IN THE COURT OF COMMON PLEAS
STATE OF OHIO, COUNTY OF WARREN
GENERAL DIVISION

RYAN D. HOBBS,	:	**CASE NO. 14 CV 86642**
Plaintiff,	:	**JUDGE PEELER**
v.	:	
PATRICK MULLIGAN & ASSOCIATES, et al.,	:	**DECISION AND ENTRY GRANTING DEFENDANTS' MOTION TO DISMISS**
Defendants.	:	**CONVERTED TO A MOTION FOR SUMMARY JUDGMENT**

OT
FAO

Pending before the Court is the motion of Defendants, L. Patrick Mulligan & Associates, L.P.A. Co., George Katchmer, Esq., and L. Patrick Mulligan, Esq., to dismiss the complaint of Plaintiff, Ryan D. Hobbs, pursuant to Civ.R. 12(B)(6). For the reasons set forth below, the motion to dismiss converted to a motion for summary judgment, is granted.

FACTS

In October 2007, Plaintiff was indicted on charges of rape, abduction, and assault in Warren County, Ohio. Plaintiff subsequently pleaded guilty to the lesser charges of gross sexual imposition and unlawful restraint on March 8, 2008. Plaintiff was thereafter sentenced to five years of community control supervision and mandatory sexual offender registration requirements for ten years. After a violation of his community control requirements, Plaintiff was sentenced to 12 months in prison in May 2009.

According to Plaintiff's complaint, he retained the services of George Katchmer, of the lawn firm L. Patrick Mulligan & Associates, in the summer of 2012 for the purposes of filing a motion to withdraw his 2008 guilty plea. Such a motion was filed August 10, 2012

and a hearing was held September 4, 2012. Prior to that hearing, Plaintiff requested Defendant Katchmer subpoena records from "Children Protective Services" related to counseling records of the victim in the underlying criminal case. Plaintiff additionally requested Defendant Katchmer subpoena police reports from the incident to obtain the presence of a member of the police department at the hearing. According to Plaintiff, these requests were never met by Defendants.

The trial court ultimately denied the motion to withdraw the guilty plea on October 23, 2012 and a notice of appeal was timely filed by Defendant Katchmer. On July 15, 2013, the Twelfth Appellate District affirmed the trial court's denial of the motion to withdraw guilty plea, and Defendants subsequently ended their representation of Plaintiff.

On December 29, 2014, Plaintiff filed the within legal malpractice lawsuit, alleging Defendants were negligent in their representation of Plaintiff at the trial and appellate levels and breached their attorney-client contract. Specifically, Plaintiff takes issue with Defendants' conduct in filing the motion to withdraw a guilty plea, in representing Plaintiff at the hearing on that motion, and in pursuing the appeal to the Twelfth Appellate District.

CONVERSION TO CIV.R. 56 MOTION FOR SUMMARY JUDGMENT

Defendants moved to dismiss Plaintiff's complaint on April 17, 2015, citing Civ.R. 12(B)(6) and the statute of limitations under R.C. 2305.11(A). However, because Plaintiff's complaint contains numerous attachments and repeatedly references those attachments, which are relevant to the Court's review of the case, the Court finds it necessary to convert the pending motion to dismiss to a motion for summary judgment.[1] The Court finds this

[1] *See* Civ.R. 12(B). When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56.

conversion in no way hinders the parties, as the attachments relied upon by Plaintiff were also heavily referenced in Defendants' motion to dismiss.

STANDARD OF REVIEW

Summary judgment is a procedure for moving beyond the allegations in the pleadings and analyzing the evidence materials in the record to determine whether an actual need for a trial exists. *Ormet Primary Aluminum Corp. v. Employers' Ins. of Wasau*, 88 Ohio St.3d 292, 300 (2000). "Summary judgment is proper when: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can only come to a conclusion adverse to the party against whom the motion is made, construing the evidence most strongly in that party's favor." *Bank of New York Mellon v. Burke*, 12th Dist. Butler No. CA2012-12-245, 2013-Ohio-2860. ¶ 9, citing Civ.R. 56(C). "Regardless of who may have the burden of proof at trial, the burden is upon the party moving for summary judgment to establish that there is no genuine issue of material fact and that he is entitled to a judgment as a matter of law." *AAA Enterprises, Inc. v. River Place Comm. Urban Redev. Corp.*, 50 Ohio St.3d 157 (1990), paragraph two of the syllabus. Once a party moving for summary judgment has satisfied its initial burden, the nonmoving party "must then rebut the moving party's evidence with specific facts showing the existence of a genuine triable issue; it may not rest on the mere allegations or denials in its pleadings." *Burke* at ¶ 9; Civ.R. 56(E).

