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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000865-MR

SASAN PASHA AND
MAREN SCHULKE — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN REYNOLDS, JUDGE
ACTION NO. 16-CI-03325

BRENT J. EISELE; MCCONNELL,
EISELE AND CASE, PLLC;
H. EDWIN BORNSTEIN; AND
BORNSTEIN AND BORNSTEIN, P.S.C. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, JONES, AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: This is a legal malpractice action filed by Sasan Pasha and Maren Schulke (collectively referred to as appellants) against Brent J. Eisele and his law firm, McConnell, Eisele and Case, PLLC, and H. Edwin Bornstein and

his law firm, Bornstein and Bornstein, P.S.C.[1] We conclude that appellants' claims for legal malpractice arising from a title examination performed by Eisele and Bornstein's failure to name Eisele in a subsequent action against Commonwealth Land Title Insurance Company are barred by the statute of limitations. We further conclude appellants' legal malpractice claim against Bornstein for his representation in their underlying claim against Commonwealth Land Title would not have succeeded.

On October 1, 2008, appellants entered into a contract to purchase real estate located at 3241 Loch Ness Drive, Lexington, Kentucky. They retained Eisele to perform a title examination and to handle the closing of the sale of the property. After the title examination was performed, Eisele advised appellants that the property was zoned to allow construction of a multi-level building. Upon the recommendation of Eisele, appellants purchased a policy of title insurance for the property from Commonwealth Land Title Insurance Company. The sale of the property was finalized on May 8, 2009.

On approximately May 26, 2009, Pasha discovered a restriction on the property that would prohibit appellants from constructing the contemplated multi-level building and advised Eisele of the restriction by email on that same day. After Eisele was unable to have the restriction lifted, Eisele advised appellants that the

[1] Our reference to Eisele includes his firm and to Bornstein includes his firm.

restriction was not properly indexed and to seek coverage for the alleged loss by making a claim under their title insurance policy with Commonwealth Land Title.

On September 14, 2009, appellants filed a coverage claim with Commonwealth Land Title. In the notice of claim, Pasha stated that appellants had been made aware of the restriction and that Eisele had not discovered the restriction due to an "indexing issue." Commonwealth Land Title responded to appellants' claim under the policy stating that it appeared to be "potentially covered." However, it also reserved its right to rely on any defense that may later become apparent. Subsequently, Commonwealth Land Title stated in letters that the basis for denying their claim was the "no loss or damage to the Insured Claimant" exception to the policy. Commonwealth Land Title reiterated that it reserved any and all rights.

After the claim was denied by Commonwealth Land Title, almost two years later, on July 11, 2011, appellants retained Bornstein to represent them in a breach of contract and bad faith action against Commonwealth Land Title for the diminution of the value of the property due to the restriction. On that same date, Pasha emailed Bornstein requesting that Bornstein review two other possible defendants, one of those being "closing attorney, McConnell Eisele and Case, PLLC" but noted that "the one (1) year statute of limitations on error and omission has passed but the firm was informed within the one year limit." In an email dated

July 20, 2011, Pasha asked Bornstein to give his "thoughts to involve the attorneys who did our closing." In response, Bornstein wrote:

> The law requires that lawsuits for malpractice be filed within one year of the date the claimant knew or should have known of the claim. Your notifying the lawyer within the year does not extend the time. Also, the lawyer was most likely hired by your lender or the seller and not by you. Therefore, it is questionable whether you could recover against the lawyer anyway.
>
> The claim against Commonwealth Land Title is pretty clear, subject to valuations of the property. I wouldn't muddy the claim by naming the attorney even if it were timely.

Ultimately, Bornstein filed the coverage action against Commonwealth Land Title.

In early April 2013, Commonwealth Land Title filed a motion for summary judgment. In doing so it did not rely on the "no loss or damage" exception to coverage but on the basis of an exclusion in the policy for "any easement or servitudes appearing in public records." On April 9, 2013, the action was dismissed by summary judgment. The trial court held that the subject restriction was discoverable in the public record and was excluded from coverage under the policy which excluded coverage for "[a]ny easements or servitudes appearing in the public records." This Court affirmed in *Pasha v. Commonwealth Land Title Ins. Co.*, No. 2013-CA-000848-MR, 2014 WL 5510931 (Ky.App. Oct. 31, 2014) (unpublished). The Kentucky Supreme Court denied discretionary review on September 16, 2015.

