HINSHAW

Alerts

Legal Malpractice Action Time-Barred By Statutes of Repose and Limitations

August 18, 2015
Lawyers for the Profession® Alert

Lamet v. Levin, 2015 IL App (1st) 143105, ___ N.E.2d ___ (August 12, 2015)

Brief Summary

An Illinois appellate court held that plaintiff's legal malpractice action was time-barred by the statute of repose because the beginning of the repose period is marked by the date of the initial malpractice, not the "last date on which the attorney performs the work involved in the alleged negligence." Plaintiff's claim was also time-barred by the statute of limitations because plaintiff knew or reasonably should have known that his claimed damages were wrongfully caused more than two years before he filed suit. The court also rejected plaintiff's fraudulent concealment argument.

Complete Summary

In 1994, plaintiff (a lawyer) retained defendant to represent him in a dispute with his landlord. Defendant represented plaintiff for the next 17 years. Defendant pursued defenses and counterclaims, which plaintiff claimed to have learned in 2011 were without merit. Having been forced to settle the landlord's claim by paying $150,000 in 2011, plaintiff sued defendant for legal malpractice, essentially claiming that defendant should have advised him in 1994 to accept his landlord's demands and forgo defense of the lawsuit.

Plaintiff leased office space for his legal practice from LaSalle National Trust (LaSalle). In 1993, LaSalle filed suit against plaintiff for unpaid rent. Plaintiff was originally represented by an attorney in plaintiff's firm. Defendant filed a substitute appearance for plaintiff in 1994. Defendant raised counterclaims and defenses based on two factual allegations that were erroneous. First, defendant claimed that plaintiff was being overcharged for his rent, alleging that rent was based on the wrong square footage. In May 1994, before defendant was retained, architects hired by LaSalle and plaintiff each calculated the square footage of the office, and the measurements did not support plaintiff's argument. Plaintiff's architect reported his findings to plaintiff's firm in May 1994. Second, defendant mistakenly claimed that plaintiff and another tenant were simultaneously being billed.

The 1993 litigation was dismissed for want of prosecution in 1998; LaSalle refiled in 2002. Defendant continued to represent plaintiff. Sometime in 2011, plaintiff asked another attorney to assist defendant. The other attorney conducted an independent review of the case's merits and discovered in August

Attorneys

Terrence P. McAvoy

Service Areas

Counselors for the Profession
Lawyers for the Profession®
Litigators for the Profession®

2011 that the claims and defenses set forth by defendant on plaintiff's behalf were "likely indefensible." Plaintiff then retained another law firm, which determined that plaintiff never had any legitimate defenses or counterclaims. Plaintiff settled the case with his landlord for $150,000 on December 9, 2011.

Less than one month later, on December 29, 2011, plaintiff filed his legal malpractice action. Plaintiff alleged that defendant knew or should have known the counterclaims and defenses he raised in the underlying litigation were meritless. Plaintiff claimed that defendant's unfounded counterclaims and defenses unnecessarily extended the lawsuits. Defendant filed a motion to dismiss based on the two-year statute of limitations and the six-year statute of repose governing legal malpractice claims. The trial court granted defendant's motion, and plaintiff appealed.

The appellate court first noted that in Illinois, a legal malpractice action "must be commenced within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought," and that such an action "may not be commenced in any event more than 6 years after the date on which the act or omission occurred." 735 ILCS 5/13-214.3(b)-(c). Plaintiff first argued that the statute of repose did not begin to run until the last date on which defendant performed his alleged acts of negligence, *i.e.*, June 2011, when defendant filed his final version of defenses in the underlying litigation. Defendant, on the other hand, argued that plaintiff's entire action was predicated on defendant's failure to advise plaintiff in 1994 that he had no legitimate defenses to LaSalle's claims, and all of plaintiff's claimed damages flowed from that initial malpractice. Accordingly, the date of that initial malpractice marked the beginning of the period of repose.

The appellate court agreed with defendant. The court noted that the statute of repose begins to run as soon as an event giving rise to the malpractice claim occurs, regardless of whether plaintiff's injury has yet been realized. *See, e.g., Mauer v. Rubin*, 401 Ill. App. 3d 630, 639 (2010). Illinois courts have consistently held that the statute of repose is not tolled merely by the continuation of the attorney-client relationship. *Id.* at 640 (citing *Witt v. Jones & Jones Law Offices, P.C.*, 269 Ill. App. 3d 540, 544 (1995)); *see also Hester v. Diaz*, 346 Ill. App. 3d 550 (2004); *Serafin v. Seith*, 284 Ill. App. 3d 577 (1996). Rather, "where there is a single overt act from which subsequent damages may flow, the statute [of repose] begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so despite the continuing nature of the injury." *Mauer*, 401 Ill. App. 3d at 642. Moreover, the period of repose is not tolled by the attorney's ongoing duty to correct past mistakes. *Fricka v. Bauer*, 309 Ill. App. 3d 82, 84 (1999).

The court found that the facts here were analogous to those in *Mauer* and *Hester*. It concluded that because plaintiff's action was premised upon defendant's failure to properly advise him in 1994, that was when the statute of repose began, notwithstanding defendant's later failure to correct that omission. *Fricka*, 309 Ill. App. 3d at 84 (ongoing duty to correct does not delay beginning of period of repose). Plaintiff's suit, filed 17 years after that alleged initial malpractice, was thus well beyond the six-year period of repose.

Plaintiff also argued the statute of limitations did not begin to run until 2011, when he retained new counsel and discovered for the first time that defendant's claims on his behalf were without merit. The court held, however, that the record established that plaintiff knew or should have known of the lack of merit in his defense well over two years before he filed suit.

Plaintiff's final argument was that the statutes of repose and limitations were tolled because defendant fraudulently concealed the causes of action. The court again rejected the notion that a lawyer has an affirmative obligation to advise a client he has legal malpractice claim. *Carlson v. Fish*, 2015 IL App (1st) 140526, ¶ 45; *see also Fitch v. McDermott, Will & Emery, LLP*, 401 Ill. App. 3d 1006, 1025 (2010) ("We similarly find no case that would require an attorney to affirmatively advise his client of his negligence and the statute of limitations for suing him."). The court further found that plaintiff failed to allege any such concealment of material facts. Rather, plaintiff knew or should have known since 1994 that defendant's square footage argument was factually unsupported. *See Mauer*, 401 Ill. App. 3d at 649 (courts will not apply the doctrine of fraudulent concealment to toll the statute of repose if plaintiff had actual knowledge of his cause of action within the statutory time frame). The court thus concluded that plaintiff could not avail himself of the five-year statute of limitations for fraudulent concealment.

Significance of Opinion

This case is significant because the appellate court held that plaintiff's legal malpractice was time-barred, as a matter of law, by the six-year statute of repose because the date of the initial malpractice marked the beginning of the repose period, not the "last date on which the attorney performs the work involved in the alleged negligence." The court also held plaintiff knew his injuries were wrongfully caused more than two years before he filed suit, and fraudulent concealment did not apply. In doing so, the court again rejected the notion that a lawyer has an affirmative duty to advise a client that he or she committed malpractice.

For more information, please contact Terrence P. McAvoy.