

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Susan M. Fisk et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 10AP-427
Rauser & Associates	:	(C.P.C. No. 09CVA-05-6615)
Legal Clinic Co., LLC et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on

Volkema Thomas Miller & Scott LPA, Michael S. Miller and Daniel R. Volkema, for appellants.

Reminger Co., LPA, Jason D. Winter and Holly Marie Wilson, for appellees.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Plaintiffs-appellants, Susan M. Fisk and Jackie L. Fisk, Jr., appeal from a judgment of the Franklin County Court of Common Pleas granting summary judgment to defendants-appellees in a legal malpractice action brought by the Fisks. Appellees are attorneys Erin Strapp and Scott Rice, who successively represented the Fisks in a bankruptcy proceeding, and the legal firm where Strapp and Rice worked during the relevant period, variously known as Rauser & Associates Legal Clinic Co., LLC, and Rauser & Associates Legal Clinic, LLP, due to some changes in corporate structure

during the period in question. The parties present no reason to distinguish between these successive organizational incarnations for purposes of the present case, and they will be collectively referred to as "Rauser & Associates."

{¶2} Attorney Rice, then employed by Rauser & Associates, filed a bankruptcy petition on behalf of the Fisks and appeared as counsel of record on May 6, 2004. The Fisks' Chapter 13 bankruptcy plan was approved by the court on July 16, 2004.

{¶3} Rice resigned from Rauser & Associates on July 31, 2007, and attorney Strapp filed a notice of substitution of counsel in the bankruptcy court and notified the Fisks of Rice's resignation and her appearance on their behalf. Rice performed no legal work for the Fisks after his resignation from Rauser & Associates.

{¶4} In November 2007, Mrs. Fisk spoke with Strapp and indicated concern that the second and third mortgages on the Fisks' home had not been discharged in the bankruptcy. This process, commonly known as "stripping," involves seeking a ruling from the bankruptcy court to treat mortgage-secured debt, to the extent that it exceeds the value of the mortgaged property, as unsecured and dischargeable in bankruptcy. In the present case, while Rice indisputably failed to petition the bankruptcy court to strip this debt, the later events regarding this deficiency are disputed. In particular, accounts differ as to the timing and content of communications between Strapp and the Fisks on this subject and the actions that Strapp later took to address the problem.

{¶5} Although one aspect of her defense to this malpractice action is that, by the time Strapp assumed representation in the Fisks' bankruptcy case, there was no remedy for the prior failure to strip the mortgages, Strapp did undertake several related filings in the bankruptcy case. On March 14, 2008, Strapp filed two motions with the bankruptcy court, one for each mortgage, to strip the mortgages. These motions were promptly

denied. Strapp followed with renewed motions on March 25 and 27, 2008, and withdrew them on May 9, 2008. Strapp then filed yet another pair of motions in the bankruptcy court on July 25, 2008, which were denied by the bankruptcy court on November 12, 2008.

{¶6} The Fisks completed their bankruptcy plan and the bankruptcy court discharged their bankruptcy in April 2009, leaving the second and third mortgages fully owed. On May 1, 2009, the Fisks filed the present legal malpractice action against Rauser & Associates, Strapp, and Rice, alleging that the failure to strip the second and third mortgages fell below the applicable standard of care.

{¶7} Rice, Strapp, and Rauser & Associates moved for summary judgment based in part on the expiration of Ohio's one-year statute of limitations for professional negligence, R.C. 2305.11(A). The Fisks opposed summary judgment and attempted to submit an amended complaint including new claims based on the theory that, in addition to any liability for the failure to strip the mortgages, Strapp was additionally liable because she had failed to meet a professional obligation to her clients to notify them that her predecessor, Rice, had botched the bankruptcy and that the Fisks as a result could maintain a legal malpractice action against Rice and Rauser & Associates. The amended complaint also asserted that Strapp was negligent for failing to pursue, after realizing that it was too late to strip the mortgages in the current action, the alternative tactic of dismissing the bankruptcy action entirely and refiling it with the second and third mortgages included.

{¶8} The trial court denied the motion to amend on the basis it was filed prejudicially late in the action and presented a mere attempt by the appellants to circumvent the obstacles they faced in opposing summary judgment. The trial court then

granted summary judgment for all defendants based upon a finding that Strapp had not committed malpractice and that the statute of limitations applied to time-bar the action against Rice and Rauser & Associates.

