STATE OF MICHIGAN

COURT OF APPEALS

TRUCKNTOW.COM,

Plaintiff-Appellant,

v

UHY ADVISORS MI, INC., and UHY, LLP,

Defendants-Appellees.

UNPUBLISHED
August 26, 2021

No. 354999
Oakland Circuit Court
LC No. 2020-181583-CB

Before: RIORDAN, P.J., and MARKEY and SWARTZLE, JJ.

PER CURIAM.

Plaintiff TrucknTow.com appeals by right the trial court's opinion and order granting summary disposition in favor of defendants UHY Advisors MI, Inc., and UHY, LLP (collectively UHY). Plaintiff sued UHY for accounting malpractice, and the trial court agreed with UHY's argument that the action was time-barred. The issue posed in this case concerns identifying the date that the claim for accounting malpractice accrued. We reverse and remand for further proceedings.

I. FACTUAL BACKGROUND

In 2014, the Michigan Department of Treasury (the Department) initiated an audit with respect to plaintiff's payment of taxes. Plaintiff retained UHY on January 15, 2015, to respond to the audit. On November 19, 2015, the Department sent plaintiff a notice of preliminary audit, indicating that plaintiff owed $452,150 in unpaid sales taxes. UHY worked on the issue of plaintiff's sales tax liability, eventually obtaining a reduction in the sales tax balance to $273,537. The Department's final determination, issued on June 6, 2016, stated that plaintiff's total tax liability was $273,537. On October 30, 2017, UHY filed an Offer in Compromise (OIC) with the Department, seeking further reduction in the sales tax debt. In the cover letter to the Department, on UHY letterhead, Susan Wagner of UHY stated:

> *On behalf of our client*, Truck N Tow.Com, enclosed you will find our request for an [OIC] . . . . This offer is a result of a sales tax audit, [with] which we disagree on the final assessment amount. The discrepancy is further explained within this document.

> You will also find enclosed the payment in full for the amount we believe is correct. We understand that interest is still owed on this amount and that the amount may be adjusted, *based on further conversations as we resolve this issue.* We are sure you will have questions and the need for additional documentation *so please do not hesitate to contact me*. I can be reached at . . . .
>
> We appreciate your assistance with this matter and *look forward to working with you on reaching a final resolution.* [Emphasis added.]

According to an invoice from UHY to plaintiff dated June 12, 2020, covering professional services rendered during a period ending on November 30, 2017, billable services were last rendered on November 27, 2017. In a letter from plaintiff's CEO Scott Silberman to UHY dated May 30, 2018, Silberman blasted UHY, expressing extreme displeasure with UHY's services and listing numerous alleged shortcomings. The letter noted that plaintiff had contacted Wagner on May 21, 2018, to discuss plaintiff's complaints. Silberman demanded a written response by UHY to plaintiff's grievances by no later than June 8, 2018. Silberman indicated that "[f]ailure to timely provide a viable plan . . . will leave us no alternative but to engage another firm to resolve this matter for us."

By letter dated June 8, 2018, the Department rejected the OIC because there was "[i]nsufficient evidence . . . to support the offer" and because there was no supporting documentation regarding out-of-state sales claims. The letter was addressed to plaintiff and copied to UHY. Plaintiff received notice of the Department's rejection of the OIC on Thursday, June 14, 2018. With respect to the rejection notice, Christine Pollitt, plaintiff's controller, wrote to UHY's Wagner and others by e-mail on June 14, 2018, stating, "Please review and advise on next steps." That same day Wagner responded to Pollitt by e-mail, indicating that she would "work on a response and will probably need . . . help with documenting the out of state sales." Wagner also asked Pollitt if she would be available for a call the following Tuesday. Jerry Grady, another UHY employee, sent an e-mail to Wagner on June 14, 2018, which was copied to CEO Silberman, as were all the e-mails that we are examining, and Grady's e-mail provided:

> I have a thought as I have been working with a data professional that potentially could pull data from their system and we work backwards and prepare a report of revenue per customer and tie it to the business name and address. I believe this is what was provided to the state but let me know.