On September 8, 2016, appellants filed this legal malpractice case against Eisele and Bornstein. Appellants claimed that Eisele was negligent for failing to discover the restriction during the title examination. With regard to Bornstein, appellants claimed that Bornstein was negligent for failing to include Eisele in the coverage action filed against Commonwealth Land Title and negligently failed to present the legal theory of equitable estoppel in that action.

In an affidavit submitted to the trial court in response to Eisele's and Bornstein's motions for summary judgment based on the statute of limitations, Pasha stated that in late May or early June 2009, Eisele represented to him that the "failure to detect the restriction was due to an improper indexing by the County Clerk, not Eisele and said error made it impossible for his firm to discover the restriction when it ran the title." He further stated that Eisele promised: "(a) to assist me by trying to get the restriction lifted, (b) assist me in filing a claim, (c) assist me during the claim handling process, and (d) to continue to assist me through the conclusion of the matter." Pasha further stated that he did not know of Eisele's fault for failing to find the restriction until after Commonwealth Land Title's motion for summary judgment in March 2013.

The trial court ruled that the statute of limitations on any potential claim against Eisele ran in May 2010 and, therefore, this action filed in 2016 was untimely. The trial court further ruled that when appellants retained Bornstein in

2011 to represent them in the Commonwealth Land Title case, the statute of limitations against Eisele had run fourteen months earlier and, therefore, Bornstein could not be liable for failing to include Eisele in that action. As to Bornstein's alleged failure to make an equitable estoppel claim in the Commonwealth Land Title case, the trial court found that argument was made but was unsuccessful. Additionally, the trial court found that appellants could not satisfy the required elements for an equitable estoppel argument.[2] This appeal followed.

The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky.App. 2001) (quoting *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996)). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, 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." Kentucky Rule of Civil Procedure (CR) 56.03. The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only

[2] The summary judgment in Eisele's favor was granted by Judge James D. Ishmael, Jr., on September 6, 2017. The summary judgment in Bornstein's favor was granted later by Judge John Reynolds.

"if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Lewis*, 56 S.W.3d at 436 (citations omitted).

Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and reviews the issue *de novo*. *Id.*

In a legal malpractice case, the plaintiff has the burden of proving: "1) that there was an employment relationship with the defendant/attorney; 2) that the attorney neglected his duty to exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances; and 3) that the attorney's negligence was the proximate cause of damage to the client." *Stephens v. Denison*, 64 S.W.3d 297, 298-99 (Ky.App. 2001) (citation omitted). In *Marrs v. Kelly*, 95 S.W.3d 856 (Ky. 2003) (internal quotation marks and footnote omitted), the Court further explained:

> Based on these factors, a legal malpractice case is the suit within a suit. To prove that the negligence of the attorney caused the plaintiff harm, the plaintiff must show that he/she would have fared better in the underlying claim; that is, but for the attorney's negligence, the plaintiff would have been more likely successful.

Id. at 860.

For a claim to be successful, it must be timely filed under the applicable statute of limitations. *Coslow v. Gen. Elec. Co.*, 877 S.W.2d 611, 612 (Ky. 1994). As to appellants' claim against Eisele, the question is whether appellants' malpractice claim for his failure to discover the restriction during the title examination in 2009 is barred by the statute of limitations. Appellants' claim against Bornstein for not naming Eisele as a defendant in the Commonwealth Land Title action for his alleged malpractice is interwoven with whether the statute of limitations on the malpractice claim against Eisele had run when appellants retained Bornstein to represent them. If so, as a matter of law, appellants' claim that the failure to name Eisele as a defendant was malpractice must fail. Under those circumstances, there is no possibility that even if Eisele was named, appellants' malpractice claim would have been successful. *Marrs*, 95 S.W.3d at 860.

The statute of limitations for legal malpractice is found in Kentucky Revised Statute (KRS) 413.245, which provides:

> Notwithstanding any other prescribed limitation of actions which might otherwise appear applicable, except those provided in KRS 413.140, a civil action, whether brought in tort or contract, arising out of any act or omission in rendering, or failing to render, professional services for others shall be brought within one (1) year from the date of the occurrence or from the date when the cause of action was, or reasonably should have been, discovered by the party injured.

