

STATE OF MICHIGAN
COURT OF APPEALS

KERRY NAGLE and KERRY STEEL, INC.,

Plaintiffs-Appellants,

V

STEVEN Z. COHEN, STEVEN RABINOVITZ,
and COHEN, LERNER & RABINOVITZ, P.C.,

Defendants-Appellees.

UNPUBLISHED
December 16, 2010

No. 294727
Oakland Circuit Court
LC No. 2009-098902-NM

Before: MURRAY, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

In this legal malpractice action, plaintiffs appeal as of right the trial court's order granting defendants' motion for summary disposition. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff Kerry Nagle was the president and majority shareholder of plaintiff Kerry Steel, Inc. For approximately 20 years, defendant Cohen, Lerner & Rabinovitz, P.C. (Cohen Lerner) provided legal representation to Nagle and Kerry Steel. On December 26, 2006, Nagle sent the following letter to defendant Steven Cohen, president of Cohen Lerner:

Effective immediately, your services and the services of anyone associated with your firm are no longer needed.

I am requesting you to deliver all my files, personal and corporate, active, inactive or closed, to my office I expect the files to be delivered at your earliest convenience but no later than Friday[,] January 5, 2007.

On April 13, 2007, Cohen Lerner sued Kerry Steel for breach of contract, account stated, and quantum meruit. The complaint alleged that Cohen Lerner performed legal services for Kerry Steel and that Kerry Steel failed to pay for the services. Thereafter, Kerry Steel filed a counterclaim against Cohen Lerner for legal malpractice. The malpractice claim concerned Cohen Lerner's representation of Kerry Steel in a matter involving "56 Industries, Inc."

On January 16, 2008, the date scheduled for Nagle's deposition, Cohen Lerner and Kerry Steel reached a settlement agreement, and the agreement was placed on the record by Steven Cohen. Pursuant to the transcript of the agreement, Kerry Steel agreed to pay a certain sum to Cohen Lerner, while Cohen Lerner agreed to dismiss with prejudice its claim against Kerry Steel. In addition, Kerry Steel, along with Nagle, in his individual capacity,¹ agreed not to take any other action against Cohen Lerner arising from the law firm's representation. The parties agreed to exchange releases; Cohen Lerner would give a release to Kerry Steel and to Nagle, individually, and Kerry Steel and Nagle would issue a full and general release to Cohen Lerner. Brian Witus, the attorney representing Kerry Steel and Nagle, stated that he had the authority to accept the settlement agreement on behalf of Kerry Steel and Nagle.

A copy of the transcript was subsequently attached to a "Settlement Agreement and Mutual Release." The agreement and release read, "The parties have agreed to settle the above-referenced matter based on the terms and conditions set forth on the attached transcript." The named parties were Cohen Lerner and Kerry Steel. The release was signed by Steven Cohen, on behalf of Cohen Lerner, and Thomas Bonk, chief financial officer of Kerry Steel.

On March 6, 2009, plaintiffs sued defendants for legal malpractice. According to plaintiffs, "[a]n attorney client relationship existed until at least March 8, 2007." Plaintiffs alleged that defendants committed legal malpractice by:

- a. Failing to provide proper tax advice, including but not necessarily limited to advising Mr. Nagle that he should not elect to be a "trader" pursuant to certain IRS requirements, rules and regulations;
- b. Providing incorrect tax advice;
- c. Acting in conflict in taking on other clients not allowed and [with]out the approval of the Plaintiff, including but not necessarily limited to the representation of adverse parties and the dissemination to those adverse parties, proving [sic] legal services to former minority shareholders, assisting in setting up an LLC to those former minority shareholders, acting in contradiction to an agreement with Plaintiffs as well as ethical and professional standards, particularly after acquiring intimate knowledge of the Plaintiffs though years of representing the Plaintiffs;^[2]
- d. Using privileged and/or confidential information;

¹ Nagle was not present when Steven Cohen placed the settlement agreement on the record. His attorney, Brian Witus, however, was present during Cohen's recitation of the agreement.