Silberman, still on June 14, 2018, responded by e-mail to Grady:

> Susan [Wagner] should have known [the Department] would want evidence to support the out of state sales. I think it would be reasonable to provide these reports (if I can get them) . . . . Your involvement has not proven useful. Chris [Pollitt] is going to call the auditor, play dumb, and try and see if this is what they will accept . . . . If we need any more assistance we will ask for it. Please put everything on your side on hold for the time being.

On June 15, 2018, Grady responded to Silberman by e-mail, observing that the Department is "looking for much more than just a spreadsheet" and is "not agreeing with data prepared reports

as we have provided everything to them based on what was able to be pulled and gathered." Grady also discussed a 30-day window within which to appeal the rejected OIC. Silberman replied to Grady by e-mail on June 18, 2018, stating, "You guys might want to check your facts. We were told there is NO APPEAL process for rejected OICs." After further back and forth regarding the possibility of an appeal, Silberman e-mailed Grady on June 18, 2018, indicating, "I ask that you let [another professional] move into the driver's seat. We need to let someone else try and resolve this once and for all." Plaintiff viewed June 18, 2018, as the date that it discharged UHY.

Plaintiff filed the instant civil action against UHY on June 5, 2020, alleging that UHY had committed "professional malpractice." Plaintiff alleged that its malpractice claim accrued no earlier than June 8, 2018, and that June 18, 2018—the date on which it allegedly discharged UHY—is when UHY "discontinued serving [plaintiff] in a professional capacity as to the matters out of which the claim for malpractice arises." UHY moved for summary disposition under MCR 2.116(C)(7), arguing that plaintiff's complaint was barred by the two-year statute of limitations that applies to malpractice actions under MCL 600.5805(8). UHY contended that it discontinued serving plaintiff in a professional capacity on November 27, 2017, which was the last date on which billed services were provided to plaintiff by UHY. The trial court granted UHY's motion for summary disposition and denied its motion for sanctions in an opinion and order entered on September 30, 2020. This appeal ensued.

II. STANDARD OF REVIEW AND SUMMARY DISPOSITION UNDER MCR 2.116(C)(7)

MCR 2.116(C)(7) provides for summary disposition of a claim when it is barred by the "statute of limitations." This Court reviews de novo a trial court's decision on a motion for summary disposition, a determination that an action is time-barred, and questions of statutory construction. *Caron v Cranbrook Ed Commnity*, 298 Mich App 629, 635; 828 NW2d 99 (2012).

In *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008), this Court recited the principles pertaining to a motion for summary disposition brought pursuant to MCR 2.116(C)(7):

> Under MCR 2.116(C)(7) . . ., this Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. This Court must consider the documentary evidence in a light most favorable to the nonmoving party. If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. If a factual dispute exists, however, summary disposition is not appropriate. [Citations omitted.]

III. LAW AND ANALYSIS

Plaintiff argues that the trial court erred by determining that plaintiff's complaint was barred by the statute of limitations. We conclude that the documentary evidence created a factual dispute regarding the date that UHY discontinued serving plaintiff.

MCL 600.5805(8) provides that the "the period of limitations is 2 years for an action charging malpractice." MCL 600.5838, which addresses malpractice claims, states, in pertinent part, as follows:

> (1) Except as otherwise provided in section 5838a or 5838b, a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession *accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim*.

MCL 600.5838 governs the issue of accrual in cases alleging accounting malpractice. *Ohio Farmers Ins Co v Shamie (On Remand)*, 243 Mich App 232, 238; 622 NW2d 85 (2000). A claim accrues when a defendant discontinues professional accounting services with respect to matters out of which the claim for malpractice arises. *Id.* at 240. "[T]he date when plaintiff suffered damages is irrelevant to the accrual of the claim." *Id.* In *Gebhardt v O'Rourke*, 444 Mich 535, 543-544; 510 NW2d 900 (1994), our Supreme Court construed MCL 600.5838 in the context of an attorney malpractice action, stating:

> The Legislature intended that the last day of service be the sole basis for determination of accrual. Lack of ripeness, i.e., that not all the elements of the tort have been discovered, is irrelevant to the two-year limitation period. We will follow the statutory scheme as clearly written and intended by the Legislature. A client has up to two years from the time his attorney stops representing him regarding the matter in question to bring a malpractice suit.

