

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALAN & THERESA STERLING, H/W : CIVIL ACTION
v. :
STACK & GALLAGHER, P.C., et al. : NO. 97-0297

MEMORANDUM AND ORDER

HUTTON, J.

February 25, 1998

Presently before this Court is the Plaintiffs' Motion in Limine to Determine Statute of Limitations Defense (Docket No. 18), the Cross Motion of Defendant Harry C. Citrino, Jr., and Defendant Harry C. Citrino, Jr., Ltd., for Summary Judgment (Docket No. 21), and the parties' responses thereto.

I. BACKGROUND

The plaintiffs have alleged the following facts. In 1981, plaintiff Alan Sterling ("Sterling") was a sixteen-year-old student at St. Michael's School for Boys (the "School"). Pls.' Compl. ¶ 12. On July 14, 1981, Sterling "was struck in the eye by a shoe thrown at him by Paul Kanner ("Kanner"), a counselor at" the school. Id. As a result, the plaintiff suffered extensive injuries. Id. ¶ 13.

In August of 1981, Sterling and his mother, Carol Sterling, "sought the professional services of defendants, Harry C. Citrino, Jr., Esquire, Harry C. Citrino, Jr., Esquire, Ltd., . . . and Stack and Gallagher, P.C., at their . . . offices." Id. ¶¶

14, 15. Defendant Harry C. Citrino ("Citrino") explained that he and Defendant Stack & Gallagher, P.C. ("Stack") would represent Sterling in a suit against the School and Kanner. Id. ¶ 17. Carol Sterling signed a Contingent Fee Agreement with the defendants pursuant to that representation. Id. ¶ 18.

The defendants filed a suit in the Court of Common Pleas of Philadelphia County on July 18, 1983. Id. ¶ 20. On January 12, 1984, the case was transferred to the Court of Common Pleas of Wyoming County. "During the course of representation . . . Sterling . . . continually inquired as to the length of time which elapsed from the time of the accident until the time the case proceeded to trial and was constantly assured by [Citrino] . . . that the case would be coming up for trial shortly." Pls.' Compl. ¶ 32.

On August 3, 1993, "a non-jury trial was held before Honorable Brendon J. Vanston, President Judge of the Court of Common Pleas of Wyoming County, resulting in an opinion and verdict in favor of [Sterling] and against [the School] and Paul Kanner, dated September 20, 1993 in the amount of \$66,000." Id. ¶ 24. The School and Kanner "filed an Appeal to the Superior Court of Pennsylvania which vacated the Judgment and held that the cause of action accrued the statute of limitations period . . . and, thus, the claim against defendants was barred by the applicable statute of limitations." Id. ¶ 26; see Sterling v.

St. Michael's Sch. for Boys, 660 A.2d 64 (Pa. Super. Ct.), cert. denied, 670 A.2d 142 (Pa. 1995). Sterling's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied on December 13, 1995. Pls.' Compl. ¶ 27; see Sterling v. St. Michael's Sch. for Boys, 670 A.2d 142 (Pa. 1995).

Sterling and his wife, Theresa Sterling, ("plaintiffs") filed the instant suit on January 14, 1997. In their Complaint, they name the following parties as defendants: (1) Stack & Gallagher, P.C.; (2) Harry C. Citrino, Jr.; and (3) Harry C. Citrino, Jr., Ltd. The plaintiffs seek damages for: (1) breach of contract (Count I) and (2) negligence (Count II). On September 30, 1997, the plaintiffs filed the instant motion in limine, seeking to preclude the defendants' statute of limitations defense. On October 14, 1997, the defendants responded with a Cross Motion for Summary Judgment, arguing that there is no issue of material fact that the defendants are entitled to a judgment as a matter of law because the statute of limitations for the plaintiffs' claims have expired.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, 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." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. Id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. Id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

It is appropriate for the court to adjudicate a statute of limitations defense on a motion for summary judgment. See,

e.g., Baily v. Lewis, 763 F. Supp. 802, 810 (E.D. Pa.), aff'd, 950 F.2d 721 (3d Cir. 1991); A. McD. v. Rosen, 621 A.2d 128, 130 (Pa. Super. Ct. 1993). Indeed, the Pennsylvania Supreme Court has stated clearly its support for the defense:

The defense of the statute of limitations is not a technical defense but substantial and meritorious. . . . Such statutes are not only statutes of repose, but they supply the place of evidence lost or impaired by lapse of time, by raising a presumption, which renders proof unnecessary. . . ."Statutes of limitations are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs."

