STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

TRUCKNTOW.COM, INC.,

Plaintiff,

v. **Case No. 20-181583-CB**
Hon. James M. Alexander

UHY ADVISORS MI, INC.,
And UHY LLP,

Defendants,

_____/

OPINION AND ORDER RE: DEFENDANTS' MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(7) AND FOR SANCTIONS UNDER MCL 600.2591 AND MCR 1.109(E)(6)

This matter is before the Court on Defendants' Motion for Summary Disposition Under MCR 2.116(C)(7) and for Sanctions Under MCL 600.2591 and MCR 1.109(E)(6). The Court dispenses with oral argument in accordance with MCR 2.119(E)(3).

Factual Background

By way of background, Plaintiff retained Defendants[1] to respond to two State of Michigan tax audits as of June 5, 2015. Specifically, Plaintiff engaged Defendants to assist with the tax audits and attempt to reduce the sales tax liability of Plaintiff for the years 2012 through 2014. On June 6, 2016, Plaintiff received the Final Audit Determination regarding the sales tax audit from the Tax

[1] Defendants refer to themselves collectively as UHY. The Court shall simply address UHY Advisors MI, Inc. and UHY LLP as Defendants.

Compliance Bureau of the State of Michigan. The letter provided three ways in which Plaintiff could appeal the final determination. See Exhibit 11 of Defendant's Motion.

According to Plaintiff, however, it was not advised by Defendants of the appeal period, nor did Defendants file an appeal on Plaintiff's behalf. Instead, Defendants filed an Offer In Compromise regarding Plaintiff's sales tax liability in June 2017. The State of Michigan subsequently rejected the Offer In Compromise on June 8, 2018. See Exhibit 18 of Defendants' Motion. Thereafter, Plaintiff alleges that it discharged Defendants on June 18, 2018 due to Defendants' negligence in missing the appeal deadline and failing to provide the necessary documentation with the Offer In Compromise. On June 5, 2020, Plaintiff initiated litigation against Defendants on the claim of professional malpractice.

In lieu of filing an Answer to the Complaint, Defendants filed their Motion for Summary Disposition under MCR 2.116(C)(7) in which they seek the dismissal of Plaintiff's Complaint on the ground that it is time-barred by the applicable two-year Statute of Limitations. "When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate." *Dextrom v Wexford Cty.*, 287 Mich App 406, 428–29; 789 NW2d 211 (2010). (Citations omitted).

Statute of Limitations

Pursuant to MCL 600.5805(8), the Statute of Limitations is two years for a malpractice claim. "[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(1). A malpractice action that is not commenced within two years is barred. MCL 600.5838(2).

Stated otherwise, "§ 5838 provides that malpractice claims accrue at the time [defendant] discontinues serving the plaintiff in a professional ... 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…[O]ur Supreme Court made clear that accrual of a malpractice claim under § 5838 does not require that the plaintiff have suffered damages." *Ohio Farmers Ins. Co. v Shamie*, 243 Mich App 232, 240; 622 NW2d 85 (2000).

With respect to Plaintiff's claim for professional malpractice, it is Defendants' contention that when the State of Michigan rejected the Offer In Compromise on June 8, 2018, Plaintiff realized that it could not be excused from its sales tax obligations or its bill from Defendants and so Plaintiff decided to accuse Defendants of malpractice. Irrespective of Plaintiff's position, Defendants argue that Plaintiff's claim is barred by the two-year Statute of Limitations since their final day of professional service to Plaintiff was November 27, 2017. Defendants offer as Exhibit 17 to their Motion the UHY Invoice that calculates the hours and fees for services rendered through November 27, 2017. Following that date, Defendants did not provide any services to Plaintiff and had virtually no contact with Plaintiff.

In further support of their position, Defendants rely on the May 30, 2018 letter by Scott Silberman, the CEO of TrucknTow.com, who acknowledges that the parties had no contact with one another since November 2017. In that letter, Mr. Silberman indicated that Defendants have failed

"to follow up on the 2nd OIC over the last 7 months, dismissing requests more than four times." See Exhibit 19 of Defendants' Motion.

