87 Mass.App.Ct. 1124
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

John L. GRAORA
v.
FLETCHER TILTON AND WHIPPLE.

No. 14–P–1189. | May 27, 2015.

By the Court (KANTROWITZ, MEADE & HANLON, JJ.[5]).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** In this legal malpractice action, a Superior Court judge allowed the defendant's motion for summary judgment; the plaintiff appeals. The plaintiff, John L. Graora, was injured in an automobile accident in 2004. He retained the defendant law firm, Fletcher Tilton and Whipple (the firm), to represent him in his ensuing personal injury action. The operator of the other automobile was insured under a $20,000 limit, and under the guidance of the firm, Graora settled the action on June 16, 2007, for $15,000.[1]

Graora filed the present legal malpractice claim on February 3, 2011, claiming that the firm undervalued his personal injury claim and failed to inform him that he could potentially recover a judgment in excess of the $20,000 policy limitation. After a hearing on the firm's motion for summary judgment,[2] the judge concluded that Graora's malpractice claim was barred by the statute of limitations and allowed the motion. We affirm.

Standard of review. "The standard of review of a grant of summary judgment is whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." *Augat, Inc. v. Liberty Mut. Ins. Co.,* 410 Mass. 117, 120 (1991). The moving party may satisfy its burden of establishing the absence of triable issues by presenting "affirmative evidence negating an essential element of the plaintiff's case" or by "demonstrating that proof of that element is unlikely to be forthcoming at trial." *Flesner v. Technical Communications Corp.,* 410 Mass. 805, 809 (1991). Once the moving party makes its necessary showing, the nonmoving party must then "set forth specific facts showing that there is a genuine issue for trial." Mass.R.Civ.P. 56(e), 365 Mass. 824 (1974). *Kourouvacilis v. General Motors Corp.,* 410 Mass. 706, 716 (1991).

Statute of limitations. Pursuant to G.L. c. 260, § 4, "[a]ctions of ... tort for malpractice, error or mistake against attorneys ... shall be commenced only within three years ... after the cause of action accrues." As a general rule, a tort action accrues at the time of the injury to the plaintiff. *Frank Cooke, Inc. v. Hurwitz,* 10 Mass.App.Ct. 99, 106 (1980). However, when the cause of action is based on an "inherently unknowable wrong," the action "may not accrue until the person injured knows or in the exercise of reasonable diligence should know the facts giving rise to the cause of action." *Ibid.* The plaintiff argues that his cause of action did not accrue until 2011, when he "obtained additional and comprehensive information concerning his rights and options as of 2006 and 2007 ... [and] became aware the he had suffered appreciable harm."

In general, the question of when a plaintiff "knew or should have known of its cause of action is one of fact that will be decided by the trier of fact," *Taygeta Corp. v. Varian Assocs.,* 436 Mass. 217, 229 (2002), and therefore is not ordinarily appropriate for resolution via summary judgment. However, this general rule "presupposes that the plaintiff has proffered evidence sufficient to create a genuine issue of material fact" regarding the contested date of accrual. *RTR Technologies, Inc. v. Helming,* 707 F.3d 84, 91 (1st Cir.2013). In the present case, the plaintiff has not proffered such evidence.

***2** Once the "defendant pleads the statute of limitations and demonstrates that the action was commenced more than three years after the date of the plaintiff's injury, the plaintiff has the burden of proving that the facts take the case outside of the statute of limitations." *Vinci v. Byers,* 65 Mass.App.Ct. 135, 139 (2005), quoting from *Williams v. Ely,* 423 Mass. 467, 474 (1996). As noted by the motion judge, "[t]here is no evidence in the record concerning how the plaintiff gained his awareness that he

had been harmed." The plaintiff's mere assertions of disputed facts cannot, without more, defeat a motion for summary judgment. *LaLonde v. Eissner,* 405 Mass. 207, 209 (1989). As such, we conclude that the plaintiff's injury accrued on the date of the settlement, June 16, 2007, which triggered the running of the limitations clock. Thus, the grant of summary judgment in favor of the defendant was proper.[3,4]

For these reasons, as well as for substantially those in the judge's well-written memorandum of decision and the brief of the defendant, we affirm.

Judgment affirmed.

All Citations

87 Mass.App.Ct. 1124, 31 N.E.3d 78 (Table), 2015 WL 3387203

Footnotes

5 The panelists are listed in order of seniority.

1 The firm's representation ceased when Graora executed the settlement.

2 Only counsel for the defendant appeared at the hearing.

3 The plaintiff's argument that the statute of limitations was tolled due to the defendant's fraudulent concealment of the facts underpinning the present malpractice action, see *Crocker v. Townsend Oil Co.,* 464 Mass. 1, 8–9 (2012), falters due to the plaintiff's failure to present any evidence of concealment, active or otherwise, by the defendant. *Id.* at 9.

4 Given our conclusion, we need not reach the defendant's alternative arguments.