STATE OF MICHIGAN

COURT OF APPEALS

MARVIN C. ROGERS,

Plaintiff-Appellant,

v

MICHAEL J. OTIS,

Defendant-Appellee.

UNPUBLISHED
September 13, 2007

No. 269480
Ingham Circuit Court
LC No. 05-001403-CZ

Before: Bandstra, P.J., and Zahra and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition for defendant based on the expiration of the statute of limitations. We affirm.

Plaintiff first argues that the trial court committed error requiring reversal when it granted defendant's motion for summary disposition under MCR 2.116(C)(8) because defendant requested summary disposition solely under subsection (C)(7). We disagree. An order granting summary disposition is reviewed by this Court de novo. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 357; 597 NW2d 250 (1999). We find that the order of summary disposition contains a typographical error indicating that the trial court granted summary disposition under MCR 2.116(C)(8). Besides requesting summary disposition under subsection (C)(7) in his motion and during oral argument, defendant asserted that plaintiff did not file his complaint before the statute of limitations lapsed. Defendant never requested summary disposition under (C)(8), and the trial court held that plaintiff's complaint was time-barred. It never indicated that plaintiff failed to state a claim. Accordingly, plaintiff's argument that the trial court granted summary disposition under subsection (C)(8) is without merit.

We further conclude that the trial court correctly granted summary disposition under MCR 2.116(C)(7). The statute of limitations for legal malpractice is two years after the claim accrued, MCL 600.5805(6). MCL 600.5838(1) provides that a legal malpractice claim accrues at the time the attorney terminates his professional service. Plaintiff concedes that defendant ceased representing him on November 18, 2003, so the statue of limitations lapsed on November 18, 2005 unless tolled.

Plaintiff argues that he filed his case at the latest on November 7, 2005, when the trial court assigned a case number to the case and ordered him to pay a partial filing fee. The filing of

a civil action by an incarcerated plaintiff requesting waiver of filing fees because of alleged indigence is governed by MCL 600.2963, which provides in pertinent part as follows:

> (1) If a prisoner under the jurisdiction of the department of corrections submits for filing a civil action as plaintiff . . . and states that he or she is indigent and therefore is unable to pay the filing fee and costs required by law, the prisoner making the claim of indigency shall submit to the court a certified copy of his or her institutional account, showing the current balance in the account and a 12-month history of deposits and withdrawals for the account. The court then shall order the prisoner to pay fees and costs as provided in this section. The court shall suspend the filing of the civil action or appeal until the filing fee or initial partial filing fee ordered under subsection (2) or (3) is received by the court. . . . The prisoner then shall, within 21 days after the date of the court order, resubmit to the court all documents relating to the action or appeal, accompanied by the required filing fee or partial filing fee and 1 certified copy of the court order. If the filing fee or initial partial filing fee is not received within 21 days after the day on which it was ordered, the court shall not file that action or appeal, and shall return to the plaintiff all documents submitted by the plaintiff that relate to that action or appeal.

"A civil action is commenced by filing a complaint with a court." MCR 2.101(B). Plaintiff attempted to file his complaint on October 19, 2005 with an affidavit on a SCAO form titled, "Affidavit and order of suspension of fees/costs." Plaintiff then filed a motion to waive fees on October 28, 2005, and sent the trial court the documentation required under MCL 600.2963. The unambiguous language of MCL 600.2963 required the trial court to "*suspend the filing* of the civil action until the . . . partial filing fee ordered under subsection (2) or (3) [was] received by the court." (Emphasis added). MCL 600.2963 further states that if "the filing fee or initial partial filing fee is not received within 21 days after the day on which it was ordered, "the court *shall not file* that action." (Emphasis added.) Thus, plaintiff's argument that his complaint was filed when the trial court ordered him to pay a filing fee and assigned a case number is without merit. See *Mayor of Lansing v Pub Service Comm*, 470 Mich 154, 157; 680 NW2d 840 (2004) (unambiguous statutory language must be enforced as written).

Plaintiff also argues that if the November 7, 2005 order to pay the partial filing fee did not commence the case, then it tolled the statute of limitations for the 21-day period plaintiff had to pay the partial filing fee. Plaintiff further argues that although the trial court received the partial filing fee after the 21-day period had lapsed, the statute of limitations was tolled on November 7, 2005, and did not restart until 21 days later. Thus, plaintiff argues, the statue of limitation would have lapsed on December 8, 2005, had the trial court not received the required filing fee on December 2, 2005.

This issue was first raised on appeal and need not be considered. *Higgins Lake Property Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 117; 662 NW2d 387 (2003). However, we may consider it if necessary to a proper determination of the case.

We note that plaintiff's tolling argument conflicts with MCL 600.2963(1), which unambiguously states, "If the filing fee or initial partial filing fee is not received within 21 days after the day on which it was ordered, the court *shall not file that action* or appeal, and shall

return to the plaintiff all documents submitted by the plaintiff." (Emphasis added). In sum, plaintiff's original complaint became a nullity as soon as the 21-day order to pay a partial filing fee expired, and the receipt of payment thereafter could only serve to deem the case filed as of the date when the ordered partial payment was received. See also, *Keenan v Department of Corrections*, 250 Mich App 628, 636; 649 NW2d 133 (2002). Accordingly, the trial court did not commit error requiring reversal in dismissing plaintiff's claim as untimely.

Plaintiff next argues that the trial court committed error requiring reversal when it failed to rule on his motion for writ to appear physically or electronically for the summary disposition hearing. We disagree. Plaintiff's alleged motion did not state that plaintiff was requesting to participate in oral argument in the summary disposition hearing but merely stated "Plaintiff in the above named case . . . respectfully request[s] that this court either writ me out for appearance on this matter or arrange video/ phone appearance for me." The trial court noted that the motion did not refer to the motion for summary disposition. Nothing in the text of plaintiff's alleged motion suggests that plaintiff was referring to the summary disposition hearing. Therefore, we find no abuse of discretion. *American Transmission, Inc. v Channel 7 of Detroit, Inc*, 239 Mich App 695, 709; 609 NW2d 607 (2000); see MCR 2.119(E)(3), ("A court may, in its discretion, dispense with or limit oral arguments on motions . . . "). Moreover, we note that plaintiff does not explain how his inability to participate in oral argument had prejudiced him. We find no prejudice because all of the arguments stated in plaintiff's brief would have failed for reasons the already discussed. Moreover, we note that plaintiff was not denied due process of law; he had an adequate opportunity to respond through his brief opposing summary disposition.

Plaintiff next argues that the trial court erred in denying his motion for reconsideration and relief from judgment as untimely under MCR 2.119(F)(1). We disagree, finding no abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). Plaintiff argues that defendant's response to plaintiff's motion for reconsideration was a motion, and that under MCR 2.108 (B) and (C)(3), the trial court could not grant defendant's motion without affording plaintiff an opportunity to respond. Plaintiff cites no authority for his argument that defendant's response to his motion for reconsideration was a motion. A response to a motion arguing that the motion should be denied is simply not a motion.

Affirmed.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Donald S. Owens