² This allegation arises out of the alleged conflict of interest in defendants providing legal services to the former minority shareholders Paul and Arthur Wolf with respect to their dispute against Kerry Steel.

e. Taking unnecessary and/or inappropriate witness depositions and/or statements, including but not necessarily limited to a sworn statement/deposition in a foreign jurisdiction in which they were not admitted and did not have the full knowledge of the consequences of taking such a statement/deposition;^[3]

f. Other acts and/or omissions not presently known but which may be ascertained through the discovery process which may be breaches of duties, may not comply with the Michigan Rules of Professional Conduct and may contravene ethical considerations applicable to attorneys in the State of Michigan.

Defendants moved for summary disposition under MCR 2.116(C)(7), arguing that plaintiffs' action was barred by res judicata, by the January 2008 settlement agreement and release, and by the two-year statute of limitations for legal malpractice claims. The trial court decided the matter on the briefs, without argument, and found plaintiffs' claims barred by both res judicata and the release. The trial court did not address defendants' statute of limitations argument.

II. ANALYSIS

On appeal, plaintiffs argue that the trial court erred in granting summary disposition to defendants where Nagle was not a party to the 2007 action initiated by Cohen Lerner and where neither Nagle nor his attorney signed the settlement agreement and release. Plaintiffs' arguments only concern whether summary disposition was properly granted to defendants on the legal malpractice claims asserted by Nagle in his individual capacity.⁴ As an alternative ground for affirmance, defendants assert that plaintiffs' malpractice claims are barred by the statute of limitations. We conclude that the malpractice claims asserted by Nagle in his individual capacity are barred by the applicable two-year statute of limitations, MCL 600.5805(6), and we, therefore, affirm the trial court's order granting summary disposition to defendants. See *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 643; 591 NW2d 393 (1998) ("When this Court concludes that a trial court has reached the correct result, this Court will affirm even if it does so under alternative reasoning.").

A. STANDARD OF REVIEW

We review de novo a trial court's decision to grant a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition is proper under MCR 2.116(C)(7) if "[t]he claim is barred because of release . . . statute of limitations" In deciding a motion under MCR 2.116(C)(7), we accept as true the contents

³ This refers to a lawsuit filed against Kerry Steel in Tennessee by a company called Unarco.

⁴ Plaintiffs do not claim that summary disposition was improperly granted on the malpractice claims specific to Kerry Steel or to Nagle in a representative capacity of Kerry Steel.

of the complaint unless contradicted by any affidavits, depositions, admissions, or other documentary evidence submitted by the parties. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006).

We acknowledge that the trial court did not address defendants' statute of limitations argument below. However, the issue was raised before the trial court, and plaintiffs responded to the argument on the merits.⁵ In addition, whether a cause of action is barred by the statute of limitations is a question of law reviewed de novo. *Kloian v Schwartz*, 272 Mich App 232, 235; 725 NW2d 671 (2006). Under these circumstances, we may decide the issue whether the legal malpractice claims brought by Nagle in his individual capacity are barred by the statute of limitations. See *Village of Hickory Pointe Homeowners Ass'n v Smyk*, 262 Mich App 512, 516; 686 NW2d 506 (2004).

B. STATUTE OF LIMITATIONS

Generally, the limitations period for a legal malpractice claim is two years from the date the claim accrues. MCL 600.5805(6); *Kloian*, 272 Mich App at 237. The accrual of a claim for a malpractice action is governed by MCL 600.5838(1), which provides, in pertinent part:

[A] claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.

“A lawyer discontinues serving a client when relieved of the obligation by the client or the court, or upon completion of a specific legal service that the lawyer was retained to perform.” *Maddox v Burlingame*, 205 Mich App 446, 450; 517 NW2d 816 (1994) (internal citations omitted); see also *Hooper v Hill Lewis*, 191 Mich App 312, 315; 477 NW2d 114 (1991) (holding the plaintiff relieved the defendant attorneys from the obligation to represent him when he sent them a letter denying them the authority to act on his behalf). The provision of ministerial acts do not extend the date of accrual beyond the termination date of the attorney-client relationship. *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, PC v Bakshi*, 483 Mich 345, 360; 771 NW2d 411 (2009).

