

[Cite as *Natures Grove Dev., L.L.C. v. Thomas Law Offices, L.L.C.*, 2015-Ohio-835.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

NATURES GROVE DEVELOPMENT,)
L.L.C. ET AL.)

PLAINTIFFS-APPELLANTS,)

V.)

THOMAS LAW OFFICES, L.L.C. ET AL.)

DEFENDANTS-APPELLEES.)

CASE NO. 14 BE 23

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from Court of Common
Pleas of Belmont County, Ohio
Case No. 11CV446

JUDGMENT:

Reversed and Remanded

APPEARANCES:

For Plaintiffs-Appellants

Attorney Scot M. McMahon
52171 National Road, Suite 4
St. Clairsville, Ohio 43950

For Defendants-Appellees

Attorney W. Gus Saines,
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JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L Waite
Hon. Mary DeGenaro

Dated: March 2, 2015

[Cite as *Natures Grove Dev., L.L.C. v. Thomas Law Offices, L.L.C.*, 2015-Ohio-835.]
DONOFRIO, J.

{¶1} Plaintiffs-appellants, Natures Grove Development and John Green, appeal from a Belmont County Common Pleas Court judgment granting summary judgment to defendants-appellees, Thomas Law Offices, LLC and Attorney Mark Thomas, on appellants' complaint for legal malpractice.

{¶2} In October 1999, appellants retained the legal services of appellees to draft the declarations for a condominium association in Belmont County. The Declarations were drafted for the Natures Grove Development and were filed in the Belmont County Recorder's Office in March 2000.

{¶3} In August 2003, Green and his wife signed an affidavit, prepared by Attorney Thomas, to correct the Declarations' signature page. Apparently it had originally been signed by Natures Grove Development, LLC instead of by Green.

{¶4} In April 2007, the Natures Grove condominium owners sued appellants seeking a declaratory judgment and injunctive relief. The complaint specifically referenced the Declarations.

{¶5} Appellants asked Attorney Thomas to represent them in the suit filed by the condominium owners. Attorney Thomas informed appellants he could not represent them because he had a family member who lived at Natures Grove and this created a conflict of interest. Consequently, appellants hired Attorney Richard Lancione to represent them in that matter. The parties to that lawsuit settled the case in June 2007, with an agreed judgment entry.

{¶6} In April 2008, appellants received a letter from the condominium owners asserting that they had not completed matters pursuant to the agreed judgment entry. The letter was forwarded to Attorney Lancione. In November 2008, appellants filed an Amended Plat in accordance with the requirements of the agreed judgment entry.

{¶7} On April 9, 2010, appellants retained a second attorney regarding concerns about the Declarations. The second attorney shared the concerns with a third attorney. Appellants also retained a fourth attorney in September 2010, regarding the concerns over the Declarations.

{¶18} Appellants filed a complaint against appellees on November 1, 2011, alleging legal malpractice in providing legal services to appellants in the formation and development of the condominium association.

{¶19} Appellants contend that appellees continued to represent them through the time they filed this lawsuit. Appellees, however, assert they did no further work for appellants after April 11 or 12, 2007, stating that appellants retained new counsel at that time.

{¶10} Appellees filed a motion for summary judgment. They alleged appellants did not file the lawsuit within the one-year statute of limitations. They asserted the legal work in question was performed in 2000, and the action accrued no later than 2007. Therefore, appellees asserted appellants should have filed the lawsuit no later than 2008.

{¶11} In response, appellants argued that the attorney-client relationship continued until they filed the present lawsuit on November 1, 2011. Therefore, they asserted their complaint was not time barred.

{¶12} The trial court found that the attorney-client relationship terminated on April 11 or 12, 2007, when Attorney Thomas declined to represent appellants in the suit against them by the condominium owners, or at the very latest on April 13, 2007, when appellants retained Attorney Lancione. Consequently, the court determined that the statute of limitations on appellants' claim expired on April 13, 2008. Therefore, the trial court granted summary judgment in appellees' favor.

{¶13} Appellants filed a timely notice of appeal on May 23, 2014.

{¶14} Appellants raise a single assignment of error that states:

THE TRIAL COURT ERRED IN DETERMINING THAT THE ATTORNEY CLIENT RELATIONSHIP BETWEEN APPELLANTS AND APPELLEES ENDED IN APRIL 2007 BECAUSE APPELLEES DID, IN FACT, CONTINUE TO REPRESENT APPELLANTS IN THE SAME UNDERTAKING UNTIL THE SUIT AT ISSUE IN THIS APPEAL WAS FILED.

