

site for residential and commercial use.¹ On or about June 1, 2002, Tower demolished a building located on the Ortlieb Site, which allegedly caused damage to the adjoining property owned by Ray King and Ray King Studio, Ltd. (collectively, “King”).² Thereafter, King commenced the underlying lawsuit against Tower (the “King Action”).³

Tower had a commercial liability insurance policy with Assurance.⁴ Assurance retained R&H to defend Tower in the King Action pursuant to its duty to defend within that policy.⁵

In or about December 2004, all parties agreed to settle the King Action for the monetary amount of \$1,100,000.00.⁶ Of the \$1,100,000.00, Assurance agreed to pay \$400,000.00 on behalf of Tower to extinguish Tower’s liability in the King Action.⁷ Although the parties agreed to the financial terms of the settlement, the non-monetary terms, including an appropriate settlement agreement and release, were not agreed upon at that time.⁸

On or about January 4, 2005, Daniel Bernheim (“Bernheim”), personal counsel to plaintiff Bart Blatstein, sent a draft of a settlement agreement and general release (the “Bernheim Release”) to R&H.⁹ Under the Bernheim Release, the settlement funds would be paid over time, the repairs to King’s property would begin within forty-five days, and

¹ Second Amended Complaint, at ¶ 20.

² *Id.* at ¶¶ 21-22.

³ *Id.* at ¶ 23.

⁴ *Id.* at ¶ 12.

⁵ *Id.* at ¶¶ 25-26.

⁶ *Id.* at ¶ 28.

⁷ *Id.* at ¶ 30.

⁸ *Id.* at ¶¶ 29, 31.

⁹ *Id.* at ¶ 34.

King would release all claims against Tower.¹⁰ R&H then forwarded the Bernheim Release to King's attorney for review.¹¹

On or about January 18, 2005, King's attorney sent back a completely different general release (the "King Release") to R&H and Bernheim.¹² The King Release purported to be self-executing and purported to bind Tower to its terms upon King's receipt of the settlement monies.¹³ Thereafter, on or about January 19, 2005, R&H faxed a letter to King's attorney rejecting the King Release.¹⁴ On that same date, Bernheim also sent a letter to R&H and King's attorney, re-stating Tower's position that "the King Release was unacceptable because it imposed conditions and requirements on [Tower] that were not only contrary to [Tower's] interests, but were also outside of the scope of [King's] enforceable rights in the King Action."¹⁵ Tower was concerned that the King Release granted King an excessive period of time to complete repairs and paid King the entire settlement payment up front, with no mechanism for insuring that King began and completed the repairs in a timely fashion.¹⁶

On or about February 28, 2005, unbeknownst to Tower, R&H sent to King a \$400,000.00 check issued and paid by Assurance on behalf of Tower to extinguish Tower's liability.¹⁷ Pursuant to the terms of the King Release, R&H's payment of the \$400,000.00 check to King caused Tower's acceptance of the King Release.¹⁸

¹⁰ Id.

¹¹ Id. at ¶ 35.

¹² Id. at ¶ 36.

¹³ Id. at ¶¶ 37, 55.

¹⁴ Id. at ¶ 38.

¹⁵ Id. at ¶¶ 39-40.

¹⁶ Id. at ¶ 67(e).

¹⁷ Id. at ¶ 50.

¹⁸ Id. at ¶¶ 37, 48, 55.

On or about March 3, 2005, Bernheim faxed a letter to R&H and King's attorney asking for an update as to the status of the release.¹⁹ R&H responded by email that same day stating that Assurance "ended up being fine with the language in the executed release" and informed Bernheim that R&H had forwarded the \$400,000.00 check to King.²⁰ Bernheim immediately contacted R&H and Assurance to express Tower's dismay at and objection to the payment, as Tower had not agreed to the terms of the King Release.²¹ Bernheim demanded that R&H and Assurance rectify the situation by placing a stop payment order on the check.²²

On August 15, 2005, King filed a Motion to Enforce Settlement in the King Action claiming that Tower had not complied with the terms of the release.²³ Litigation in the King Action continued until an agreement was reached in August 2006, during which time the parties drafted an Amendment to the General Release that was agreed to by all parties.²⁴

II. The Present Action

Tower filed the instant lawsuit on May 30, 2007. In its Second Amended Complaint, Tower brought four counts against R&H: professional negligence (Count I), breach of contract (Count II), breach of fiduciary duty (Count III), and punitive damages (Count IV). Tower alleges that R&H continued to represent Tower despite the existence of a conflict of interest between Tower and Assurance.²⁵ Tower claims that as a result of R&H's conduct, Tower suffered damages, including the continued litigation costs

¹⁹ Id. at ¶ 52.

