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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3418-15T4

HANNA ROSENBAUM,

Plaintiff-Appellant,

v.

McCARTHY & SCHATZMAN, and  
JAMES BRITT, ESQUIRE,

Defendants-Respondents.

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Argued April 6, 2017 – Decided April 26, 2017

Before Judges Hoffman and O'Connor.

On appeal from Superior Court of New Jersey,  
Law Division, Mercer County, Docket No. L-  
2656-12.

Robyne D. LaGrotta argued the cause for  
appellant (LaGrotta Law, LLC, attorneys; Ms.  
LaGrotta, of counsel and on the briefs).

William F. O'Connor, Jr., argued the cause for  
respondents (McElroy, Deutsch, Mulvaney &  
Carpenter, LLP, attorneys; Mr. O'Connor, of  
counsel and on the brief; Lawrence S. Cutalo,  
on the brief).

PER CURIAM

In this legal malpractice action, plaintiff Hanna Rosenbaum  
appeals from the December 18, 2015 Law Division order, which

granted partial summary judgment to defendants based on the six-year statute of limitations, N.J.S.A. 2A:14-1. Plaintiff also appeals from the March 29, 2016 Law Division order dismissing the remainder of plaintiff's claim, following a bench trial, on statute of limitations grounds. We affirm.

I.

We derive the following facts from the record, acknowledging that certain background information from the trial was not before the motion judge at summary judgment. In or about 2002, plaintiff retained defendant James Britt, Esq. (Britt), to represent her in the purchase of a home on Riverside Drive in Princeton (the property) for \$520,000. Plaintiff executed the contract with her nephew, Eliav Alaluf (Alaluf), a citizen and resident of Israel. Plaintiff utilized Alaluf as a cosigner on the mortgage in order to take advantage of a mortgage program that allowed foreign nationals to receive a lower interest rate. However, the parties never intended Alaluf to reside in the home; instead, plaintiff claimed she planned to live there exclusively with her son.

On February 11, 2003, Britt prepared a power of attorney (POA), which Alaluf signed. This POA authorized plaintiff to act in Alaluf's place to obtain financing for the property. The POA further stated plaintiff and Alaluf would purchase the property as "joint tenants and not as tenants in common."

Plaintiff closed on the property on February 25, 2003. The deed transferred the property to plaintiff and Alaluf as joint tenants. Following the purchase, plaintiff entered into negotiations with a developer to grant a sewer easement on the edge of the property. Plaintiff contacted Britt regarding this issue, who informed her that Alaluf needed to execute an additional POA before she could grant the easement. Thereafter, on or about July 9, 2003, Britt prepared two additional POAs for plaintiff. The first authorized plaintiff to act on Alaluf's behalf for all purposes relating to the sewer easement. The second was a general POA, appointing plaintiff as Alaluf's attorney-in-fact.

Plaintiff later testified at deposition regarding these events. She said Britt told her the bank required Alaluf to be on the deed, which was "joint." She agreed to this even though Britt "did not explain [to] me what it means." Plaintiff noted she became concerned with Britt's performance around July 2003 during the easement issue, stating:

[W]hen I was informed by [Britt] that I have to ask [Alaluf] to execute a power of attorney for the easement, I did not like that. For some reason I felt that it's wrong that I have to ask permission from [Alaluf] to allow me to do things, and I called - I don't know if I called or went to Britt because that was a major concern to understand why do I need to have permission from [Alaluf], and what is going to happen if in the future I am looking to sell my home, so what's going to happen

then? So that's why he prepared this power of attorney.

Plaintiff further acknowledged she requested the additional POAs because she believed Britt "had done something in the transaction that would impair [her] ability to sell the house[,] and he "hadn't done everything he should have done" with regard to this issue.

After Britt prepared the new POAs, plaintiff faxed them to Alaluf for his signature. Alaluf responded by email and objected to signing the general POA because it was "far too reaching." On July 21, 2003, plaintiff replied, "I have put my house in your name with full trust so what do you think I'll use the general form for?"

Britt then prepared a new POA, dated August 25, 2003 (August 2003 POA), which gave plaintiff the right "to do each and every act and take any and all actions which [Alaluf] could personally do with respect to the property." This POA included the right "[t]o give, bargain, convey, sell or to contract . . . any or all of the Property," and to "receive all monies that may become due and owing to me by reason of such sale." Alaluf signed this POA in August 2003.

