

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

EDWARD C. KRAMB,

Plaintiff,

vs

File No. 91-9074-NM
HON. PHILIP E. RODGERS, JR.

ROBERT W. PARKER and TERESA
SCHAFFER SULLIVAN, Jointly and
Severally,

Defendants.

Dennis E. Moffett (P17863)
Attorney for Plaintiff

Thomas H. Blaske (P26760)
Attorney for Defendant Sullivan

E. Robert Blaske (P10876)
Co-Counsel for Defendant Sullivan

Laura M. Dinon (P41225)
Steven L. Barney (P10465)
Attorneys for Defendant Parker

DECISION AND ORDER

The Defendant, Sullivan, has filed a Motion for Summary Disposition alleging that Plaintiff's claim of legal malpractice is barred by the statute of limitations. MCR 2.116(C)(7). The Court has had an opportunity to review the briefs and affidavits filed by the parties and has entertained the oral arguments of counsel. For reasons that will be further described ahead, the Defendant Sullivan's Motion is denied.

This claim for legal malpractice arises out of the Defendant Sullivan's representation of Plaintiff in certain litigation involving the title to real property. It is not disputed that the Defendant Sullivan last represented Plaintiff on May 20, 1988. Likewise, there is no dispute that this case was filed on June 25, 1991.

The statute of limitations for a legal malpractice claim is

set forth by statute. The statute provides that the claim must be brought within two years from the date of last service or six months from the date on which Plaintiff discovered, or should have discovered, the alleged malpractice. MCLA 600.5805; MCLA 600.5838. For purposes of this motion, the only issue is whether the Plaintiff discovered, or should have discovered, the alleged malpractice prior to December 25, 1990.

The Defendant Sullivan argues that Plaintiff was aware of a legal malpractice claim, or should have been, when he received an adverse decision in the underlying case in October, 1989. At that time, the Defendant Sullivan states that Plaintiff discovered an identifiable, adverse effect and that the issuance of the trial court's opinion is identical with the date when he discovered, or should have discovered, the claimed malpractice.

Plaintiff responds with several arguments. Most importantly, Plaintiff notes the role of the Defendant Parker who assumed control of the case after the Defendant Sullivan was allowed to withdraw pursuant to Circuit Court order. It is undisputed that the Defendant Parker was never critical of the Defendant Sullivan and did not assign any error or malpractice to her during the time he represented Plaintiff. Rather, Plaintiff alleges that the Defendant Parker told him that the Court was in error and the matter would be corrected on appeal. It is undisputed that Plaintiff's action was filed within six months of an adverse decision by the Court of Appeals.

The Defendant's Motion brings into conflict Plaintiff's right to his day in court and the Defendant's right to rely upon a statute of repose. Several cases have been provided to the Court in an effort to resolve this question. The Court first notes that the standard of review for the resolution of a motion brought pursuant to MCR 2.116(C)(7).

The standard of review for a (C)(7) motion is set forth in Moss v Pacquing, 183 Mich App 574, 579 (1990).

"In considering a motion for summary disposition under MCR 2.116(C)(7), a court must consider any affidavits,

pleadings, depositions, admissions, and documentary evidence then filed or submitted by the parties. MCR 2.116(G)(5). In this case, all of Plaintiffs' well-pled factual allegations are accepted as true and are to be construed most favorably to Plaintiffs. Wakefield v Hills, 173 Mich App 215, 220; 433 NW2d 410 (1988). If a material factual question is raised by the evidence considered, summary disposition is inappropriate. Levinson v Sklar, 181 Mich App 693, 697; 449 NW2d 682 (1989); Hazelton v Lustig, 164 Mich App 164, 167; 416 NW2d 373 (1987)."

With this standard of review in mind, the Court first reviewed the case of Seebacher v Fitzgerald Hodgeman, 181 Mich App 642 (1989). This case is relied upon by both parties. In Seebacher, Plaintiff retained the Defendant law firm for tax advice regarding the distribution of certain funds owed him by his former employer's pension and profit sharing plans. Plaintiff followed the advice he received and was later notified by the Internal Revenue Service of various adjustments which were being made to his returns, the culmination of which created a liability for significant additional taxes, penalties and interest. Plaintiff retained a second attorney within two weeks of receiving this notice, which attorney confirmed that the legal advice provided by the Defendant was incorrect.

