STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: January 13, 2016)

CAROL BROWNE,	**:**	
Plaintiff,	**:**	
	:	**C.A. No. PC 2013-3814**
V.	**:**	
	:	
DIANE MESSERE MAGEE, ESQ.,	**:**	
Defendant.	**:**	

DECISION

LICHT, J. This matter is before the Court on Attorney Diane Messere Magee's (Defendant or Attorney Magee) Motion for Summary Judgment. The Court heard arguments for summary judgment on October 6, 2015, and held an evidentiary hearing on December 17 and 18, 2015 concerning the issue of when this cause of action accrued for purposes of determining when the statute of limitations would have barred this action, if at all. For the reasons stated herein, the Court grants the Defendant's Motion for Summary Judgment.

I

Facts

On October 9, 1987, Plaintiff Carol Browne (Ms. Browne or Plaintiff) married Finn Behncke (Mr. Behncke). Mr. Behncke was employed in both Norway and Ireland, where he paid into their pension systems. In 1985, Mr. Behncke moved to the United States and also started paying into the Social Security system. Mr. Behncke died on February 15, 1993.

Subsequently, Ms. Browne started dating Doctor Andre Zalzal (Dr. Zalzal), and they became engaged. Dr. Zalzal requested Ms. Browne sign a prenuptial agreement, and Ms.

Browne retained Attorney Magee to advise her. Each party presented a different version of what occurred at this meeting. Ms. Browne alleges that in June 1996, during one of her consultations, Attorney Magee told Ms. Browne that if her marriage to Dr. Zalzal ended, she would revert back to being Mr. Behncke's widow and would be eligible to collect widow benefits from Mr. Behncke's pensions in Norway and Ireland. (Compl. ¶ 20.) Attorney Magee argues that at a consultation on May 20, 1996, Ms. Browne informed Attorney Magee that her understanding was that she would lose her widow's pension benefits from Ireland and the United States upon marriage or cohabitation with Dr. Zalzal, and that Attorney Magee advised her to confirm that information. See Ex. 2, Magee Dep. Tr. 27:6-28:8. Attorney Magee maintains that at the meeting they never discussed Norway. Id. Attorney Magee avers that she negotiated the Prenuptial Agreement with Ms. Browne's understanding that she would no longer be able to receive widow's benefits after marrying Dr. Zalzal. Id. at 30:16-31:11. Further, Attorney Magee followed up the consultation by sending a letter summarizing their consultation and advised Ms. Browne to contact the government of Ireland to ascertain her benefits. Ex. 3, Letter dated May 21, 1996. Attorney Magee's representation included negotiating two changes to the Prenuptial Agreement. Plaintiff alleges that because she believed she was going to get Mr. Behncke's pension benefits if her marriage to Dr. Zalzal ended in divorce, she agreed to waive any right to "alimony, dower, widow's allowance, statutory allowance, distribution in intestacy, and right of election to take against the will of Andre" and "agreed that Andre's retirement/profit-sharing and IRA fund(s) and accumulations thereto would remain his separate property." See Ex. 4, Agreement. Ms. Browne signed the agreement on June 27, 1996 and on June 29, 1996, Ms. Browne and Dr. Zalzal married. In 2002, Ms. Browne filed for divorce from Dr. Zalzal and final

judgment with a Settlement Agreement incorporated by reference was entered on November 7, 2002.

On August 8, 2010, at age sixty-five, Ms. Browne applied for Mr. Behncke's pensions from Norway and Ireland, as his widow. On October 15, 2010, Ms. Browne learned she was no longer eligible for the benefits because she had remarried after Mr. Behncke's death. Ms. Browne filed the present Complaint on August 1, 2013, alleging she relied on Attorney Magee's erroneous advice concerning her eligibility for her late husband's pension.

II

Standard of Review and Travel

On July 17, 2015, Defendant filed a motion for summary judgment, on which a hearing was held on October 6, 2015. For purposes of summary judgment, the Court must view the evidence "in the light most favorable to the nonmoving party" and determine if there is no "genuine issue of material fact to be decided." DeMaio v. Ciccone, 59 A.3d 125, 129 (R.I. 2013) (quoting Pereira v. Fitzgerald, 21 A.3d 369, 372 (R.I. 2011)) (internal quotation marks omitted). Further, the Court '"must refrain from weighing the evidence or passing upon issues of credibility."' Id. at 130 (quoting Doe v. Gelineau, 732 A.2d 43, 48 (R.I. 1999)). At the hearing, the Court found that there were genuine issues of material fact as to whether Attorney Magee breached her duty of care, whether there was causation, and the amount of damages. Hr'g Tr. 25:8-12; 31:8-32:4, Oct. 6, 2005.

