> A: Yes.

Q: And then you employed [subsequently retained counsel]?

A: Yes.

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Q: Did you ask [subsequently retained counsel] to file a motion on your behalf with regard to disposition of the proceeds of the Missouri property?

A: Yes.

Q: And was the purpose of that motion to correct what you considered to be an error in the judgment for dissolution of marriage?

A: Yes.

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Q: When did you first realize that there was some difference between what had been said in court and what ended up in the judgment for dissolution of marriage?

A: When my friend looked at the settlement paper.

Q: From February 24, 2010?

A: Yes. Yes. Like I said, I'm not a realtor. I don't know how to read these things, and...

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Q: But you first knew about the problem around the time of the closing which was somewhere near February 22.

A: Yes.

***

Q: What I'm trying to get at is, by the time subsequently retained counsel filed a motion for *nunc pro tunc* order, you knew at that time that there was something different in the judgment for dissolution than what was in the court hearing, correct?

A: Yes.

Q: Okay. And did you, at that time, feel that that was because of some error that Mr. Winstein had made?

A: Yes, because of the [Missouri] property.

Q: Because he didn't make sure that the judgment of dissolution tracked the same language that was in the transcript of the October [*sic*] 2008 hearing.

A: Right."

¶ 15 On January 26, 2013, plaintiff filed a response to defendants' motion for summary judgment arguing she did not know, and could not reasonably have known, she would incur damages prior to the March 16, 2010, ruling by the trial court denying subsequently retained counsel's motion for the entry of an order *nunc pro tunc*. Defendants filed a reply to plaintiff's response, reiterating that plaintiff learned in February 2010 that the language contained in the judgment of dissolution of marriage did not mirror the language provided in the settlement agreement.

¶ 16 On January 29, 2013, plaintiff filed an affidavit in support of her response to defendants' motion for summary judgment, admitting she received a total of $182,021.12 from two separate checks ($132,021.12 plus $50,000.00) on March 19, 2010, as her share of the proceeds from the sale of the Missouri property. Plaintiff averred this total was $25,000 less than the amount she expected to receive after settling the property issues at the September 19, 2009, settlement hearing.

¶ 17 On February 14, 2013, the trial court entered an order, finding plaintiff "was aware at least by February 2010 that she had a potential malpractice claim and was aware of exactly what the potential damage was." The order stated that plaintiff waited more than two years before filing her malpractice complaint, violating the statute of limitations set forth in 735 ILCS 5/13-214.3(b) (West 2010).

¶ 18 Plaintiff filed a motion to reconsider, on March 18, 2013, arguing plaintiff did not learn of her actual damages in the amount of $25,000.00, plus attorney fees, until at least March 16, 2010, when the trial court denied her motion for the entry of an order *nunc pro tunc*. In addition, plaintiff argued "after March 17, 2010[,] is the date she suffered her injury" because any injury before that date would have been speculative. Defendants responded, arguing the trial court should deny the motion to reconsider because "the uncontested facts unequivocally demonstrate plaintiff knew or reasonably should have known she had incurred an injury which was wrongfully caused, at the least, in February 2010."

¶ 19 After a hearing on April 16, 2013, the trial court denied plaintiff's motion to reconsider stating "when you say it's speculative, it's not speculative at all. It's clearly originally a $25,000 injury. There is no speculation ***." The court concluded, "I believe that the – the Court's ruling on the 29th of January was correct. I believe that the provisions with regard to the cases described here with regard to when the two year limitation period should have started was in February of 2010 and that that [*sic*] two years past from that period of time before the malpractice case was filed *** and that therefore the statute of limitations was – was violated." Plaintiff timely appeals.

¶ 20 ANALYSIS

¶ 21 On appeal, plaintiff raises two issues. First, plaintiff contends the trial court erred by granting defendants' motion for summary judgment since the two-year statute of limitations did not begin to run, at the earliest, until the trial court denied her motion for the entry of an order *nunc pro tunc* on March 16, 2010. Plaintiff also submits she did not suffer an actual injury until March 19, 2010, the date she received the money from the escrow account following the closing on the Missouri property. Since plaintiff argues the entry of summary judgment in favor of defendants was improper, plaintiff also argues the trial court erroneously denied her motion to reconsider its award of summary judgment in favor of defendants.

¶ 22 Defendants respond the trial court properly determined the statute of limitations began to run no later than February 2010, when plaintiff obtained a copy of the proposed HUD-1 settlement statement and hired a new attorney to rectify the discrepancy contained in the judgment of dissolution. Defendants contend that since the statute of limitations began to run in February 2010, the two-year statute of limitations bars plaintiffs' legal malpractice lawsuit filed on March 15, 2012.

¶ 23 A motion for summary judgment should be granted when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Romano v. Morrisroe*, 326 Ill. App. 3d 26, 27-8 (2001). The disposition of a summary judgment motion is not discretionary, and the standard of review is *de novo*. *Id*. at 28. To determine whether a genuine issue of material fact exists, a reviewing court should consider the pleadings, depositions, admissions, exhibits, and affidavits on file and construe them liberally in favor of the opponent of the motion and strictly against the movant. *Id.*

¶ 24 To prevail on a legal malpractice claim as alleged in this case, plaintiff must plead and prove that (1) defendant attorney owed plaintiff a duty of due care arising from the attorney-

client relationship, (2) defendant attorney breached that duty, and (3) as a proximate result, plaintiff client suffered injury. *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 306 (1986). The case law provides, and the parties agree, a suit for attorney 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 2010). Pursuant to the "discovery rule," the two-year period begins to run when plaintiff knows or should know facts that would cause her to believe her injury was wrongfully caused (*Romano*, 326 Ill. App. 3d at 28), thereby creating an obligation to inquire further on that issue. *SK Partners I, LP v. Metro Consultants, Inc.*, 408 Ill. App. 3d 127, 130 (2011).