Additionally, Defendants provide emails from June 14, 2018 and June 18, 2018 to illustrate Plaintiff's instruction that Defendants refrain from providing further services. For example, Mr. Silberman stated: "[y]our involvement has not proven useful…If we need any more assistance we will ask for it. Please put everything on your side on hold for the time being." Mr. Silberman also instructed Jerry Grady, an accountant for Defendants, via email as follows: "[f]or now, I ask that you let Dennis [counsel for Plaintiff] move into the driver's seat. We need to let someone else try and resolve this once and for all." See Exhibit 20 of Defendants' Motion. Based upon the foregoing, Defendants maintain that their last date of professional service was November 27, 2017.

In light of the fact that Defendants discontinued services to Plaintiff on November 27, 2017, Defendants argue that the Statute of Limitations expired two years later or on November 27, 2019. Since Plaintiff initiated this lawsuit on June 5, 2020, Defendants maintain that Plaintiff is barred from raising this claim.

According to Defendants, even Plaintiff pleaded with them to toll the limitations period. In support of this assertion, Defendants submit the January 9, 2020 letter from Plaintiff's counsel who asserted that "TrucknTow holds UHY responsible and will continue to hold UHY responsible for failing to appeal the June 6, 2016 notice…TrucknTow suggests that you immediately contact your insurance carrier and then that the carrier agree to a tolling agreement, effective today, that will stop the running of the statute of limitations while the final damages are calculated." See Exhibit 21 of Defendants' Motion. On March 6, 2002, Plaintiff's counsel emailed Defendants' counsel to communicate that he "again suggest[s] a tolling agreement so we can see what happens with the pending OIC." See Exhibit 22 of Defendants' Motion.

Further, Defendants characterize Plaintiff's position that its claim accrued no earlier than June 8, 2018 as a bare false accusation that is not supported by any documentary evidence. According to Defendants, their interactions with Plaintiff in June 2018 were simply emails defending Defendants' professional services to Plaintiff in response to the threat of litigation. Additionally, Defendants point out that the emails do not evidence any professional services or advice rendered.

Finally, Defendants seek sanctions against Plaintiff and its counsel for filing this lawsuit. Defendants rely upon MCL 600.2591(1), which provides as follows:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
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> …
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> (3)(a) "Frivolous" means that at least 1 of the following conditions is met:
> (*i*) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
> (*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
> (*iii*) The party's legal position was devoid of arguable legal merit.

Defendants contend that it placed Plaintiff on notice, in its February 7, 2020 letter, that if Plaintiff pursued this frivolous lawsuit, Defendants would seek sanctions to recover their attorney's fees and costs. See Exhibit 23 of Defendants' Motion. According to Defendants, Plaintiff had no reasonable basis to believe that Defendants performed legal services for Plaintiff after November 2017. As such, the Complaint is not well grounded in fact nor warranted by existing law. Thus, Defendants are seeking sanctions under MCL 600.2591 and MCR 1.109(E)(6).

In opposition to the motion, Plaintiff argues that its engagement with Defendants continued through June 8, 2018 at the earliest, as the parties awaited the State of Michigan's decision

regarding the Offer in Compromise. In fact, Plaintiff expected Defendants to answer any questions concerning the Offer in Compromise and advise Plaintiff on next steps following the State of Michigan's response. Once the State of Michigan rejected the Offer in Compromise, Plaintiff asserts that Defendants did in fact provide professional advice in the June 18, 2018 email communications.

Plaintiff also points to the June 14, 2018 email from Christine Pollitt, Plaintiff's controller, who notified both parties of the rejection notice and indicated "[p]lease review and advise on next steps." In response, Susan Wagner, an accountant for Defendants, stated: "I'll work on a response and will probably need your help with documenting the out of state sales. Are you available on Tuesday for a call?" See Exhibit C of Plaintiff's Response.

Within the group email string, Mr. Grady suggested an approach to the State of Michigan's rejection. He wrote: "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." In response to Mr. Grady's email, however, Mr. Silberman voiced his displeasure with Defendants and instructed them to "[p]lease put everything on your side on hold for the time being." Exhibit C of Plaintiff's Response.