The statute provides two different limitations periods: "one year from the date of the 'occurrence,' and one year from the date of the actual or constructive discovery of the cause of action." *Queensway Financial Holdings Ltd. v. Cotton & Allen, P.S.C.*, 237 S.W.3d 141, 147 (Ky. 2007). When a plaintiff claims that the malpractice action was filed within both limitations periods, the first step is the analysis to determine whether the action was filed within the occurrence period. *Id*. at 148. Appellants argue that the claim against Eisele, filed on September 8, 2016, was filed within the parameters of both rules, so we begin with the occurrence rule.

"Occurrence," as used in KRS 413.245, is synonymous with "cause of action[.]" *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 271 (Ky.App. 2005). As explained in *Michels v. Sklavos*, 869 S.W.2d 728, 730 (Ky. 1994) (quoting *Northwestern Nat'l Ins. Co. v. Osborne*, 610 F.Supp. 126, 128 (D.C. Ky. 1985)), "[t]he use of the word 'occurrence' in KRS 413.245 indicates a legislative policy that there should be some definable, readily ascertainable event which triggers the statute." The triggering event is "the date of 'irrevocable non-speculative injury.'" *Id.* In sum, "[a]n 'occurrence' legal malpractice claim is ripe, and a cause of action has accrued, when both negligence and 'reasonably ascertainable' damages have occurred." *Saalwaechter v. Carroll*, 525 S.W.3d 100, 105 (Ky.App. 2017) (citations omitted).

There is no dispute that the alleged negligent act, the title examination, occurred on or before the closing on May 8, 2009 and that the appellants purchased the property on that date. The appellants argue that does not end our inquiry because although the negligence occurred in May 2009, the damages have yet to become irrevocable and non-speculative. They point out that the Commonwealth Land Title case was resolved by summary judgment without a determination as to damages.

As the appellants note, *Meade County Bank v. Wheatley*, 910 S.W.2d 233 (Ky. 1995), also involved an alleged negligently performed title examination. The Bank relied on the title examination in making a loan and placing a mortgage on the property. After the homeowners defaulted, the Bank discovered a pre-existing mortgage. The question was whether the statute of limitations began to run when an appraisal was done over a year before the Bank's malpractice action was filed or whether the statute was tolled until the foreclosure sale. The Court held that although the appraisal raised the possibility that the Bank's loan would be partially unsecured, it was also possible that the proceeds from a foreclosure sale would satisfy the Bank's loan. Consequently, there was no "occurrence" until the sale. *Id*. at 234-35. Appellants' reliance on *Wheatley* is misplaced.

In *Matherly Land Surveying, Inc. v. Gardiner Park Development, LLC*, 230 S.W.3d 586, 590-91 (Ky. 2007), our Supreme Court clarified what it

meant by "fixed and nonspeculative" damages as that phrase was used in *Wheatley*. It rejected the notion that "fixed and nonspeculative" means absolute certainty of the amount of damages. The Court noted that "Kentucky law has never required a specified dollar amount be known before the statute of limitations can run." *Id*. at 591 (citation omitted). In short, "[t]he statute of limitations begins to run as soon as the injury becomes known to the injured." *Id*. (citations omitted). In *Matherly*, there was an occurrence to begin the limitations period when the plaintiff was aware that the defendant's action "caused them damages and had a good idea what those damages were[.]" *Id*. Here, the same is true of appellants.

Appellants were aware that they were damaged shortly after the closing on May 8, 2009. Unlike in *Wheatley*, there was no contingency that could decrease the damages or make damages nonexistent. The damages were readily ascertainable by an appraisal with and without the building restriction. The occurrence limitations period began to run in May 2009, seven years before this action was filed against Eisele and fourteen months before appellants retained Bornstein. Consequently, under the occurrence limitations period, appellants' claim against Eisele is time-barred and Bornstein cannot be liable for failing to name Eisele in the Commonwealth Land Title case.

The second limitations period, the discovery period, begins to run when the alleged negligence was discovered or reasonably should been discovered.