According to her initial complaint, plaintiff understood the POA gave her "unfettered rights to treat the home as her own," and she "could sell the home at any time[,] and the proceeds of the

sale could be maintained by her alone." She later certified she "believed [under the August 2003 POA] that I was fully protected to be able to sell my house without any input or signature from my nephew."

On September 8, 2003, plaintiff requested her file from McCarthy & Schatzman. Plaintiff testified at trial she invested substantial sums of money into the home with the understanding she would be entitled to all of the benefits of her improvements.

Eight years later, on or about May 25, 2011, plaintiff executed a contract of sale, individually and as Alaluf's attorney-in-fact, to sell the property for \$1,090,000. New counsel represented plaintiff in this transaction.

However, prior to closing, the title company expressed concerns regarding the August 2003 POA due to its age and uncertainty of Alaluf's present location. The title company subsequently rejected the POA and informed plaintiff that Alaluf needed to sign the documents, or she needed to provide an updated replacement POA. Plaintiff then attempted to find another title company willing to accept the August 2003 POA. Plaintiff was further informed that even if a title company accepted the POA, Alaluf would be entitled to half of the sale proceeds.

On or about July 29, 2011, plaintiff recorded the August 2003 POA. On August 2, 2011, plaintiff filed a quitclaim deed, using

her power as Alalouf's attorney-in-fact to transfer the property into her name. Nevertheless, the buyers cancelled the transaction, and the parties never conducted closing.

In May 2012, plaintiff filed suit against Alaluf, seeking partition of the property. Plaintiff reached a settlement with Alaluf, agreeing to pay him \$10,000 in exchange for a deed conveying the property to her in full. Alaluf signed this deed on July 31, 2012.

Thereafter, on November 9, 2012, plaintiff filed a complaint against defendants for legal malpractice. The complaint alleged Britt "should have drafted a separate agreement which memorialized that the proceeds of any sale belonged to the [p]laintiff alone," and he "should have advised [p]laintiff of the risks associated with having a deed placed in the name of her and her nephew as joint owners." Plaintiff ultimately sold her home in 2014 for \$999,000, incurring a difference of \$91,000 less than she would have sold it for under the 2011 contract. Plaintiff sought to recover this amount as well as the \$10,000 from her settlement with Alaluf and other related costs, amounting to a total of \$108,633 in damages.

Defendants moved for summary judgment in November 2015, asserting the statute of limitations barred plaintiff's claim, and in the alternative, plaintiff failed to prove Britt's alleged

errors proximately caused her injuries. Following argument on December 18, 2015, the motion judge delivered an oral decision, granting partial summary judgment for defendants as to the difference in the sale price between the failed 2011 sale and the successful sale in 2014. He found the six-year statute of limitations barred plaintiff's claim because she had sufficient "knowledge of the facts of the injury and fault that caused her claim to accrue" in July 2003. Specifically, the judge determined her claim accrued when she "asked Britt for the general power of attorney due to her fear and concern that Britt hadn't done everything correctly." Nevertheless, the judge allowed plaintiff's claim for the \$10,000 in settlement costs to proceed to trial.

A different judge then conducted a bench trial on this remaining issue. Plaintiff testified and submitted a liability expert report to the court. Defendants submitted a rebuttal expert report and presented testimony from Nancy Goldstein, the attorney for the buyers from the failed 2011 sale; Barry Levine, an attorney who also provided services for plaintiff; and Britt.

Britt testified regarding his representation of plaintiff, noting she told him Alaluf was "essentially her future co-owner." He explained to plaintiff the difference in the right of survivorship for a joint tenancy versus a tenancy in common. He

said, "I think [plaintiff] probably said we'll go with joint tenants," and he said he would not have proceeded if he felt plaintiff did not understand the legal implications. However, he did not tell plaintiff Alaluf would be entitled to half of the proceeds because his "focus was to get ownership in the both of them." Britt further stated the August 2003 POA should have allowed plaintiff to sell the property without Alaluf's signature. He did not add a provision entitling plaintiff to all of the proceeds because he "didn't want to go into the understandings between [plaintiff and Alaluf]," noting the POA was "not a partnership document."

Following trial, on March 29, 2016, the trial judge entered an order, accompanied by a written opinion, barring the remainder of plaintiff's claim based upon the statute of limitations, which began to run in July 2003. The trial judge principally based his determination on plaintiff's deposition testimony, noting:

[A]t the time [d]efendant drafted a general power of attorney for [p]laintiff, [p]laintiff was made aware of Alaluf's potential ownership/title interest in the property. Thus, [p]laintiff had knowledge in July 2003 that there could be a potential issue with Alaluf such that a cause of action could arise. This was clear by her deposition, in which she stated that she was worried that James Britt's actions had affected her ability to sell the property in the future. . . .