²⁰ Id. at ¶ 53.

²¹ Id. at ¶¶ 42, 54.

²² Id.

²³ Id. at ¶ 60.

²⁴ Id. at ¶ 62.

²⁵ Id. at ¶ 66.

associated with the litigation in the King Action and the construction costs and other business consequences associated with a two-year delay in the development of the Ortlieb Site.²⁶

R&H now moves for judgment on the pleadings to dismiss Tower's tort claims (Counts I, III, and IV) on the basis that those claims are barred by the statute of limitations.²⁷

Discussion

Pennsylvania Rule of Civil Procedure 1034 provides that “[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for judgment on the pleadings.” Judgment on the pleadings may be entered where there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law. In ruling on a motion for judgment on the pleadings, the court may consider only the pleadings and attached documents.²⁸

I. Tower's Claim for Professional Negligence (Count I) is Barred by the Statute of Limitations.

In Pennsylvania, the statute of limitations for legal malpractice actions sounding in tort is two years.²⁹ Pennsylvania favors strict application of the statute of limitations.³⁰ In determining when the statute of limitations begins to run in a legal malpractice action, Pennsylvania follows the “occurrence rule.”³¹ Under the occurrence rule, the statutory

²⁶ Id. at ¶¶ 70-72.

²⁷ R&H is not moving for judgment on the pleadings on Tower's breach of contract claim (Count II).

²⁸ Mellon Bank, N. A. v. National Union Fire Ins. Co., 768 A.2d 865, 870 (Pa. Super. 2001).

²⁹ See 42 Pa. C.S. § 5524(7) (“The following actions and proceedings must be commenced within two years... Any other action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct or any other action or proceeding sounding in trespass, including deceit or fraud, except an action or proceeding subject to another limitation specified in this subchapter”).

³⁰ Glenbrook Leasing Co. v. Beausang, 839 A.2d 437, 441 (Pa. Super. 2003).

³¹ Wachovia Bank, N.A. v. Ferretti, 935 A.2d 565, 572 (Pa. Super. 2007) (citations omitted).

period commences upon the occurrence of the alleged breach of duty, not the realization of actual loss. An exception to the occurrence rule is the discovery rule, which applies when the injured party is unable, despite the exercise of due diligence, to know of the injury or its cause. Lack of knowledge, mistake or misunderstanding does not toll the running of the statute.

R&H contends that Tower's claim for professional negligence is barred by the statute of limitations because every act of R&H's alleged professional negligence set forth in Tower's Second Amended Complaint occurred on or before February 28, 2005 and Tower admits that it knew about the alleged breach by March 3, 2005. Since Tower did not institute the present lawsuit until May 30, 2007, R&H contends that Tower's claim is time-barred.

In response, Tower contends that although it was aware that R&H sent the \$400,000.00 settlement check on March 3, 2005, the discovery rule should toll the statute of limitations because it was not aware that it had incurred an injury at that time. Tower asserts that no injury accrued until August 15, 2005 when King harmed Tower's interests by filing the Motion to Enforce Settlement in the King Action seeking the enforcement of the King Release. Tower argues that the statute of limitations should be tolled until August 15, 2005 because this was the first time it had reason to believe R&H's actions caused Tower's injury.