Abel v. Austin, 411 S.W.3d 728, 739 (Ky. 2013). The discovery rule "is a codification of the common law discovery rule, and often functions as a 'savings' clause or 'second bite at the apple' for tolling purposes." *Queensway Financial Holdings Ltd.*, 237 S.W.3d at 148 (citation omitted).

In contrast to the occurrence limitations period, the discovery limitations period does not necessarily commence at the time of the negligence and resulting damages. "It presumes that a cause of action has accrued, i.e., both negligence *and* damages has occurred, but that it has accrued in circumstances where the cause of action is not reasonably discoverable, and it tolls the running of the statute of limitations until the claimant knows, or reasonably should know, that injury has occurred." *Michels*, 869 S.W.2d at 732. "[T]he discovery rule is available only in cases where the fact of injury or offending instrumentality is not immediately evident or discoverable with the exercise of reasonable diligence[.]" *Fluke Corp. v. LeMaster*, 306 S.W.3d 55, 60 (Ky. 2010).

Although the appellants discovered the restriction on the property on May 26, 2009, they argue that the first time they knew the restriction had not been properly indexed as Eisele contended was on April 9, 2013, when the trial court granted summary judgment to Commonwealth Land Title. In related arguments, appellants argue that the statute of limitations was tolled against Eisele based on the continuous representation rule and equitable estoppel doctrine.

Even if appellants are correct that Eisele's alleged negligence was not discoverable until April 9, 2013, the statute of limitations has run. This claim was not filed until 2016, well over one year after 2013. Their argument fares no better in their claim against Bornstein.

The undisputed facts are that at the end of May 2009, appellants knew that Eisele ran a title examination and, for whatever reason, missed the restriction which would prohibit them from using the property for a multi-level building. At that point, they were on notice that they may have been inadequately represented and had a duty to use due diligence to discover whether Eisele was negligent. *Queensway Financial Holdings Ltd.*, 237 S.W.3d at 151. Despite being on notice that Eisele possibly negligently performed the title examination, it was not until July 11, 2011, that Pasha asked Bornstein if Eisele could be included in the Commonwealth Land Title action. In fact, Pasha stated in his email dated July 11, 2011, to Bornstein that he was aware of the one-year statute of limitations and had informed Eisele of the issue within the one-year limitations period.

Under both the occurrence rule and the general discovery rule, the statute of limitations had run against Eisele at the time Bornstein was retained to represent appellants in the Commonwealth Land Title case. Therefore, no action could be successful against Eisele and, therefore, Bornstein could have no liability for failing to name Eisele in that action.

In a related argument, appellants suggest the continuous representation rule, a branch of the discovery rule, applies. The continuous representation rule is a branch of the discovery rule that says "by virtue of the attorney-client relationship, there can be no effective discovery of the negligence so long as the relationship prevails. This recognizes the attorney's superior knowledge of the law and the dependence of the client, and protects the client from an unscrupulous attorney." *Alagia, Day, Trautwein & Smith v. Broadbent*, 882 S.W.2d 121, 125 (Ky. 1994).

The trial court found that the attorney-client relationship between appellants and Eisele terminated before August 8, 2011. Appellants argue that the existence of their continued attorney-client relationship with Eisele through September 2015 when the Commonwealth Land Title case concluded was a question of fact precluding summary judgment.

The trial court correctly found that Eisele did not advise appellants or participate in the preparation of the case against Commonwealth Land Title and it was anticipated Eisele would be a witness in that case. Although Pasha's affidavit indicated that Eisele promised to assist appellants with filing the insurance claim, there is no evidence the Eisele or his firm promised to assist with the filing of a legal action or that they assisted in the legal action against Commonwealth Land Title. Bornstein contacted McConnell, an attorney in Eisele's firm, on March 28,

2013, to examine his file for an indication that Commonwealth Land Title agreed that the error was an indexing error, but that is far from evidence that appellants and Eisele had an attorney-client relationship. Appellants have not pointed to any correspondence, pleading, motion, or other evidence that tends to show Eisele represented them in the Commonwealth Land Title case. The undisputed evidence is to the contrary.