{¶9} The court applied Ohio law stating that the statute would begin to run in the present case at the later of two events: (1) Termination of legal representation by the attorney or (2) occurrence of a cognizable event by which the client discovered or should have discovered the harm devolving from the attorney's alleged malpractice. The trial court concluded that Rice's termination of representation occurred with his resignation from Rauser & Associates on July 31, 2007, and that in November 2007, the Fisks were on notice of the alleged malpractice and the failure to strip the mortgages. The trial court accordingly applied the later date of November 2007 in determining the running date of the statute of limitations. Because the action was filed more than one year after this date, the trial court concluded that the action against Rice was time-barred.

{¶10} With respect to the claims against Strapp, the court found that the Fisks had failed to state a claim of malpractice because the alleged failure to strip the mortgages occurred before Strapp began representation in the matter and the bankruptcy action had proceeded to the point that the errors could no longer be resolved by the time Strapp assumed responsibility for the case.

{¶11} With respect to claims against Rauser & Associates, the trial court noted that in Ohio an action against a legal employer or partnership for vicarious liability is derivative of the underlying claim against the employee. As a result, because the action against Rice is time-barred and Strapp had not committed malpractice, Rauser & Associates could not be vicariously liable.

{¶12} The Fisks have timely appealed and bring the following two assignments of error:

ASSIGNMENT OF ERROR NO. 1:

THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF PLAINTIFFS-APPELLANTS IN GRANTING DEFENDANTS-APPELLEES' MOTIONS FOR SUMMARY JUDGMENT ON THE GROUND THAT THE STATUTE OF LIMITATIONS HAD EXPIRED.

ASSIGNMENT OF ERROR NO. 2:

THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF THE PLAINTIFFS-APPELLANTS IN DENYING THE PLAINTIFFS-APPELLANTS' MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT.

{¶13} We will first address appellants' second assignment of error concerning the trial court's denial of appellants' motion for leave to file an amended complaint. Under Civ.R. 15(A), after the time has passed under which a responsive pleading may be filed, a party may amend its pleading only by leave of court or with the written consent of the adverse party. The rule also provides, however, that "leave of court shall be freely given when justice so requires." The grant or denial of a motion for leave to amend a pleading lies within the sound discretion of the trial court, and upon appeal we will not reverse the trial court's determination absent an abuse of that discretion. *Wilmington Steel Products, Inc. v. Cleveland Electric Illuminating Co.* (1991), 60 Ohio St.3d 120, 122.

{¶14} Appellants now argue that the trial court abused its discretion in denying leave to amend the complaint because, when confronted with a motion for summary judgment by appellees based on statute of limitation grounds, this raised legal issues not contemplated in the original complaint. Appellants also argue that the Ohio Supreme Court's holding in *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, stands for the

proposition that it is an abuse of discretion to deny leave to amend a complaint when it is possible that the proposed amended complaint may state a valid claim.

{¶15} While *Peterson* does state that it was an abuse of discretion in that case to deny leave to timely amend where the proposed amendments added claims upon which relief could be granted "and no reason otherwise justifying denial of the motion [was] disclosed[.]" *id* at paragraph eight of the syllabus, the trial court in the present case did not fail to state such justifiable grounds for denying the motion. The trial court noted that there was a one-year delay between the filing of the original complaint and the proposed amended complaint. This allowed appellants to pursue the legal theory set forth in the original complaint, and yet when confronted with obstacles to that theory by means of the arguments set forth in appellees' motion for summary judgment, reinvent the case on entirely separate alternative legal grounds. The trial court found that this was both prejudicial to opposing parties and constituted inefficient use of the judicial system's time and resources. The court further noted that nothing new had been revealed in discovery that would have made the claims more cognizable than at the time of the initial filing.

{¶16} We find that the trial court did not abuse its discretion in denying leave to amend the complaint. We would further add to the trial court's reasons set forth above that the statute of limitations defense set forth in appellees' motion for summary judgment was not new to the case, as appellees pleaded the statute of limitations in their initial answer. For these reasons, we find that the trial court did not err in denying appellants' leave to amend their complaint, and appellants' second assignment of error is overruled.

{¶17} Turning to appellants' first assignment of error, we will sequentially address the distinct issues presented therein: under what circumstances Rauser & Associates can be held vicariously liable for the conduct of its employees-attorneys, at what point and by

whom the malpractice, if any, occurred, and at what point in time the statute of limitations for a legal malpractice action began to run.