However, the Defendant had also argued that the statute of limitations barred Plaintiff's claim of legal malpractice. Section 9-1-14.3 of the Rhode Island General Laws provides, "Notwithstanding the provisions of §§ 9-1-13 and 9-1-14, an action for legal malpractice shall be commenced within three (3) years of the occurrence of the incident which gave rise to the

action." Additionally, the statute sets out an exception, called the discovery rule, for those instances where the malpractice is not immediately apparent, stating:

> "In respect to those injuries due to acts of legal malpractice which could not in the exercise of reasonable diligence be discoverable at the time of the occurrence of the incident which gave rise to the action, ***suit shall be commenced within three (3) years of the time that the act or acts of legal malpractice should, in the exercise of reasonable diligence, have been discovered.***" Sec. 9-1-14.3(2) (emphasis added).

The purpose of the discovery rule is to "protect individuals suffering from latent or undiscoverable injuries who then seek legal redress after the statute of limitations has expired for a particular claim." Canavan v. Lovett, Schefrin & Harnett, 862 A.2d 778, 783 (R.I. 2004). In applying the discovery rule, "[i]t is well settled that the statutory period begins to run not when the plaintiff has actual knowledge of alleged acts of malpractice, but rather when he becomes aware of facts or by exercising reasonable diligence could discover facts that would place a reasonable person on notice that a potential claim exists." Zanni v. Voccola, 13 A.3d 1068, 1071 (R.I. 2011); 54 C.J.S. Limitations of Actions § 248. The plaintiff does not need "to fully appreciate the potential liability, or even be convinced of an injury; the objective standard requires only that the plaintiff be aware of facts that would place a reasonable person on notice that a potential claim exists." Canavan, 862 A.2d at 783-84 (citing Riemers v. Omdahl, 687 N.W.2d 445, 449 (N.D. 2004)). In determining whether the plaintiff exercised reasonable diligence, the Court has stated, "[i]n keeping with the remedial spirit of the rule, this Court draws 'all reasonable inferences' in plaintiff's favor to determine whether, in the exercise of reasonable diligence, plaintiff should have discovered the alleged act of malpractice." Id. at 784.

In the October 6, 2015 hearing, the Court found that there was a genuine issue of material fact as to whether the discovery rule applied in this case. Hr'g Tr. 33:8-14, Oct. 6, 2015. As

explained by our Supreme Court, the proper procedure is to have the parties present the material facts "at a preliminary evidentiary hearing at any time in advance of trial" to determine "when reasonable diligence would have put a person on notice that a potential claim existed." Sharkey v. Prescott, 19 A.3d 62, 67 (R.I. 2011). Similarly, in medical malpractice[1] cases, the Court has found that the issue of whether a plaintiff acted with reasonable diligence in discovering the acts of malpractice is an issue of fact, not law. Grossi v. Miriam Hosp., 689 A.2d 403, 405 (R.I. 1997). As in the legal malpractice case, the Court explained "[t]his question of fact should be determined by a justice of the Superior Court as a preliminary issue preceding the determination of whether the statute of limitations had run prior to the addition of this defendant." Hall v. Ins. Co. of N. Am., 666 A.2d 805, 806 (R.I. 1995) (Hall I); see also Roe v. Gelineau, 794 A.2d 476, 481 (R.I. 2002); Doe v. LaBrosse, 588 A.2d 605, 606-07 (R.I. 1991); Moore v. R.I. Bd. of Governors for Higher Educ., 18 A.3d 541, 545 (R.I. 2011). Therefore, because the Court, at the October hearing, determined there is a genuine issue of material fact as to when the plaintiff, with all reasonable diligence, should have discovered the acts of malpractice, the Court scheduled an evidentiary hearing to allow the Court to find these facts before ruling on the summary judgment motion. See Hall I, 666 A.2d at 806; Doe, 588 A.2d at 606-07; Hall v. Ins. Co. of N. Am., 727 A.2d 667, 669 (R.I. 1999) ("Hall I and Grossi establish that it is at times proper for a motion or trial justice to determine 'as a preliminary issue' whether a plaintiff has acted with due diligence . . . and the court may do so in a separate, evidentiary proceeding preliminary to a consideration of a summary judgment motion.").

[1] The Court has used the similar medical malpractice discovery rule in analyzing legal malpractice cases. See Canavan, 862 A.2d at 783 ("The statute of limitations governing legal malpractice causes of action is set forth at § 9-1-14.3. Section 9-1-14.3, which codifies the 'discovery rule' exception previously recognized by this Court in the context of medical malpractice . . .).