APPLICABLE STATUTE OF LIMITATIONS

Defendants claim entitlement to judgment as a matter of law on both Plaintiff's legal malpractice and breach of contract claims based upon the statute of limitations found under R.C. 2305.11(A). Though Plaintiff sets forth two distinct causes of action, the one year malpractice statute of limitations set forth in R.C. 2305.11 is applicable to both malpractice claims and breach of contract actions resulting from the manner in which an attorney

represented a client. *Muir v. Hadler Real Estate Mgt. Co.*, 4 Ohio App.3d 89, 89-90, (10th Dist.1982) ("An action against one's attorney for damages resulting from the manner in which the attorney represented the client constitutes an action for malpractice within the meaning of R.C. 2305.11, regardless of whether predicated upon contract or tort or whether for indemnification or for direct damages. * * * Malpractice by any other name still constitutes malpractice"). Essentially, if the statute of limitations under R.C. 2305.11(A) applies to Plaintiff's malpractice claim, it also applies to bar Plaintiff's breach of contract claim. Accordingly, the sole issue before this Court is whether Plaintiff's complaint is barred by the statute of limitations found under R.C. 2305.11(A).

ANALYSIS

"The time within which a party must bring a cause of action for legal malpractice is governed by R.C. 2305.11(A), which states that a legal malpractice claim 'shall be commenced within one year after the cause of action accrued * * *.'" *Linter v. Nuckols*, 12th Dist. Preble No. CA2003-10-020, 2004-Ohio-3348, ¶ 13, citing R.C. 2305.11(A). In *Zimmie v. Calfee, Halther & Griswold*, 43 Ohio St.3d 54 (1989), the Ohio Supreme Court established the following two-part test to determine when the statute of limitations begins to run on a claim for legal malpractice:

> Under R.C. 2305.11(A), an action for legal malpractice accrues and the statute of limitations begins to run when there is a cognizable event whereby the client discovers or should have discovered that his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue his possible remedies against the attorney or when the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later.

Id. at syllabus; *Linter* at ¶ 14. A cognizable event is defined as "an event that is sufficient to 'alert a reasonable person that in the course of legal representation his attorney committed

an improper act.'" *Hamilton v. Kirby*, 12th Dist. Warren No. CA2006-06-071, 2007-Ohio-5901, ¶ 15, quoting *Spencer v. McGill*, 87 Ohio App.3d 267, 278 (8th Dist.1993).

Plaintiff alleges in his complaint that he "did not come within knowledge" of Defendants' misconduct until November 2014, within the one-year statute of limitations. Plaintiff further contends in his response to Defendants' motion to dismiss that the statute of limitations did not begin to run until May 2014.[2] However, Plaintiff's arguments as to why these dates should apply at the "cognizable event" are either nonexistent or unpersuasive.

Upon review of the pleadings in this case, the Court finds three possible "cognizable events" that would have alerted a reasonable plaintiff to potential questionable legal malpractice. First, as explained by Plaintiff in his complaint, Plaintiff repeatedly requested Defendant Katchmer subpoena records before the motion to withdraw a guilty plea hearing commenced so that Plaintiff could put on a specific defense. However, the records were never subpoenaed, as was made clear at the September 4, 2012 hearing. Thus, Plaintiff arguably should have known at the hearing that Defendant Katchmer's performance was allegedly inadequate. Thus, the statute of limitations arguably began to run on September 4, 2012. As Plaintiff's complaint in this case was not filed until two years after this date, the statute of limitations would bar Plaintiff's causes of action.

However, the two-part test in *Zimmie* instructs that the termination of the attorney-client relationship also acts as a trigger to the statute of limitations. *Zimmie* at 57. Here, the parties are in agreement that the attorney-client relationship terminated in July 2013, after the Twelfth District issued its decision on Plaintiff's appeal. Thus, the statute of limitations arguably began to run in July 2013, one year and five months before Plaintiff filed his

[2] The Court notes Plaintiff's "Motion in opposition to dismiss" was not properly served upon Defendants, as the certificate of service states only that the document was hand delivered to the "Clerks Office" (sic) and not to defense counsel.

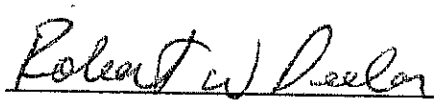
complaint. As such, if this date was used to initiate the statute of limitations, Plaintiff's complaint would be barred.

Finally, the last possible date that could be treated as a "cognizable event" in this case is August 26, 2013, when Plaintiff filed his first *pro se* motion to withdraw his guilty plea. As Plaintiff moved to have the court review his guilty plea again, he was aware at this time of Defendants' alleged malpractice. If the Court were to use this date as the trigger for the statute of limitations, Plaintiff's complaint would still be barred, as he filed his suit one year and four months after this date.

As the cognizable event occurred in this case, at the latest, on August 26, 2013, and Plaintiff did not file his legal malpractice suit until December 29, 2014, the Court finds Plaintiff's suit is barred by the statute of limitations pursuant to R.C. 2305.11(A). Consequently, the Court finds no genuine issues of material fact remain in this case, and Defendants are entitled to judgment as a matter of law. Accordingly, Defendants' motion to dismiss, converted to a motion for summary judgment, is well taken and the same is hereby **GRANTED.** Plaintiff's causes of action are dismissed with prejudice.

There is no just reason for delay.

IT IS SO ORDERED.



Electronic Signature pursuant to WCCP Local Rule 2.08
5/21/2015 9:22 AM

Robert W. Peeler, Judge
Warren County Common Pleas Court

Dist.
Ryan D. Hobbs, pro se
Robert W. Hojnoski, Esq. (Counsel for Defendants)
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