{¶15} Appellants argue that their hiring of Attorney Lancione on April 13, 2007, did not terminate the attorney-client relationship between them and Attorney Thomas. They note that Attorney Thomas was only unable to represent them in that particular lawsuit filed by the condominium owners due to a conflict of interest because he had a family member residing in the condos. Appellants assert Attorney Thomas did not indicate that he was no longer their attorney and he never sent a disengagement letter. Additionally, appellants contend Attorney Thomas continued to represent them following the condominium owners' lawsuit by working to alleviate problems caused by the Declarations, transfers of ownership, and giving tax advice. Appellants cite to 2011 emails from Attorney Thomas to them indicating he was working on a resolution to problems caused by the Declarations.

{¶16} Additionally, appellants argue that the question of when an attorney-client relationship terminates is generally a question of fact for a jury. They assert a question of fact exists here as to if and when the attorney-client relationship terminated.

{¶17} In reviewing a trial court's decision on a summary judgment motion, appellate courts apply a de novo standard of review. *Cole v. Am. Industries & Resources Corp.*, 128 Ohio App.3d 546, 552, 715 N.E.2d 1179 (7th Dist.1998). Thus, we shall apply the same test as the trial court in determining whether summary judgment was proper. Civ.R. 56(C) provides that the trial court shall render summary judgment if no genuine issue of material fact exists and when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *State ex rel. Parsons v. Flemming*, 68 Ohio St.3d 509, 511, 628 N.E.2d 1377 (1994). A "material fact" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.*, 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

{¶18} Initially, we should point out that both parties attached uncertified

deposition excerpts, copies of various documents, copies of emails, and other “evidence” to their motion for summary judgment and response thereto. Much of this evidence is improper summary judgment evidence. However, both parties and the trial court relied on and cite to this improper evidence. Civ.R. 56(C) provides:

Summary judgment shall be rendered forthwith if the *pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact*, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *No evidence or stipulation may be considered except as stated in this rule.*

(Emphasis added).

{¶19} It is within the trial court's discretion to consider nonconforming summary judgment evidence when there is no objection. *Bell v. Holden Surveying, Inc.*, 7th Dist. No. 01-AP-766, 2002-Ohio-5018, ¶22. The trial court's judgment entry indicates that it considered the evidence the parties attached to their motions and responses regardless of whether it was proper summary judgment evidence. Furthermore, both parties relied on this evidence and voiced no objections. Therefore, we too will consider the parties' evidence despite its noncompliance with Civ.R. 56(C).

{¶20} Pursuant to R.C. 2305.11(A), a claim for legal malpractice shall be commenced within one year after the cause of action accrued. A legal malpractice accrues, starting the running of the statute of limitations,

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.

Zimmie v. Calfee, Halter & Griswold, 43 Ohio St.3d 54, 538 N.E.2d 398, syllabus (1989). A “cognizable event” is an event sufficient to alert a reasonable person that his attorney has committed a “questionable legal practice.” *Id.* at 58.

{¶21} In order to determine when a legal malpractice cause of action accrues, the court should determine (1) “when the injured party became aware, or should have become aware, of the extent and seriousness of his or her alleged legal problem,” (2) “whether the injured party was aware, or should have been aware, that the damage or injury alleged was related to a specific legal transaction or undertaking previously rendered him or her,” and (3) “whether such damage or injury would put a reasonable person on notice of the need for further inquiry as to the cause of such damage or injury.” *Omni-Food & Fashion, Inc. v. Smith*, 38 Ohio St.3d 385, 388, 528 N.E.2d 941 (1988).

{¶22} The Ohio Supreme Court has found that generally “the question of when an attorney-client relationship for a particular undertaking or transaction has terminated is necessarily one of fact.” *Omni-Food & Fashion, Inc.*, 38 Ohio St. 3d at 388. However, one party to the attorney-client relationship may take actions that are so inconsistent with a continued relationship that the question of when the attorney-client relationship ended can be decided as a matter of law. *Ruf v. Belfance*, 9th Dist. No. 26279, 2013-Ohio-160, ¶12. If the actions terminating the attorney-client relationship are clear and unambiguous, so that reasonable minds can come to but one conclusion from the evidence, the court termination may decide the issue as a matter of law. *Id.*

{¶23} The following facts are not in dispute.