On December 17 and 18, 2015, the Court held an evidentiary hearing solely on the issue of reasonable diligence and the statute of limitations. The parties submitted agreed-upon exhibits and two witnesses testified, Ms. Browne and Attorney Kristin Barkett Pettey (Attorney Pettey). Ms. Browne testified as to the advice she received from Attorney Magee and why she did not contact the governments of Ireland or Norway before age sixty-five to ascertain her benefits. Attorney Pettey testified about her general practices and her representation of Ms. Browne during her divorce from Dr. Zalzal. The parties concluded with oral arguments on December 18, 2015.

III

Analysis

Defendant asserts, generally, a legal malpractice claim must be brought within three years of the occurrence of the incident giving rise to the legal malpractice; but here, Ms. Browne brought her case seventeen years later, and fourteen years after the statute of limitations expired. Defendant contends that the discovery rule is not applicable in the present case because Plaintiff was not reasonably diligent in ascertaining that her widow's pension benefits[2] would be permanently revoked upon marrying Dr. Zalzal. See § 9-1-14.3(2). Because Plaintiff did not do any independent research, but instead merely sat and did nothing, Defendant argues the discovery rule does not apply.

Plaintiff contends that because she could not receive her late husband's retirement pension benefits from Ireland or Norway until she reached age sixty-five on August 8, 2010, it was reasonable for her to rely on Attorney Magee's representation and not contact the

[2] In evidence, there are references to two benefits—widow's benefits and a widow's pension benefit. The widow's benefit is payment that Ms. Browne received from Ireland only after Mr. Behncke's death. The pension benefits from Norway and Ireland are only available upon reaching retirement age.

governments until she became eligible. Plaintiff explains that immediately upon turning sixty-five, she tried to collect the pensions, but she was informed on October 15, 2010 that her benefits ceased after she remarried. Plaintiff then filed suit diligently after discovering the malpractice.

A

1996 Representation by Attorney Magee

Defendant asserts that a person acting with reasonable diligence should have discovered the malpractice during the time Attorney Magee represented Ms. Browne. Attorney Magee, both orally and by letter, instructed Ms. Browne to contact the government of Ireland. On May 21, 1996, Attorney Magee wrote "I suggested you contact the Government of Ireland and ascertain what your benefit would be under your late husband's pension. This will help you formulate a fair and equitable settlement of property in the unlikely event of divorce." See Ex. 3, Letter dated May 21, 1996. Nevertheless, Ms. Browne stated that she did not contact the government of Ireland. She testified that she felt the advice was to contact the government for the purposes of determining the amount of the benefit and she said, at that time, she did not care about the amount of the benefit. Plaintiff contends that her reliance on the accuracy of Attorney Magee's advice, and not calling the government of Ireland at that time, was reasonably diligent.

However, if Ms. Browne had contacted the government of Ireland at that time, it is very likely that she would have realized that the information that she alleges Attorney Magee provided was incorrect. Ms. Browne testified she retained the contact information for the government of Ireland because at that time she was receiving widow's benefits. Shortly after marrying Dr. Zalzal, she contacted the widow survivor's benefits office in Ireland to inform them of her marriage, which presented an opportunity to inquire about her other expected benefits as well.

Furthermore, beyond Ms. Browne's testimony, there is no evidence that Ms. Browne mentioned the pension from the government of Norway to Attorney Magee. The May 21, 1996 letter summarizes in great detail the May 20, 1996 meeting of the parties. The fact that Attorney Magee suggests that Ms. Browne contact the government of Ireland, and not the government of Norway, leads the Court to infer that Attorney Magee was credible when she states in her deposition and interrogatory response that Norway was not brought up at the prenuptial consultations. See Magee Dep. Tr. 28:7-8; Def.'s Answers to Interrogs. 13. Additionally, upon receiving the summary letter, if Ms. Browne believed the letter inaccurately reflected their conversation, of if she was unclear as to why Attorney Magee suggested contacting the Irish government, then she should have contacted Attorney Magee to clarify. A reasonably diligent person would have contacted the attorney regarding such a glaring absence of information in the summary letter.

Based on this Court's review of the May 21, 1996 letter, Ms. Browne and Attorney Magee's depositions, and Ms. Browne's testimony, the Court finds that Ms. Browne's version of the events is not credible. Furthermore, Attorney Magee's version is supported by her May 21, 1996 summary letter. The Court can further infer that a Rhode Island attorney would be unlikely to give advice on pension laws of foreign countries which is buttressed by Attorney Magee's suggestion to contact the government of Ireland. Additionally, the Court finds that a reasonably diligent person would (a) if suggested by her attorney, contact the Irish government to determine her pension benefit, if any; and (b) contact her attorney when the summary letter failed to mention Norway. The Court finds that the discovery rule is not applicable. See Zanni, 13 A.3d at 1071; Sharkey, 19 A.3d at 68 (plaintiff was not reasonably diligent because plaintiff admitted to reading and understanding the contract when it was signed). Thus, because Ms. Browne was

on inquiry notice of facts which would have, in the exercise of reasonable diligence, allowed her to discover the legal malpractice claim in 1996, the discovery rule does not apply and the statute of limitations to file this claim expired in 1999.