Schmucker v. Naugle, 231 A.2d 121, 123 (Pa. 1967) (quoting United States v. Oregon Lumber Co., 260 U.S. 290, 299-300 (1922)).

B. Statute of Limitations

The plaintiffs allege that the defendants' failure to timely file a suit in Sterling's case against Kanner and the School gives rise to their negligence and breach of contract claims. The defendants contend that by failing to file the instant action in a timely manner, the plaintiffs' claims are time barred by the Pennsylvania statute of limitations.

In Pennsylvania, an action for breach of contract is subject to a four-year statute of limitations. 42 Pa. Cons. Stat. Ann. §

5525(8) (Purdon 1981 & Supp. 1997).¹ A tort action must be commenced within two years. Id. § 5524(7).² "In Pennsylvania, the occurrence rule is used to determine when the statute of limitations begins to run in a legal malpractice claim. Under the occurrence rule, the statutory period commences upon the happening of the alleged breach of duty." Robbins & Seventko Orthopedic Surgeons, Inc. v. Geisenberger, 674 A.2d 244, 246 (Pa. Super. Ct. 1996) (citing Bailey v. Tucker, 621 A.2d 108, 115 (Pa. 1993)). "Failure by an attorney to commence a suit within the statute of limitations period constitutes a breach of duty." Home Ins. Co. v. Powell, No.CIV.A.95-6305, 1997 WL 370109, at * 5 (E.D. Pa. June 13, 1997) (citation omitted).

However, the Pennsylvania Supreme Court recognizes an exception to those statutes, under the "discovery rule", which delays the running of the statute "until the plaintiff knew, or through the exercise of reasonable diligence should have known, of the injury and its cause. Ayers v. Morgan, 397 Pa. 282, 292, 154 A.2d 788, 793 (1959). See also Pocono International Raceway, Inc. v. Pocono Produce, Inc., 503 Pa. 80, 85, 468 A.2d 468, 471

1. The statute reads: "The following actions and proceedings must be commenced within four years: . . . (8) An action upon a contract, obligation or liability founded upon a writing not specified in paragraph (7) [covering negotiable or nonnegotiable bonds], under seal or otherwise." 42 Pa. Cons. Stat. Ann. § 5525(8).

2. Section 5524(7) reads: "The following actions and proceedings must be commenced within two years: . . . (7) Any other action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct or any other action or proceeding sounding in trespass, including deceit or fraud." 42 Pa. Cons. Stat. Ann. § 5524(7).

(1983)." Urland v. Merrell-Dow Pharms., Inc., 822 F.2d 1268, 1271 (3d Cir. 1987). "The party seeking to invoke the discovery rule bears the burden of establishing the inability to know of the injury despite the exercise of reasonable diligence. Pocono Int'l Raceway, at 84-85 The standard of reasonable diligence is objective, not subjective." Dalrymple v. Brown, 701 A.2d 164, 167 (Pa. 1997).

"There are very few facts which diligence cannot discover, but there must be some reason to awaken inquiry and direct diligence in the channel in which it would be successful. This is what is meant by reasonable diligence." Urland, 822 F.2d at 1273 (quoting Deemer v. Weaver, 187 A. 215, 217 (Pa. 1936)). Therefore, if a plaintiff has no reason to investigate, the statute is tolled.

C. Plaintiffs' Claims

In the instant case, there is a genuine issue of material fact concerning the proper date of accrual of the legal malpractice action. The alleged breach of duty took place on July 14, 1983, when the defendants failed to timely file Sterling's action against the School and Kanner. "However, it would have been unreasonable to expect [Sterling] to have learned of the injury at this time. Therefore, it is proper to utilize the discovery rule." Robbins & Seventko Orthopedic Surgeons, Inc., 674 A.2d at 248.

The defendants present two arguments regarding the proper date of accrual under the discovery rule. First, the defendants claim that Citrino informed Sterling that there was a problem with the statute of limitations in 1988. Second, the defendants contend that Citrino informed Sterling that the School and Kanner raised a statute of limitations defense in 1992. Thus, the defendants argue that the plaintiffs learned of the injury, and the statute of limitations started to run, either in 1988 or in 1992.