In this case, UHY submitted an invoice dated June 12, 2020, which was five days after the lawsuit was filed, showing professional services rendered to plaintiff through November 30, 2017. The final entries were for various services performed on November 27, 2017. On the basis of the invoice, UHY asserts that on November 27, 2017, it discontinued serving plaintiff in a professional capacity with respect to matters giving rise to the malpractice claims.

UHY's cover letter from Wagner, on behalf of plaintiff, to the Department, which accompanied the October 30, 2017 OIC, indicated or suggested that UHY would continue servicing plaintiff in a professional capacity during the period in which the Department was processing the OIC. In the letter, Wagner offered "further conversations" with the Department to "resolve" the tax issue. She also informed the Department that it should not hesitate to contact her about any questions that might arise concerning the OIC or the Department's need for any additional documentation. Wagner closed the letter by indicating that she "look[ed] forward to working with [the Department] on reaching a final resolution."

It was not until June 8, 2018, that the Department formally rejected the OIC by letter to plaintiff, with a copy going to UHY. Silberman's May 30, 2018 letter to UHY reflected that plaintiff still looked to UHY to provide guidance, explanations, and answers, and Silberman noted contacting Wagner on May 21, 2018, to discuss issues. While the letter was very critical of UHY, Silberman only threatened "to engage another firm" if a viable plan to go forward was not offered, which revealed that plaintiff still believed that UHY was continuing to provide professional

services for plaintiff. The flurry of emails from June 14th through June 18th of 2018 could reasonably be interpreted as showing that UHY was continuing to render professional services for plaintiff by offering a plan or ideas on how to keep the battle against the Department afloat. Wagner even asked Pollitt if she would be available for a phone conference on Tuesday, June 19, 2018, to discuss matters.

The act of sending a bill for services rendered by a professional constitutes an acknowledgment by the professional that he or she performed professional services for the client on the date indicated in the bill. See *Bauer v Ferriby & Houston, PC*, 235 Mich App 536, 540; 599 NW2d 493 (1999); *Maddox v Burlingame*, 205 Mich App 446, 451; 517 NW2d 816 (1994). This does not necessarily mean, however, that the failure to bill for professional services actually provided to a client establishes that those services are not to be considered for purposes of accrual under MCL 600.5838. To hold otherwise would be a patently absurd interpretation of MCL 600.5838. Although UHY did not bill plaintiff for services performed after November 27, 2017, there was evidence that could be construed as reflecting that UHY continued serving plaintiff in a professional capacity thereafter and did not discontinue rendering services until sometime after June 5, 2018.

In *Bauer*, 235 Mich App at 539, this Court observed:

> A lawyer has an ethical duty to serve the client zealously. Some of a lawyer's duties to a client survive the termination of the attorney-client relationship, most notably the general obligations to keep client confidences and to refrain from using information obtained in the course of representation against the former client's interests. Sound public policy would likewise encourage a conscientious lawyer to stand ever prepared to advise a former client of changes in the law bearing on the matter of representation, to make a former client's file available if the former client had need of it, and, indeed, to investigate and attempt to remedy any mistake in the earlier representation that came to the lawyer's attention. To hold that such follow-up activities attendant to otherwise completed matters of representation necessarily extends the period of service to the client would give providers of legal services a powerful disincentive to cooperate with a former client who needs such attention. We conclude that the proper inquiry is whether the new activity occurs pursuant to a current, as opposed to a former, attorney-client relationship. [Citations omitted.]

Here, reasonable minds could differ regarding whether UHY's activities in June 2018 can be characterized as attending to otherwise completed matters. The trier of fact must determine whether those activities were a continuation of professional services provided to plaintiff relative to settling on a strategy in an ongoing fight with the Department over taxation issues.

We hold that a question of fact exists regarding whether the action for accounting malpractice accrued on November 27, 2017, making the complaint filed on June 5, 2020, untimely under the two-year statute of limitations, or whether it accrued after June 5, 2018, making the filing of the complaint timely.

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction. We decline to award taxable costs under MCR 7.219.

/s/ Jane E. Markey
/s/ Brock A. Swartzle