¶ 25 To avoid the harsh consequences of the court's ruling on summary judgment, plaintiff urges this court to focus on the date plaintiff was negatively impacted by a $25,000 financial injury on March 19, 2010, the date of the distribution of the sale proceeds. Plaintiff is correct in her assertion that it is the realized injury to the client, not the attorney's misapplication of his legal expertise that marks the point for measuring compliance with a statute of limitations period. *Goodman v. Harbor Market, Ltd.*, 278 Ill. App. 3d 684, 690 (1995). However, damages are not considered speculative where their existence is certain even if their exact amount is uncertain or yet to be fully determined. *Northern Illinois Emergency Physicians.*, 216 Ill. 2d at 307. In this case, the specific amount of $25,000 in damages was identified when plaintiff reviewed the HUD-1 settlement statement on February 22, 2010, even though those reduced proceeds were not distributed to plaintiff until March 19, 2010.

¶ 26 Here, plaintiff testified at her deposition that she became aware of the discrepancy between the language contained in the judgment of dissolution of marriage signed by the court

and the language agreed to by the parties during the September 2008 settlement hearing, when her friend reviewed the HUD-1 settlement statement a few days before the February 24, 2010, closing on the Missouri property. It was undisputed plaintiff immediately acted on her friend's concerns and contacted attorney Winstein on February 22, 2010, to request his assistance to correct the HUD-1 settlement statement. Attorney Winstein would not assist plaintiff, his former client, causing her to retain another attorney to represent her interests on the same date.

¶ 27 On February 26, 2010, subsequently retained counsel filed a motion requesting entry of an order *nunc pro tunc* with respect to the distribution of sale proceeds. A motion for entry of an order *nunc pro tunc* is used to correct clerical errors in written orders to conform them to the court's actual judgment; not to alter the court's judgment. *In re Marriage of Morreale*, 351 Ill. App. 3d 238, 241 (2004). On March 16, 2010, the court denied this request. The court found on October 5, 2009, the parties previously submitted an agreed order to the same judge, which included the same language for the distribution of sale proceeds contained in the original April 29, 2009 judgment of dissolution which plaintiff requested to be modified by an order *nunc pro tunc*. The court further noted attorney Winstein and plaintiff's husband's counsel had twice previously presented orders to the trial court which also contained the alleged incorrect language now at the center of plaintiff's malpractice claim in this case.

¶ 28 Based on our *de novo* review, we recognize it is undisputed that on May 27, 2009 attorney Winstein filed two separate motions requesting the court to amend and clarify the language of the April 29, 2009 judgment which the court allowed. One motion requested the court to clarify the language regarding the *method* of sale for the Missouri property, and included a document, approved by attorney Winstein, which repeated the *incorrect* language contained in

the judgment. On October 5, 2009, Judge Mesich granted relief pursuant to an *agreed* resolution of those issues raised in attorney Winstein's May 27, 2009 motion.

¶ 29 Although we do not believe the filing of a motion for entry of an order *nunc pro tunc* or the trial court's ruling on that motion should be used as a tool to toll the commencement of the statute of limitations, the facts of this case are troubling and unique. When the trial court announced the denial of plaintiff's motion for entry of an order *nunc pro tunc,* the court stressed attorney Winstein twice previously affirmed the usage of the purported *inaccurate* language included in the judgment of dissolution. Thus, the court implicitly found the language at issue constituted something other than a clerical or scrivener's error which could be corrected with an order *nunc pro tunc*. In light of the fact that the terms of the settlement agreement, as set forth in paragraph 5 above, had been read into the record, it seems that plaintiff was not unreasonable in assuming, prior to March 16, 2010, that the language of the dissolution order could be changed to reflect that agreement. Consequently, we conclude the trial court's ruling on March 16, 2010 establishes the date upon which plaintiff reasonably should have known attorney Winstein's conduct was wrongful rather than a careless, isolated clerical mistake. Based on these unique circumstances, we conclude plaintiff first discovered facts that would cause her to believe her injury was wrongfully caused on March 16, 2010, thereby creating plaintiff's obligation to inquire further on that issue whether the $25,000 error was attributable to any potential legal malpractice of previous counsel.

¶ 30 Without explanation, subsequently retained counsel waited nearly two additional years after the court's ruling on March 15, 2010 before initiating the malpractice action. Obviously, subsequently retained counsel did not consider the possibility that the statute of limitations may have been triggered as early as February 2010 when his client found it necessary to hire him to

attempt to correct the language approved by attorney Winstein. Based on this record, a viable argument could be made that this plaintiff twice suffered from inattentive representation of retained counsel.

¶ 31 In conclusion, based on our *de novo* review of the pleadings, and due to the very unique circumstances of this case, we conclude the date of discovery of attorney Winstein's alleged legal malpractice is controlled by the date the trial court refused to correct the alleged scrivener's error. Although we reverse the trial court's ruling on defendant's motion for summary judgment based on the statute of limitations, we express no opinion regarding the merits of the underlying complaint.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, the judgment of the circuit court of Rock Island County is reversed.

¶ 34 Reversed.

¶ 35 JUSTICE O'BRIEN, specially concurring.

¶ 36 I concur in all respects with the majority's analysis and disposition of the issue presented on appeal. I write separately because I believe we lack any basis in this record to characterize the performance of the attorney who filed this action as inattentive and therefore do not join my colleagues in that dictum.