1. What Plaintiffs Knew, or Should Have Known, in 1988

Under the discovery rule, "the limitations period does not begin to run until the discovery of the injury is reasonably possible." Dalrymple, 701 A.2d at 167. The defendants argue that discovery of the injury was reasonably possible in or before 1988. Defs.' Reply at 2. To substantiate their claim, the defendants offer Citrino's affidavit, wherein he states that in 1988 he discussed with Sterling the statute of limitations problem in Sterling's case against the School and Kanner. Citrino Aff. ¶ 4. The defendants argue that the statute of limitations of the legal malpractice action started to accrue in 1988, and, thus, the plaintiffs' complaint must be dismissed.

In response, Sterling states that Citrino failed to inform him of the issue. Instead, Sterling claims that he "had no knowledge of any dispute surrounding when the incident took place

or the statute of limitations" in 1988. Sterling Aff. ¶ 3. Sterling denies that Citrino gave him any indication that there was a statute of limitation defense until 1992.

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. Big Apple BMW, Inc., 974 F.2d at 1363. Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. Id. In the present case, there is a genuine issue of material fact concerning whether it would have been reasonable for Sterling to learn of the alleged breach in 1988. Thus, the parties' motions must both be denied on this issue.

2. What Plaintiffs Knew, or Should Have Known, in 1992

On May 28, 1992, Sterling knew that "a statute of limitations defense had been raised and denied by a Motion for Summary Judgment" in Sterling's suit against the School and Kanner. Pls.' Mem. at 2; Pls.' Reply at 9; Gusoff Dep. at 13-15.³ Assuming that Citrino never told Sterling in 1988, this

3. The defendants offer the deposition of Gary M. Gusoff, Esquire ("Gusoff"), to substantiate their argument that the plaintiffs had reason to know of the statute of limitations problem in 1992. Defs.' Ans. Ex. A. The plaintiffs hired Gusoff in 1992, because they were frustrated and concerned that their case against the School and Kanner had already taken nine years and had yet to proceed to trial. Pls.' Mem. at 2. The defendants informed Gusoff that a statute of limitations defense had been raised in a summary judgment motion, but that the motion had been denied. Gusoff Dep. at 13. Gusoff was satisfied with the defendants' response. Id. at 13-14.

would be the first time Sterling knew that there was an issue concerning the filing date. Because the motion had been resolved

in Sterling's favor, he would have had no reason to believe that the defendants had breached a duty owed to him.

On August 3, 1993, Sterling won a verdict of \$66,000. Id. at 3. It was not until May 4, 1995, when the Superior Court of Pennsylvania reversed the trial court, that the plaintiff could have known that he was injured. See Robbins & Seventko Orthopedic Surgeons, Inc., 674 A.2d at 248-49 (plaintiffs learned of injury arising from attorney's breach of duty when notified by IRS); E.J.M. v. Archdiocese of Philadelphia, 622 A.2d 1388, 1394 (Pa. Super Ct. 1993) (date of plaintiff's knowledge of injury and cause of injury controls duty to reasonably investigate); Garcia v. Community Legal Servs. Corp., 524 A.2d 980, 986 (Pa. Super Ct. 1987) (stating that under Pennsylvania law, an injured client learns of his attorney's breach of duty to timely file upon dismissal, not after appeals are exhausted). Accordingly, if the plaintiff did not have reason to know of alleged breach in 1988, the proper date of accrual of the legal malpractice action is May 4, 1995.

The plaintiffs filed the instant complaint on January 14, 1997. If the proper date of accrual was May 4, 1995, neither the contract claim nor the tort claim is time barred. However, as explained above, there is a genuine issue of material fact concerning whether Citrino informed the plaintiffs of the alleged malpractice in 1988, and, if so, whether this provided sufficient

notice to start the running of the statute of limitations. Thus, the plaintiffs' Motion in Limine is denied and the defendants' Cross-Motion for Summary Judgment is denied.

An appropriate Order follows.

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O R D E R

AND NOW, this 25th day of February, 1998, upon consideration of the Plaintiffs' Motion in Limine to Determine Statute of Limitations Defense (Docket No. 18), and the Cross Motion of Defendant Harry C. Citrino, Jr., and Defendant Harry C. Citrino, Jr., Ltd., for Summary Judgment (Docket No. 21), IT IS HEREBY ORDERED that the parties Motions are **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.