B

2002 Filing for Divorce

Even if the Court were to not judge the credibility of the parties and look at the evidence in the light most favorable to the Plaintiff and then apply the discovery rule, Defendant claims that Ms. Browne also should have become aware of the legal malpractice claim in 2002 when she divorced Dr. Zalzal. Ms. Browne retained Attorney Pettey to represent her in the divorce proceedings and to negotiate the divorce settlement agreement. Ex. 5, Attorney Pettey Aff. ¶¶ 6-12. While preparing documents for the divorce, Ms. Browne indicated on her DR-6, a Family Court form required to file for divorce in Rhode Island, she did not have a pension or retirement account. See Ex. 6, DR-6 Form. Attorney Pettey testified that it was her practice to have her client fill out the DR-6, and then Attorney Pettey would review the handwritten form with the client and type a final version to file with the Family Court. See Ex. 6, DR-6 Form. Ms. Browne had the opportunity to discuss her expectation of retirement benefits with Attorney Pettey at this time; however, Ms. Browne testified she never discussed the Norway or Ireland pensions with Attorney Pettey. See Ex. 1, Browne Dep. Tr. 142:14-19. Moreover, during this major change in her life circumstances involving a divorce and moving back to England, Ms. Browne indicated that she did not contact the Irish or Norwegian governments to ascertain her expected pension benefits. Id. at 144:16-25. Further, Ms. Browne testified that she had contacted the government of Ireland to cancel her widow's survivor benefit, but never considered asking to reinstate it after her divorce.

Plaintiff testified that she did not include the pensions on the DR-6 form because she was not currently receiving them at that time. Further, Attorney Pettey testified that because the pension or retirement benefits were not acquired during the marriage, they would not be considered a marital asset, which was the purpose of filling out the DR-6 form.

The Court finds that a reasonably diligent person would mention her pension or retirement expectations while filling out her asset declaration forms during divorce, or at least, would be curious enough to inquire further about the amount she expected to receive in order to help plan for the future as a single, self-supporting person. See Guay v. Dolan, 685 A.2d 269, 271 (R.I. 1996) (plaintiff did not exercise due diligence because waiting eleven months to request evidence of malpractice did not pause the running of the statute of limitations). Therefore, a reasonably diligent person in his or her late fifties would, as he or she approached divorce, explore the details of his or her retirement income. Had Ms. Browne made such inquiry in 2002, she would have been on notice of the acts of legal malpractice and the statute of limitations on the claim would have expired in 2005.

C

Ascertaining Retirement Benefits

At the hearing, Ms. Browne testified that she never contacted the governments of Ireland or Norway before her retirement age to ascertain the value of her pension benefits because she believed that it was a fixed amount and the government would just pay her out what she was due at that time. Ex. 1, Browne Dep. Tr. 144:16-25. However, the Court finds that a reasonably diligent person plans for their financial future and researches what income they can expect to receive, which Ms. Browne testified she never did.

Further, Ms. Browne testified that she applied to receive her own personal UK pension five years before she turned sixty-five, at which time she believed she would be eligible for her husband's Norway and Ireland pensions. Upon turning sixty and starting to receive one pension benefit, a reasonably diligent person would inquire about other pension entitlements. Thus, again in 2005, when Ms. Browne applied for her UK pension, had she been reasonably diligent, she should have inquired from Ireland or Norway to ascertain the expected amount of income for retirement. Had she done so, Ms. Browne would have been aware of the alleged acts of legal malpractice by Ms. Magee. As such, the statute of limitations would have ceased to toll in August 2005 and would have expired in August 2008.

IV

Conclusion

Summary judgment is granted in favor of the Defendant because the statute of limitations expired prior to the filing of this suit. Moreover, the Court finds that a reasonably diligent person would have been on inquiry notice when Attorney Magee instructed Ms. Browne to call the government of Ireland to confirm her advice. However, the Court also believes that a reasonably diligent person would have taken control of their financial future and inquired about their expected retirement income at the time of her divorce, and again when she started collecting a personal pension from the UK government. Therefore, because Ms. Browne was on inquiry notice at the very latest by August 2005, the statute of limitations on this claim expired no later than August 2008. Since the Complaint was not filed until August 1, 2013, it is barred under the statute of limitations. The Defendant's Motion for Summary Judgment is granted.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Carol Browne v. Diane Messere Magee, Esq.
CASE NO:	PC 2013-3814
COURT:	Providence County Superior Court
DATE DECISION FILED:	January 13, 2016
JUSTICE/MAGISTRATE:	Licht, J.

ATTORNEYS:

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