Therefore, the [c]ourt finds that the time to assert a claim began to accrue in July of 2003 . . . .

The judge therefore concluded, "[T]he time to assert a claim" against Britt had expired "well before" plaintiff filed her complaint in 2012, making it "barred by the statute of limitations."

## II.

On appeal, plaintiff argues both the motion judge and trial judge erred because her malpractice claim did not begin to accrue until the sale failed in 2011. She also urges us to apply the doctrine of equitable tolling to bypass the statute of limitations.

We review a ruling on summary judgment de novo, applying "the same standard governing the trial court." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405 (2014) (quoting Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584 (2012)). We must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 406 (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)); see also R. 4:46-2(c). If there is no issue of material fact, we review the trial court's interpretation of law de novo. Nicholas v. Mynster, 213 N.J. 463, 478 (2013).

As for our review of a decision resulting from a bench trial, "[t]he general rule is that [factual] findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998) (citing Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 484 (1974)). We will not disturb the factual findings of the trial judge unless we are "convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Id. at 412 (quoting Rova Farms, supra, 65 N.J. at 484); see also Beck v. Beck, 86 N.J. 480, 496 (1981). Conversely, we review the trial judge's interpretation of the law de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Legal malpractice claims are subject to a six-year statute of limitations. N.J.S.A. 2A:14-1; McGrogan v. Till, 167 N.J. 414, 419 (2001). Such claims arise from a theory of negligence. McGrogan, supra, 167 N.J. at 425. "Ordinarily, a cause of action 'accrues when an attorney's breach of professional duty proximately causes a plaintiff's damages.'" Vastano v. Algeier, 178 N.J. 230, 236 (2003) (quoting Grunwald v. Bronkesh, 131 N.J. 483, 492 (1993)). However, our Supreme Court has adopted the "discovery rule," which will "postpone the accrual of a cause of

action when a plaintiff does not and cannot know the facts that constitute an actionable claim." Grunwald, supra, 131 N.J. at 492. The purpose of this rule is to avoid "the unfairness of an inflexible application of the statute of limitations." Vastano, supra, 178 N.J. at 236.

Under the discovery rule, "the statute of limitations does not commence until 'the client suffers actual damage and discovers, or through the use of reasonable diligence should discover, the facts essential to the malpractice claim.'" Ibid. (quoting Grunwald, supra, 131 N.J. at 494). "[A] professional malpractice claim accrues when: (1) the claimant suffers an injury or damages; and (2) the claimant knows or should know that its injury is attributable to the professional negligent advice." Vision Mortg. Corp. v. Patricia J. Chiapperini, Inc., 156 N.J. 580, 586 (1999) (quoting Circle Chevrolet Co. v. Giordano, Hallernan & Ciesla, 142 N.J. 280, 296 (1995)).

With respect to damages, "[m]ere knowledge of an attorney's negligence does not cause a legal malpractice claim to accrue. The client must sustain actual damage." Olds v. Donnelly, 150 N.J. 424, 437 (1997). "Actual damages are those that are real and substantial as opposed to speculative." Grunwald, supra, 131 N.J. at 495 (noting "damage" is used "interchangeably with 'injury'"). However, uncertainty as to the amount of damages "does not delay

accrual. 'It is not necessary that all or even the greater part of the damages have to occur before the cause of action arises.'" Vision Mortg., supra, 156 N.J. at 586 (quoting Grunwald, supra, 131 N.J. at 495).

With regard to knowledge that the injury is attributable to the defendant, the critical inquiry is "whether the facts presented would alert a reasonable person, exercising ordinary diligence, that he or she was injured due to the fault of another." Caravaggio v. D'Agostini, 166 N.J. 237, 246 (2001). "The accrual date . . . is set in motion when the essential facts of the malpractice claim are reasonably discoverable." Vastano, supra, 178 N.J. at 242. Although actual damage and knowledge of fault are "key elements" of a legal malpractice claim, "[t]he limitations period begins to run when a plaintiff knows or should know the facts underlying those elements, not necessarily when a plaintiff learns the legal effect of those facts." Grunwald, supra, 131 N.J. at 492-93.

Plaintiff contends she did not suffer damages "until she was unable to use the Power of Attorney when she tried to sell her home in 2011." Instead, she suggests her damages remained speculative until the title company failed to accept the August 2003 POA. Plaintiff further argues both judges erred because, until 2011, she believed the August 2003 POA corrected any potential malpractice by Britt. She asserts Britt "lulled [her]

into a false sense of security," thereby delaying the accrual of her claim until 2011. We disagree.