Mr. Grady subsequently responded to the group email, in which he indicated: "[a]gain I need to caution and remind you of the 30 day appeal. Sue please provide them with what will need to be done as we don't want to miss a response to this issue as if it is [sic] locked and can't be changed. Based on your response we do not want to assume you are handling the appeal, but we need more than a week or two to file the proper response. That response is 30 days from the date of the letter not date received." In light of Mr. Grady's email response, Plaintiff maintains that Mr. Grady provided professional advice to Plaintiff regarding the 30-day timeframe. Yet, Ms. Pollitt

was well aware of the 30-day deadline as evidenced by her initial email. Finally, Mr. Silberman emailed the group and directed Defendants as follows: "[f]or now, I ask that you let Dennis move into the driver's seat. We need to let someone else try and resolve this once and for all." See Exhibit C of Plaintiff's Response. Plaintiff characterizes Mr. Silberman's direction to mean that Defendants were to wait for further instructions.

Moreover, Plaintiff points out that Defendants did not even prepare its invoice until June 12, 2020. As noted in the invoice, Plaintiff maintains that Defendants' role was not limited to the filing of the Offer In Compromise, but Defendants also provided generalized services such as "various tax and business matters." Stated otherwise, the engagement between the parties did not specifically end upon the completion of a particular service. Plaintiff also offers the Affidavit of its owner, Scott Silberman who attests that "TrucknTow did not terminate the relationship and did not intend to do so [as of June 14, 2018]." Mr. Silberman attests further that "TrucknTow did not terminate UHY [on June 18, 2018], but instead directed UHY to await further instructions." See Exhibit E of Plaintiff's Response.

Next, Plaintiff relies on the Michigan Supreme Court's analysis of the "last treatment rule" in the case of *Levy v Martin*, 463 Mich 478, 485–86; 620 NW2d 292 (2001). In that case, the *Levy* Court held that the plaintiff's malpractice claim against its accountants was not untimely due to the accountants' continued preparation of tax returns from 1974 to 1996. The *Levy* Court reasoned that "under the rationale of the last treatment rule… [an] accountant's client is likewise entitled to rely completely on the account's [sic: accountant's] skills and effectiveness until the termination of the relationship…a client who entrusts preparation of annual tax returns to an accountant is provided with an assurance of professional preparation of the tax returns that induces the client to take no further action regarding those matters until it is time to prepare the next year's tax returns." *Id.*

"[F]or purposes of applying the 'last treatment' rule and thereby ascertaining whether the statute of limitations bars this suit, plaintiffs had no duty to inquire into the effectiveness of [defendants'] measures until the end of the professional relationship." *Levy, supra* at 487. It is Plaintiff's position that the professional relationship had not ended between the parties in November 2017 as they were awaiting the decision of the State of Michigan in regard to the Offer In Compromise that Defendants submitted on behalf of Plaintiff.

Plaintiff also defers to the Michigan Court of Appeals' decision in *Estate of Mitchell v Dougherty*, 249 Mich App 668, 685; 644 NW2d 391 (2002) regarding the termination of an attorney-client relationship by implication. The Court of Appeals examined the facts of that case to determine whether the plaintiffs intended to terminate their relationship with the defendant law firm. In this case, Plaintiff argues that there is no evidence that it intended to terminate Defendants in November 2017.

Finally, Plaintiff maintains that the Statute of Limitations had not yet passed when it requested that Defendants consent to a tolling agreement in January 2020. Plaintiff asserts that its request for a tolling agreement was to allow the parties to discuss settlement without Plaintiff having to initiate litigation. When Defendants rejected Plaintiff's request, Plaintiff initiated this lawsuit.