{¶18} With respect to Rauser & Associates vicarious liability, the liability of a law firm in this respect is clearly defined in Ohio:

1. A law firm does not engage in the practice of law and therefore cannot directly commit legal malpractice.
2. A law firm may be vicariously liable for legal malpractice only when one or more of its principals or associates are liable for legal malpractice.

Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth, 122 Ohio St.3d 594, 2009-Ohio-3601, syllabus. Because Rauser & Associates may not be directly liable for legal malpractice, appellants must establish liability on the part of either Rice or Strapp individually, in their capacity as employees, agents, or members of the firm, before Rauser & Associates can be held liable.

{¶19} Furthermore, as a logical corollary to the above proposition and in relation to our subsequent discussion of the statute of limitations in this case, continuing representation of a client by a firm acting through several successive individual attorneys cannot extend the time to sue for alleged malpractice by any one of those individual attorneys. While such continued representation might delay the discovery of such malpractice, as will be discussed further below, the actual fact of organizational representation does not alter the fact that malpractice is committed by individual attorneys and the plaintiff must succeed in an action on its own merits against such an individual before proceeding to establish vicarious liability on the part of an employer or firm.

{¶20} Now we turn to the trial court's determination that Strapp individually had not committed malpractice in this case. The trial court, although disposing of a motion for

summary judgment on Strapp's behalf, phrase this as a finding that appellants had failed to set forth the facts to state a claim against Strapp. We will restate the proposition, pursuant to our review of summary judgment, as whether there remains a genuine issue of material fact on the question of Strapp's liability.

{¶21} To establish a claim for legal malpractice based upon negligent representation, the plaintiff must establish that the attorney owed a duty or obligation to the plaintiff, that the attorney breached that obligation and failed to conform to the applicable standard of care, and that this breach was the proximate cause of damage to the plaintiff. *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259, syllabus. Failure to establish any one of these three elements will compel summary judgment for the defendant. *Katz v. Fusco* (Dec. 9, 1997), 10th Dist. No. 97AP-846.

{¶22} In the present case, the Fisks allege malpractice based on Strapp's failure to remedy Rice's prior failure to address the second and third mortgages in the bankruptcy action. The Fisks have presented no evidence or argument to dispute the bare fact that, pursuant to bankruptcy law and court rules, by the time Strapp succeeded Rice as counsel in the bankruptcy action the time to include these debts in the bankruptcy proceeding had passed. This unfortunate reality is conclusively demonstrated by the bankruptcy court's summary denial of Strapp's subsequent motions to remedy the situation. As the original complaint in this matter is framed, therefore, the actions constituting malpractice cannot be attributed to Strapp, and the Fisks have therefore failed to preserve a genuine issue of material fact regarding this element of their claim against Strapp. While the Fisks continue to argue in this appeal that there were additional colorable grounds for liability by Strapp, these were set forth in the proposed amended complaint that was refused by the trial court. Those arguments, once we have affirmed

the denial of leave to amend, are not properly before us. We accordingly find that the trial court did not err in granting summary judgment for Strapp.

{¶23} We now turn to the trial court's disposition of Rice's liability. Because there remains at the very least a genuine issue of material fact on the deficiency of Rice's representation, the sole issue is whether any claim against Rice personally is barred by the statute of limitations. As stated above, the one-year statute of limitations for legal malpractice actions found in R.C. 2305.11(A) commences to run either at the later of when the client discovers, or in the exercise of reasonable diligence should have discovered, the resulting damage or injury, or when the end of the attorney-client relationship for the transaction in question occurs. *Omni-Food & Fashion, Inc. v. Smith* (1988), 38 Ohio St.3d 385, paragraph one of the syllabus. The statute of limitations is thus tolled so long as the attorney and client continue to have an attorney-client relationship. *Vail v. Townsend* (1985), 29 Ohio App.3d 261. The determination of when the attorney-client relationship for a particular transaction is terminated remains a question of fact. *Boggs v. Baum*, 10th Dist. No. 10AP-864, 2011-Ohio-2489, ¶18. Likewise, the question of when a malpractice plaintiff did, or should by reasonable diligence, have discovered the resulting injury will typically present an issue of fact. *Downey v. Corrigan*, 9th Dist. No. 21785, 2004-Ohio-2510, ¶23. The "cognizable event" alerts the client to the malpractice; that is, the occurrence of an event that would put a reasonable person on notice "that questionable legal practice may have occurred" and that action against the attorney might be required. *Zimmie v. Calfee, Halter and Griswold* (1989), 43 Ohio St.3d 54, 58. As with medical malpractice cases, the injured party need not be aware of the full extent of his or her injuries before the "cognizable event" triggers

the statute of limitations. *Id.* at 58; see also *Allenius v. Thomas* (1989), 42 Ohio St.3d 131, 133-34.