First, it is clear plaintiff suffered "actual damages" in 2003 to the extent Britt failed to preserve her property rights in the manner she desired. Plaintiff asserts the POA Britt prepared was deficient because it failed "(1) to allow her to sell the property, and (2) to allow her full entitlement to the proceeds." Assuming plaintiff's assessments were correct, her property rights would have been impaired the instant Alaluf signed the POA. See Vision Mortg., supra, 156 N.J. at 586 (holding in a case for negligent appraisal that "the cause of action should accrue when the mortgagee knows or has reason to know that its collateral has been impaired or endangered"). The fact that plaintiff did not know the full measure of her damages until 2011 "does not delay accrual." Ibid.

Moreover, allowing a different result would effectively provide plaintiff with an "indefinite" amount of time to bring suit. Id. at 585. Under plaintiff's theory, she could have waited over thirty years to sell the property, and her claim would not have accrued until that point. Our Supreme Court has declined to permit such a result in malpractice suits. See ibid. (noting a plaintiff should not be allowed to "determine when the claim accrues").

We also conclude plaintiff knew, or should have known, the facts underlying her claim in 2003. Grunwald, supra, 131 N.J. at 493. As noted, in July 2003 plaintiff was concerned that Britt might have impaired her ability to sell the property. She claimed she believed the August 2003 POA resolved this issue. However, the record shows plaintiff was aware she and Alaluf owned the property as joint tenants. In her July 21, 2003 email, plaintiff told Alaluf she put the house in his name "with full trust." As such, although plaintiff claimed Britt failed to explain the consequences of a joint tenancy, she should have exercised "reasonable diligence" by following up to ensure the POA protected her rights. Vastano, supra, 178 N.J. at 241.

Our Supreme Court reached a similar conclusion in Vastano, which also concerned the statute of limitations for a legal malpractice claim. In Vastano, the Court found the plaintiffs "actually" learned of a settlement offer, which their attorney failed to disclose, before the six-year limitations period expired. Id. at 235, 241. However, the Court determined the claim accrued a year earlier when the plaintiffs obtained possession of their case file, noting at that point, the "essential facts" of their malpractice claim were "reasonably discoverable." Id. at 241-42.

Similarly, plaintiff here obtained her case file from defendants in September 2003. Even if she did not "actually" discover Britt's alleged errors until 2011, plaintiff "possessed all the information necessary to reveal [the] malpractice without resort to the interpretative assistance of an expert."<sup>1</sup> Id. at 242. Therefore, because we find plaintiff's cause of action against defendants accrued by September 2003 at the latest, we conclude both the motion and trial judges did not err in holding the six-year statute of limitations barred plaintiff's 2012 complaint.

Last, we reject plaintiff's contention, raised for the first time on appeal,<sup>2</sup> that we should apply equitable tolling to bypass the statute of limitations. Equitable tolling is "reserved for limited occasions," including: "(1) [if] the defendant has actively misled the plaintiff, (2) if the plaintiff has 'in some extraordinary way' been prevented from asserting his rights, or (3) if the plaintiff has timely asserted his rights mistakenly in

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<sup>1</sup> We make no finding that defendants were, in fact, negligent. We assume negligence solely for the purpose of our analysis in this opinion.

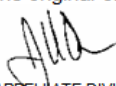
<sup>2</sup> Plaintiff contends she did not make this argument before the trial court because defendants raised the statute of limitations issue for the first time during closing arguments, leaving her with no time to prepare a defense. However, defendants first raised this issue in their amended answer prior to summary judgment. Nonetheless, we briefly address this argument and find it without merit.

the wrong forum." F.H.U. v. A.C.U., 427 N.J. Super. 354, 379 (App. Div.) (quoting Kocian v. Getty Ref. & Mktg. Co., 707 F.2d 748, 753 (3d Cir. 1983)), certif. denied, 212 N.J. 198 (2012). Plaintiff asserts defendants "concealed their malpractice" and misled her by advising she would be free to sell her property without Alaluf's permission following the August 2003 POA.

However, plaintiff fails to identify any evidence in the record showing defendants actively concealed Britt's alleged malpractice. Britt sufficiently explained his actions at trial. Accordingly, we discern no basis to disturb the motion and trial judge's determinations to bar plaintiff's complaint on statute of limitation grounds.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION