

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36852

HAROLD FORD,)	2010 Unpublished Opinion No. 423
)	
Plaintiff-Appellant,)	Filed: April 9, 2010
)	
v.)	Stephen W. Kenyon, Clerk
)	
GREGG E. LOVAN and MICHAEL E.)	THIS IS AN UNPUBLISHED
DUGGAN,)	OPINION AND SHALL NOT
)	BE CITED AS AUTHORITY
Defendants-Respondents.)	
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Darla S. Williamson, District Judge.

Orders of the district court dismissing complaints and denying motion for reconsideration, affirmed.

Harold Ford, Boise, pro se appellant.

Moffatt, Thomas, Barrett, Rock & Fields, Chartered; Mark S. Prusynski, Boise, for respondents.

GRATTON, Judge

Appellant Harold Ford, pro se, appeals from the district court’s orders granting motions to dismiss brought by respondents, Gregg E. Lovan and Michael E. Duggan, and the district court’s order denying Ford’s motion for reconsideration. We affirm.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Ford filed professional malpractice actions against attorneys Lovan and Duggan. Ford hired Lovan and Duggan to represent him in a civil litigation case and contends that the attorneys committed malpractice in the handling of the case which resulted in a judgment against Ford. Lovan and Duggan filed motions to dismiss, which the district court granted, holding that the claims had not been filed within the applicable statute of limitations. The district court subsequently denied Ford’s motion for reconsideration. Ford appeals.

II. ANALYSIS

The motions to dismiss filed by Lovan and Duggan were supported by affidavits. While the district court stated that “The Defendants’ Motions to Dismiss are GRANTED,” the district court, in the body of its memorandum decision correctly noted that where matters outside the pleadings are submitted in support of a party’s motion to dismiss, a court must treat the motion to dismiss as a motion for summary judgment. Idaho Rule of Civil Procedure 12(c); *Ackerman v. Bonneville County*, 140 Idaho 307, 310, 92 P.3d 557, 560 (Ct. App. 2004). The district court, thereafter, expressly stated that the motions to dismiss would be treated as motions for summary judgment.

We first note that summary judgment under I.R.C.P. 56(c) is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. On appeal, we exercise free review in determining whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986). When assessing a motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. Furthermore, the trial court must draw all reasonable inferences in favor of the party resisting the motion. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct. App. 1994).

The party moving for summary judgment initially carries the burden to establish that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. *Eliopulos v. Knox*, 123 Idaho 400, 404, 848 P.2d 984, 988 (Ct. App. 1992). The burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial. *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994). Such an absence of evidence may be established either by an affirmative showing with the moving party’s own evidence or by a review of all the nonmoving party’s evidence and the contention that such proof of an element is lacking. *Heath v. Honker’s Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000). Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial, or to

offer a valid justification for the failure to do so under I.R.C.P. 56(f). *Sanders*, 125 Idaho at 874, 876 P.2d at 156.

The United States Supreme Court, in interpreting Federal Rule of Civil Procedure 56(c), which is identical in all relevant aspects to I.R.C.P. 56(c), stated:

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (citations omitted). The language and reasoning of *Celotex* has been adopted in Idaho. *Dunnick*, 126 Idaho at 312, 882 P.2d at 479.

Ford hired the law firm with which both Lovan and Duggan were associated in June 2002. A trial was commenced in January 2003 and the court issued a decision against Ford in March 2003. Ford appealed the decision to the Supreme Court, but the appeal was dismissed in November 2004. In July 2006, Ford filed complaints against Lovan and Duggan with Bar Counsel's Office for failing to diligently pursue and timely obtain bank records relative to his case for the prior trial. On January 12, 2009, the Idaho State Bar sent letters to Lovan and Duggan stating Bar Counsel's findings that Duggan violated Idaho Rule of Professional Conduct 1.3 and that Lovan violated Idaho Rule of Professional Conduct 5.1.