On appeal, following a dismissal of the complaint predicated on an application of the statute of limitations, Plaintiff claimed that the malpractice was not discovered when he was notified of the adjustment by the I.R.S., but only when the amount due was subsequently determined, i.e., the assessment date. The Seebacher court addressed this issue as follows:

"Plaintiff learned of the possible cause of action when he received the I.R.S. notice. Within two weeks, he hired a new attorney to establish whether the advice was correct. We reject his contention that the claim is not discovered until the date of assessment, when the full amount of damages was known. See, Sherrell v Bugaski, 169 Mich 10, 16-17; 425 NW2d 707 (1988). Plaintiff was aware in October that there was possible malpractice. It is not necessary that he be notified of the full extent of the damages in order for his cause to accrue. Id. We conclude the malpractice claim is barred, because Plaintiff failed to file his action within six months of

October 1986. Seebacher, supra, 647-648."

In the case before this Court, Plaintiff's discovery of the Defendant Sullivan's errors would be fixed at the date the trial court issued its decision, but for Defendant Parker's active representation that the trial court was in error and these issues would be corrected on appeal. A key distinction between the facts at bar and those in Seebacher is the active representation of Plaintiff's second attorney that the error lay with the Court and not with the Plaintiff's prior counsel.

In the other precedent cited to the Court, the Plaintiffs acknowledged notice of their attorney's misconduct but claimed the cause of action did not accrue until their appellate remedies were exhausted. Luick v Rademacher, 129 Mich App 803 (1983). The accrual of a cause of action for legal malpractice was discussed in the Rademacher opinion. There, the Court distinguished between the existence of "identifiable and appreciable harm" sufficient to trigger the statute of limitations and subsequent appellate efforts which may have mitigated the loss. In relevant part, the Rademacher court addressed this point as follows:

"Based on the allegations of Plaintiff's own complaint, he suffered identifiable and appreciable harm as a result of his attorney's alleged misconduct well in advance of the time that the Supreme Court denied his application for leave to appeal in the divorce action. Further, these damages occurred, in substantial part, prior to or at the time of Defendant's discharge as counsel for Plaintiff. At that point, Plaintiff, therefore, both knew of the alleged malpractice and had sustained appreciable harm as a proximate result of it. Subsequent success in having the consent judgment set aside by the trial or appellate courts may have reduced future damages, but would not have eliminated prior losses or abolished Plaintiff's cause of action. Id. 808-809."

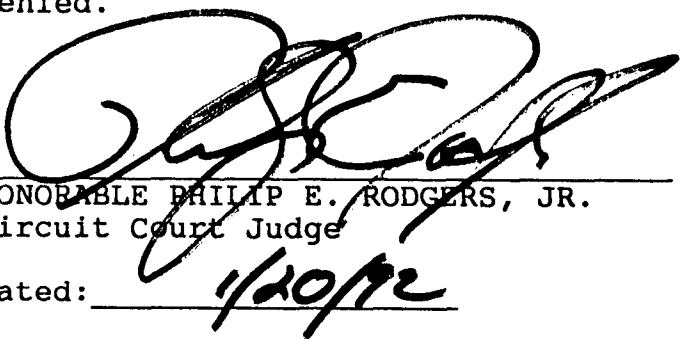
While the issue was somewhat different in Hayden v Green, 166 Mich App 352 (1988), the Court recognized that the suit was filed within six months of the termination of the Defendant's services. The Court would not allow a prior law firm to assert the statute of limitations due to the fact that the Defendant was no longer a member. In the Green case, the Defendant continued to represent

Plaintiff on appeal in an effort to correct his prior errors.

In reviewing the uncontested facts in the case before this Court, and construing those facts which are contested in a light most favorable to Plaintiff, it is this Court's opinion that the adverse trial court opinion and the costs and expenses associated with an appeal did not constitute "identifiable and appreciable harm" attributable to attorney error until the Court of Appeals issued its opinion. The key to this determination, is this Court's finding that the active representations of Defendant Parker were reasonably relied upon by Plaintiff. Surely, with the issuance of the trial court's opinion, the Plaintiff knew, or should have known, that he had suffered identifiable and appreciable harm. Absent the affirmative representations of the Defendant Parker that the harm was due to trial court error, the Defendant Sullivan's Motion would be granted. In the face of the representations attributed to Defendant Parker, the Motion must be denied.

Given the Plaintiff's active pursuit of his appellate rights in the underlying case and the dispatch with which this case was filed upon learning of the Court of Appeals opinion, the Plaintiff cannot be accused of sleeping on his rights. The statements of Defendant Parker cannot inure to the benefit of the Defendant Sullivan without placing a greater importance on dispute resolution by passage of time as opposed to a substantive evaluation of fact and law. The Motion is denied.

IT IS SO ORDERED.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 1/20/12