The statute of limitations in legal malpractice actions begins upon the happening of an alleged breach of duty and is tolled only when the client, despite the exercise of due diligence, cannot discover the injury or its cause.³² According to the Second Amended Complaint, R&H's breach of duty occurred on or before February 28, 2005. Indeed,

³² Wachovia Bank, 935 A.2d at 573.

pursuant to the factual allegations contained in the Second Amended Complaint itself, the crux of Tower's claim for professional negligence occurred on February 28, 2005, when R&H "sent the four hundred thousand dollar (\$400,000.00) check, issued and paid by Assurance, to [King]" and purportedly executed the King Release without Tower's consent.³³ Tower specifically alleges that "[a]t the time [R&H] sent the four hundred thousand dollar (\$400,000.00) check to [King], [R&H] knew that [Tower], [its] client[], objected to the terms of the King Release."³⁴ Thus, applying the occurrence rule, Tower's legal malpractice claim against R&H accrued on or before February 28, 2005.

Moreover, Tower admits in its Second Amended Complaint that the breach occurred by March 3, 2005, when it was aware that R&H had issued the settlement check to King on behalf of Tower. Tower states in its Second Amended Complaint:

"52. On or about March 3, 2005, Mr. Bernheim faxed a letter to [King's attorney] and [R&H] asking for an update as to the status of the Release.

53. On or about March 3, 2005, [R&H] responded via email notifying Mr. Bernheim that Defendant Assurance 'ended up being fine with the language in the executed release.' The email stated that [R&H] had forwarded the check to [King's attorney].

54. Mr. Bernheim immediately contacted [R&H] and Defendant Assurance to express the [Tower's] dismay at and objection to the payment. Mr. Bernheim demanded that [R&H] and Assurance rectify the situation by placing a stop payment order on the check."³⁵

Tower admits in its Second Amended Complaint that it knew that the King Release imposed unfavorable and unacceptable terms upon it. Indeed, Tower claims that Bernheim actually rejected the King Release on behalf of Tower by letter dated January

³³ Second Amended Complaint, at ¶ 50.

³⁴ *Id.* at ¶ 56.

³⁵ *Id.* at ¶¶ 52-54.

19, 2005 because it “imposed conditions and requirements on [Tower] that were not only contrary to [Tower’s] interests, but were also outside of the scope of [King’s] enforceable rights in the King Action.”³⁶ Thus, Tower was aware that it was injured by R&H’s alleged breach by March 3, 2005 at the latest. Since Tower did not file the present lawsuit until more than two years after that date, Tower’s professional negligence claim is barred by the statute of limitations.

II. Tower’s Claim for Breach of Fiduciary Duty (Count III) is Barred by the Statute of Limitations.

A claim for breach of fiduciary duty is also subject to a two-year statute of limitations.³⁷ Tower’s claim for breach of fiduciary duty stems from the same alleged wrongful acts of R&H that formed the basis of Tower’s professional negligence claim. In Count III of its Second Amended Complaint, Tower simply states that R&H owed a fiduciary duty to Tower and that R&H “breached their fiduciary duties to [Tower] by failing to act in good faith and solely for the benefit of [Tower] in all matters during the King Action *as previously alleged*.”³⁸

R&H’s alleged wrongful acts occurred on or before February 28, 2005 and Tower had knowledge that it was injured at least by March 3, 2005. Since the present lawsuit was not filed until May 30, 2007, Tower’s claim for breach of fiduciary duty is barred by the statute of limitations.

³⁶ *Id.* at ¶ 40.

³⁷ See 42 Pa.C.S. § 5524(7) (“The following actions and proceedings must be commenced within two years...Any other action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct or any other action or proceeding sounding in trespass, including deceit or fraud, except an action or proceeding subject to another limitation specified in this subchapter”); *Koken v. Colonial Assurance Co.*, 885 A.2d 1078, 1093 (Pa. Commw. 2005).

³⁸ Second Amended Complaint, at ¶¶ 81-82 (emphasis added).

III. Tower's Claim for Punitive Damages (Count IV) Must Be Dismissed.

A plaintiff cannot recover punitive damages for an action solely sounding in breach of contract.³⁹ Since Tower's tort claims have been dismissed, leaving only a claim for breach of contract, Tower's request for punitive damages fails.

Conclusion

For the foregoing reasons, defendant Rawle & Henderson, LLP's Motion for Judgment on the Pleadings is granted and Counts I, III, and IV of Tower's Second Amended Complaint are dismissed.

BY THE COURT,

MARK I. BERNSTEIN, J.

³⁹ DiGregorio v. Keystone Health Plan East, 840 A.2d 361, 370 (Pa. Super. 2003).