In reply, Defendants maintain that they have been sending the same invoice to Plaintiff for years since it was created on November 30, 2017. Defendants offer the original invoice, dated November 30, 2017, as Exhibit 24 to their Reply. Next, Defendants contend that Plaintiff's brief creates another basis for dismissal. Specifically, Plaintiff alleges that its malpractice claim pertains only to the missed 60 to 90-day appeal deadline in response to the June 6, 2016 Final Audit Determination letter. Defendants maintain that Plaintiff waited four years after the alleged malpractice to file this frivolous action. Defendants argue further that Plaintiff's May 30, 2018 letter

accused Defendants of malpractice and threatened litigation. At that point in time, Defendants contend that the relationship between the parties was clearly adversarial. See Exhibit 19 of Defendants' Motion.

Defendants also rely on the case of *Bauer v Ferriby & Houston, P.C.*, 235 Mich App 536, 539–40; 599 NW2d 493 (1999) to assert that work done by an attorney to address alleged errors committed during a prior engagement does not extend the Statute of Limitations. The *Bauer* Court held that if "such follow-up activities attendant to otherwise completed matters of representation necessarily extends the period of service to the client [that theory] 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." The *Bauer* Court regarded "the activities of defendant in 1996 as a response to a complaint about an earlier, terminated representation, not as legal service in furtherance of a continuing or renewed attorney-client relationship." As such, the *Bauer* Court held that the plaintiff's claim was barred by the Statute of Limitations. *Id.*

As noted on Defendants' Invoice, the last date for professional services rendered by Defendants to Plaintiff was November 27, 2017. See Exhibit 17 of Defendants' Motion. The Court observes further that the parties had virtually no contact from November 2017 until May 2018 when Mr. Silberman drafted a litigious letter to Defendants, expressing his extreme displeasure with Defendants and characterizing Defendants' services as "unprofessional, negligent and malfeasant actions that continue to harm TrucknTow." See Exhibit 19 of Defendants' Motion. While Mr. Silberman contacted Susan Wagner on May 21, 2018 to discuss the unresolved lien, he noted that she had not returned the call. In his letter, Mr. Silberman also demanded a written, viable plan from Defendants to remove the lien in the amount of $390,000.00 for taxes. See Exhibit 19 of

Defendants' Motion. However, there is no evidence that Defendants responded to this demand by Mr. Silberman.

In her June 14, 2018 email to both parties' representatives, Ms. Pollitt informed the parties of the State of Michigan's rejection of the Offer In Compromise. In response, Ms. Wagner indicated that she will work on a response and will probably need Ms. Pollitt's help in documenting the out of state sales. However, Mr. Silberman instructed Defendants to "put everything on your side on hold for the time being." See Exhibit 20 of Defendants' Response. As a result, Defendants did not provide any further professional services on Plaintiff's behalf.

As the email communication continued between the parties on June 14, 2018, there was discussion concerning the 30-day deadline, the data needed to support out of state sales, and Mr. Grady's representation that Defendants would "need more than a week or two to file the proper response." On June 18, 2018, however, Mr. Silberman asked that Defendants allow Dennis Kent to move into the driver's seat. Mr. Silberman then followed up with the statement that "[w]e need to let someone else try and resolve this once and for all." See Exhibit 20 of Defendants' Response. Mr. Silberman's statement that someone else needed to resolve the lien issue "once and for all" evidences Mr. Silberman's intent that Defendants were not to provide any further services to Plaintiff. Consequently, Defendants did not provide any further professional services. In fact, Defendants last date of professional services to Plaintiff was November 27, 2017. Accordingly, the Statute of Limitations expired on November 27, 2019 prior to the filing of Plaintiff's Complaint for professional malpractice.

Having considered the well-pled factual allegations in comparison to the documentary evidence presented, the Court finds that reasonable minds could not differ regarding the legal effect of the fact that Defendants' professional services concluded on November 27, 2017 and as a result,

Plaintiff's Complaint is barred by the Statute of Limitations. Therefore, dismissal is appropriate, and Defendants' Motion for Summary Disposition is GRANTED.

It is hereby ordered that Plaintiff's Complaint for Professional Malpractice is dismissed.

It is further ordered that Defendants' request for sanctions is denied.

IT IS SO ORDERED.

This Opinion and Order resolves the last pending matter and closes the case.

September 29, 2020
Date

/s/ James M. Alexander
Hon. James M. Alexander
Circuit Court Judge