{¶24} Appellants hired Attorney Thomas in 1999, to perform legal services in the formation of the Natures Grove condominiums. Attorney Thomas drafted the Natures Grove’s Declarations and filed the Declarations on March 15, 2000. (Pl. Summary Judgment Response Ex. A).

{¶25} Appellees allege, and the trial court found, that the service of the condominium owners' lawsuit on appellants on April 11, 2007, was a cognizable event that alerted or should have alerted appellants that improper legal work may have taken place. The condominium owners' lawsuit dealt with the Declarations prepared by Attorney Thomas. (Def. Summary Judgment Motion, Ex. G; Pl. Summary Judgment Response Ex. B).

{¶26} After being served with the condominium owners' lawsuit, Green contacted Attorney Thomas to represent appellants. (Def. Summary Judgment Motion, Ex. J). But Attorney Thomas told Green he could not represent appellants. (Def. Summary judgment motion, Exs. D, J). Appellants subsequently hired Attorney Lancione to represent them. (Def. Summary Judgment Motion, Ex. H, J).

{¶27} The condominium owners and appellants settled the lawsuit on June 4, 2007, with an agreed judgment entry imposing certain duties on appellants relating to the condos. (Def. Summary Judgment Motion, Ex. G; Pl. Summary Judgment Response Ex. D). On April 1, 2008, Green received a letter from the condominium owners complaining that he had yet to comply with the terms of the agreed judgment entry. (Def. Summary Judgment Motion, Ex. K). Green forwarded this letter to Attorney Lancione. (Def. Summary Judgment Motion, Ex. K).

{¶28} Appellants filed the instant lawsuit against appellees on November 1, 2011.

{¶29} The only factual dispute in this case is whether Attorney Thomas continued to represent appellants in matters relating to Natures Grove and the Declarations after he refused to represent them in the 2007 condominium owners' lawsuit.

{¶30} Appellees submitted Attorney Thomas's affidavit in which he averred that he had no legal involvement with appellants nor did he perform any legal work for appellants after he "terminated further representation" in 2007. (Def. Summary Judgment Motion, Ex. D).

{¶31} In response, appellants submitted Green's affidavit in which he averred

that he only hired Attorney Lancione to handle the 2007 condominium owners' lawsuit because Attorney Thomas had a conflict of interest in that case. (Pt. Summary Judgment Response Ex. C., ¶¶5-6). He further averred that, after the 2007 lawsuit was settled, Attorney Thomas continued to handle all of the business of implementing the Natures Grove Development including drafting documents, perfecting title, handling real estate closings, offering tax advice, and dealing with homeowner issues. (Pl. Summary Judgment Response Ex. C, ¶¶8-14). Green also averred that Attorney Thomas continued the attorney-client relationship working to alleviate problems between appellants and the condominium owners caused by the deficiencies in the Declarations even after appellants filed the instant lawsuit. (Pt. Summary Judgment Response Ex. C, ¶¶16-17).

{¶32} Appellants also submitted copies of two emails from Attorney Thomas to Green. The first is dated March 11, 2011. In the email, Attorney Thomas advises Green that he has left him two voicemails and asks Green about setting up a meeting. (Pl. Summary Judgment Response Ex. G). The second email is dated April 4, 2011. In this email, Attorney Thomas speaks of meeting with two condominium owners and working out a resolution on "outstanding issues" in addition to referencing building plans and the 2007 agreed judgment entry. (Pt. Summary Judgment Response Ex. H).

{¶33} While the 2007 lawsuit by the condominium owners was a cognizable event, there is a genuine issue of material fact as to whether the attorney-client relationship continued past this time. A legal malpractice accrues, starting the running of the statute of limitations, when a cognizable event occurs *or* when the attorney-client relationship terminates, *whichever occurs later*. R.C. 2305.11(A). Thus, even though a cognizable event occurred in April 2007, this did not automatically start the running of the statute of limitations.

{¶34} Green's affidavit, coupled with the copies of emails from Attorney Thomas to Green, suggest an on-going attorney-client relationship at least up until April 2011. Granted, Attorney Thomas's affidavit states that the attorney-client

relationship ended in 2007. But this conflict creates a genuine issue of material fact precluding summary judgment on this issue. Thus, the trial court should not have granted summary judgment.

{¶35} Accordingly, appellants' sole assignment of error has merit.

{¶36} For the reasons stated above, the trial court's judgment is hereby reversed and the matter is remanded for further proceedings according to law and consistent with this Court's opinion.

Waite, J., concurs.

DeGenaro, J., concurs.