In this case, Nagle sent a letter to Cohen Lerner on December 26, 2006, stating that “[e]ffective immediately” its legal services were no longer needed. The letter relieved Cohen

⁵ Plaintiffs in their reply brief on appeal assert that the record is not adequate to address defendants' statute of limitations argument and that if the Court is inclined to address the argument, we should remand the case to the trial court to allow “the opportunity for appropriate discovery.” However, as noted, plaintiffs responded to the statute of limitations argument on the merits below. In their response brief to the motion for summary disposition, plaintiffs did not claim that discovery on the relevant facts had not yet occurred.

Lerner of any obligation to Kerry Steel and Nagle, in either his representative capacity or his personal capacity, as Nagle requested Cohen Lerner to return “all my files, *personal and corporate*, active, inactive or closed” (emphasis added).

However, despite the December 26, 2006 letter, plaintiffs alleged in their complaint that an attorney-client relationship existed with Cohen Lerner “at least until March 8, 2007.” They argued in their response to defendants’ motion for summary disposition that because the complaint was filed within two years of this date, their legal malpractice claims were timely. On March 8, 2007, there was a telephone conference between an attorney at Cohen Lerner and Thomas Bonk, the chief financial officer of Kerry Steel, “regarding documents concerning the purchase of Pemberton in 1996.” As the discussion was between a Cohen Lerner attorney and Bonk, it is obvious that the matter concerned legal services provided by Cohen Lerner to Kerry Steel, not legal services rendered to Nagle in his individual capacity. Accordingly, the documentary evidence contradicts and refutes the allegation in the complaint that an attorney-client relationship existed between Cohen Lerner and Nagle in his individual capacity at least until March 8, 2007.

In their response to defendants’ motion for summary disposition, plaintiffs also argued that an attorney-client relationship existed until February 2008, for the reason that Cohen Lerner received payments from David and Jill Tracz, pursuant to a court order in a 2003 case in which it represented Kerry Steel and Nagle, and held those payments in its IOLTA account on behalf of plaintiffs. In an affidavit, David Tracz averred that Steven Cohen was the attorney for Kerry Steel and Nagle in the 2003 case. Nagle stated in an affidavit that Steven Cohen never informed him that Cohen Lerner had received and was holding in its IOLTA account funds received on behalf of him or Kerry Steel from David Tracz. In their brief on appeal, plaintiffs claim that the legal malpractice claims asserted by Nagle in his individual capacity relate to “tax issues” and “tax consequences.” According to the complaint, defendants failed to provide Nagle with proper tax advice, including advising him “that he should not elect to be a ‘trader’ pursuant to certain IRS requirements, rules, and regulations.” The record contains no explanation of the issues involved in the 2003 case, and it would be nothing but speculation and conjecture to conclude that any relationship exists between the 2003 case and the alleged improper tax advice rendered by Cohen Lerner to Nagle in his individual capacity. Accordingly, the allegation, first asserted in plaintiffs’ response brief, that an attorney-client relationship existed between Nagle in his individual capacity and Cohen Lerner until February 2008 is not supported by the record, including the documentary evidence submitted by plaintiff.

In conclusion, on December 26, 2006, Nagle discharged Cohen Lerner of any obligation to Kerry Steel and to him in an individual capacity. Although plaintiffs alleged that an attorney-client relationship existed between them and Cohen Lerner until either March 8, 2007, or February 2008, the record does not support that an attorney-client relationship existed between Cohen Lerner and Nagle in his individual capacity until either of these dates. Because the legal malpractice claims asserted by Nagle in his individual capacity were not filed within two years after Cohen Lerner was discharged of its obligations to Nagle, the claims are barred by the statute of limitations.

Affirmed.

/s/ Christopher M. Murray

/s/ Joel P. Hoekstra

/s/ Deborah A. Servitto