{¶24} Appellants do not question that the present action was filed more than one year after Rice terminated his representation. Rice resigned from the firm on July 31, 2007, and did not represent the Fisks thereafter. The Fisks filed their action for malpractice on May 1, 2009. As we have stated above, there is no authority for the proposition that continued representation by a firm collectively will prolong the period of representation by an individual attorney beyond the date at which that attorney ceases to represent a given client. The timeliness of the malpractice action, therefore, hinges on whether the Fisks "discovered" the alleged malpractice no earlier than May 2, 2008.

{¶25} The trial court found that the cognizable event giving rise to discovery occurred no later than November 2007, when Mrs. Fisk spoke with Strapp. The parties present conflicting accounts of the content of this conversation, but as did the trial court, we conclude that, even accepting Mrs. Fisk's version, the cognizable event giving rise to discovery of malpractice occurred at this time.

{¶26} Strapp's affidavit submitted in support of summary judgment states that, at this time, November 2007, she informed the Fisks that it was too late to file motions to strip the subject mortgages, and subsequently proceeded to file motions to that effect only upon the Fisks' insistence. Mrs. Fisk's affidavit does not specify a date, but gives the following sequence of events in part:

5. I asked Attorney Scott Rice, shortly after retaining Rauser & Associates Legal Clinic Co., LPA, to represent me, about having two mortgages declared to be unsecured to the extent that the amount of indebtedness exceeded the value of the property, and was told by Attorney Scott Rice that this was something that would be taken care of at the end of the bankruptcy action.

6. When I learned that Attorney Erin Strapp was working on my case, I contacted her to make sure she was aware of the need to do something about the mortgages at the end of the bankruptcy case, as indicated by Attorney Scott Rice.

7. Attorney Erin Strapp said that she had my file would be taking care of my case now, that she had spoken with Attorney Scott Rice, and that she would review my file and get back to me.

8. I called her several times to see what the status was, and was told she would get back to me.

9. I learned that the Motion to have the mortgages declared unsecured to the extent that they exceeded the value of the property had been filed by Attorney Erin Strapp because either Attorney Erin Strapp called me and told me that she would file the Motion, or because I received a copy of the Motion in the mail.

10. The first hearing date for this Motion was cancelled, and, when I called just before the rescheduled hearing, Attorney Erin Strapp informed me that she had dismissed the Motion because the attorney for the mortgage holders said the Motion would be denied because it was not timely filed.

{¶27} While the affidavit does not specify a date for this last dismissal, it corresponds to the May 9, 2008 dismissal of motions for which there is evidence elsewhere in the record. The Fisks postulate that this is the earliest date at which they can be charged with actual or constructive knowledge that the debts would not be stripped as result of Rice's omissions. The affidavit, however, does not specifically rebut the affirmative assertion in Strapp's affidavit that she told the Fisks in November 2007 that the time had passed for petitioning to strip the mortgages, nor her averment that she filed the resulting late motions only pursuant to the Fisks' insistence. The only remaining question is whether the existence of these late and ineffectual motions filed by Strapp, of itself, rebuts by negative inference the explicit statement found in Strapp's affidavit

indicating that she had from the outset of her handling of the file indicated to Mrs. Fisk that it was too late to strip the mortgages. We conclude that it does not, and that there remain no genuine issues of material fact that the cognizable event giving notice that it was too late to strip the mortgages took place in November 2007, despite the later motions to attempt to recoup the situation. From this we conclude that, since the statute of limitations began to run at the later of Rice's termination of representation or the discovery of the harm, the statute began to run in November 2007. The action filed in May 2009 was therefore not timely. The trial court did not err in granting summary judgment for Rice. Appellants' first assignment of error is accordingly overruled.

{¶28} In summary, the trial court did not err in granting summary judgment for the individual attorney defendants and, as a result, no claim could go forward against the law firm on a vicarious liability theory. Appellants' two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT, P.J., and FRENCH, J., concur.