On March 11, 2009, Ford filed his complaints for professional malpractice against Lovan and Duggan. The cases were consolidated. In each case, Ford alleged that the failure to act with reasonable diligence and timely obtain the bank records caused Ford to lose the prior trial. Lovan and Duggan filed motions to dismiss on the ground that Ford's claims had not been filed within the applicable statute of limitations. The district court granted the motions and subsequently denied Ford's motion for reconsideration.

A cause of action for professional malpractice may arise if the alleged act or omission occurred in the course of performing professional services. *Lapham v. Stewart*, 137 Idaho 582, 588, 51 P.3d 396, 402 (2002). The applicable statute of limitations for professional malpractice is two years. Idaho Code § 5-219(4). An action to recover damages for professional malpractice

must be commenced within two years after the cause of action accrues. *City of McCall v. Buxton*, 146 Idaho 656, 659, 201 P.3d 629, 632 (2009). Except for actions based upon leaving a foreign object in a person's body or where the fact of damage has been fraudulently and knowingly concealed, a cause of action for professional malpractice accrues as of the time of the occurrence, act or omission of which a party complains. *Lapham*, 137 Idaho at 585-86, 51 P.3d at 399-400. However, a cause of action for professional malpractice cannot accrue until some damage has occurred. *Buxton*, 146 Idaho at 659, 201 P.3d at 632. The "some damage" referred to is damage that the client could recover from the professional for malpractice. In addition, there must be objective proof that would support the existence of some actual damage. *Id.* at 661, 201 P.3d at 634. The outcome of the litigation provides objective proof of some actual damage, here, a court decision adverse to the client because of attorneys' alleged malpractice. *Id.* at 661-663, 201 P.3d at 634-636. Ford did not file his claims against Lovan and Duggan within two years of the adverse trial determination in March 2002 or the Supreme Court's dismissal of his appeal in November 2004.

Ford contends that he did not know of his injury until January 2009 when the Idaho State Bar issued letters to Lovan and Duggan setting forth Bar Counsel's findings of professional conduct violations. However, whether there has been some damage, or whether that damage was objectively ascertainable, which triggers the running of the statute of limitations, does not depend upon the knowledge of the injured party. *Lapham*, 137 Idaho at 587, 51 P.3d at 401. To base the accrual of the cause of action and, thus, the running of the statute of limitations, on the knowledge of the injured party would constitute a discovery rule which the legislature has rejected. *Id.* An exception to this rule exists, though, where the fact of damage has been fraudulently and knowingly concealed. I.C. § 5-219. While Ford argued for this exception below and on this appeal, Ford did not include any claim of fraudulent or knowing concealment in his complaints or plead any facts supporting or even suggestive of fraudulent or knowing concealment. Therefore, the accrual analysis is not altered in this case by fraudulent or knowing concealment of the fact of damage.

Ford further contends that the statute of limitations was tolled by a discovery rule, because he was required to hire another attorney to prosecute the appeal from the trial ruling, the filing of a complaint with the Idaho State Bar, and functional illiteracy. Having reviewed the

record and the authorities cited, we conclude that these arguments are without merit, unsupported by Idaho law, and will not be discussed further.

Finally, Ford contends that breach of contract claims are governed by a five-year statute of limitations under I.C. § 5-216. First, Ford did not assert breach of contract claims in his complaints. Nonetheless, “professional malpractice” actions, within the terms of I.C. § 5-219, are not limited to negligence claims and may include breach of contract claims. *Lapham*, 137 Idaho at 588 n.4, 51 P.3d at 402 n.4. Ford’s claims that Lovan and Duggan failed to act with reasonable diligence are claims of “wrongful acts or omissions in the performance of professional services” and the applicable statute of limitations is two years under I.C. § 5-219(4). The district court correctly determined that Ford had failed to timely file his professional malpractice claims against Lovan and Duggan.

III.

CONCLUSION

Ford failed to file his claims against Lovan and Duggan within the applicable statute of limitations. Therefore, the orders of the district court dismissing Ford’s complaints against Lovan and Duggan and denying Ford’s motion for reconsideration are affirmed.

Chief Judge LANSING and Judge MELANSON, **CONCUR.**