Appellants hired Bornstein in July 2011. Part of what they asked Bornstein was to determine whether they had a viable malpractice claim against Eisele. As the Kentucky Supreme Court explained, changing attorneys defeats a plaintiff's reliance on the continuous representation rule. *Michels*, 869 S.W.2d at 732. This is particularly true when the plaintiff asks his new counsel to advise him on the viability of a claim against his original attorney. *Id*. Appellants' argument that they reasonably believed Eisele continued to represent them after they retained Bornstein is untenable, and the trial court properly ruled that there was no issue of material fact.

In a further strained attempt to avoid the limitations period, appellants argue that equitable estoppel tolled that statute of limitations from running on their claim against Eisele. Their argument fails for a number of reasons.

In *Fluke Corp*., 306 S.W.3d at 62 (quoting *Sebastian-Voor Properties, LLC v. Lexington-Fayette Urban Cty. Gov't*, 265 S.W.3d 190, 194-95 (Ky. 2008)),

the Court set forth the elements of equitable estoppel:

> (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

A defendant may be equitably estopped from relying on the statute of limitations as a defense. *Id.* However, in *Fluke Corp*., the Kentucky Supreme Court made clear that delaying the accrual of the cause of action or tolling the running of the statute of limitations by operation of the equitable estoppel doctrine is "reserved for truly exceptional circumstances[.]" *Id.* at 67.

Again, Eisele's alleged negligence was readily apparent in May 2009 and known by appellants and, as stated above, appellants had a duty to exercise reasonable diligence to discover their cause of action within the time prescribed by the statute of limitations. Moreover, Eisele's position that it was impossible to discover the restriction was not a misrepresentation but was a defense to the

potential denial of coverage by Commonwealth Land Title based on Eisele's alleged negligence.

Appellants' last claim of legal malpractice is against Bornstein for his representation of appellants in the Commonwealth Land Title case. Appellants claim Bornstein committed legal malpractice when he failed to argue to the trial court that Commonwealth Land Title should be estopped to deny coverage based on its misrepresentation that there was coverage under the policy and, prior to its motion for summary judgment, did not assert coverage was denied because the restriction was in the public record.

In *Pasha*, this Court declined to address appellants' equitable estoppel argument "based upon alleged conduct and representations of a number of attorneys and other agents of Commonwealth" which, appellants asserted, "led them to believe that coverage existed under their title insurance policy" because it was not preserved. *Pasha*, 2014 WL 5510931, at *5. In that Opinion, this Court ruled that the issue was not properly preserved when raised for the first time in the trial court in a CR 59.05 motion to alter, amend, or vacate the summary judgment. While this Court held the issue was unpreserved, that does not mean that appellants necessarily could survive Bornstein's motion for summary judgment in this malpractice action. The question is whether an equitable estoppel claim would have been more than likely successful against Commonwealth Land Title. *Marrs*,

95 S.W.3d at 860. In other words, appellants must show that there is a material issue of fact that summary judgment would not have been granted had Bornstein made the equitable estoppel argument earlier.

Appellants' equitable estoppel argument is that Commonwealth Land Title believed throughout the case against it that the public record exclusion applied but concealed that belief. Even if true, Commonwealth Land Title did not make a false misrepresentation or conceal a material fact. *Fluke Corp.*, 306 S.W.3d at 62. Commonwealth Land Title's opinion that the alleged loss could "potentially be a covered matter under the policy" was just that, an opinion, and not a material fact. Moreover, Commonwealth Land Title did not conceal that it reserved the right to assert any additional defenses. It repeatedly informed appellants that it reserved that right. Finally, even if appellants could establish all other elements of equitable estoppel, it is undisputed that not only were appellants aware of Commonwealth Land Title's reservation of any and all defenses, appellants had the means to discover what those defenses might be. As we noted in *Pasha*, the plain language of the policy set forth the exclusion ultimately relied on by Commonwealth Land Title. *Pasha*, 2014 WL 5510931, at *4. Even if Bornstein had presented the equitable estoppel argument earlier in the Commonwealth Land Title case, appellants would not have fared better in that action. *Marrs*, 95 S.W.3d at 860.

For the reasons stated, the summary judgments of the Fayette Circuit Court are affirmed.

ALL CONCUR.

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