

IN THE COURT OF COMMON PLEAS
SS.
CASE NO. CV 11 746857

JOURNAL ENTRY AND OPINION

V.

Defendants,

IT IS SO ORDERED:

Defendants James C. Wrentmore, Timothy Billick, Robert H. Young and The Law Offices of John D. Clunk Co., L.P.A , (collectively referred to as “Defendants”) have filed a motion for judgment on the pleadings dismissing the claim of Plaintiffs GMAC Mortgage L.L.C. and Homecomings Financial L.L.C. (collectively referred to as “Plaintiffs”), asserting that the claim is barred by the Ohio Supreme Court’s decision in *National Union Fire Insurance Co. of Pittsburgh, Pa v. Wuerth*, 122 Ohio St. 3d 594, 2009-Ohio-3601. Upon review of Defendants’ motion for judgment on the pleadings, Plaintiffs’ brief in opposition, and Defendants’ reply brief; the Court finds that accepting the allegations of the operative pleadings as true, the claim fails as a matter of law. For the reasons discussed below, the Court grants Defendants’ motion for judgment on the pleadings and dismisses Plaintiffs’ claim with prejudice.

I. STATEMENT OF FACTS

This matter arises from an underlying foreclosure proceeding in which Defendants represented Plaintiffs in connection with a dispute regarding a property owned by Michael and Pamella Negrea (hereinafter referred as “the Negreas”). Defendants filed a foreclosure complaint on behalf of Plaintiffs and against the Negreas in the Lake County Court of Common Pleas (*Homecomings Financial Network, Inc. v. Michael Negrea, et al.*, Case No. 05-CF-000211). The Negreas responded by filing a counterclaim and third-party complaint against Plaintiffs for breach of contract, breach of implied covenant of good faith, violations of the Fair Debt Collection Practices Act (FDCPA), and infliction of emotional distress.

The Negreas filed a motion for summary judgment on the foreclosure complaint and an opposition brief was not filed. Subsequently, the Negreas’ motion for summary judgment was granted, extinguishing GMAC and Homecomings’ foreclosure complaint and a trial date was set on the counterclaim. Those claims were then tried to a jury, which found in favor of the Negreas on their claims for breach of contract and violation of the FDCPA. The jury awarded \$78,125 to each of the Negreas on their breach of contract claim, and \$1,000 each plus attorney’s fees on the FDCPA claim. The Negreas were awarded a total of \$217,244.03, which included damages, prejudgment interest, attorney’s fees, and post-judgment interest. Plaintiffs appealed the damages award on the breach of contract claim, but the 11th District Court of Appeals affirmed the award.

GMAC Mortgage and The Law Offices of John D. Clunk Co., L.P.A. entered into a tolling agreement after the jury verdict. The tolling agreement tolled all “claims that GMACM had against the Clunk Law Firm based on its legal representation of GMACM and Homecomings in the Negrea lawsuit”. See Complaint, ¶ 18. The tolling agreement between GMAC Mortgage and

The Law Offices of John D. Clunk Co., L.P.A. was renewed several times and expired on December 31, 2009. Defendants James Wrentmore, Timothy Billick and Robert H. Young were not parties to the tolling agreement.

Plaintiffs originally filed their legal malpractice complaint on November 16, 2009. The complaint was then voluntarily dismissed on January 26, 2010, and re-filed on January 25, 2011. Plaintiffs' re-filed action asserts that Defendants were negligent in the provision of legal services by failing to provide Plaintiffs with an accurate analysis of Plaintiffs' exposure; failing to communicate timely, or in some cases at all, with Plaintiffs regarding material developments in the action; failing to timely provide Plaintiffs with material documents and pleadings filed in the action; failing to respond at all to the Plaintiffs' requests for status updates for over four months despite several requests from Plaintiffs for such updates; failing to meet filing deadlines; failing to competently represent Plaintiffs at trial; and making a misrepresentation to the court which caused the court to be prejudiced against GMACM. Id. at ¶ 21

II. MOTION FOR JUDGMENT ON THE PLEADINGS STANDARD

Rule 12(C) of the Ohio Rules of Civil Procedure states, "After the pleadings are closed but within such times as not to delay the trial, any party may move for judgment on the pleadings". "Judgment on the pleadings may be granted where no material factual issue exists and the moving party is entitled to judgment as a matter of law. The determination is restricted solely to the allegations of the pleadings and the nonmoving party is entitled to have all material allegations in the complaint, with all reasonable inferences to be drawn therefrom, construed in her favor as true." *Sabitov v. Graines* (2008), 177 Ohio App.3d 451, *State ex rel. Pirman v. Money* (1994), 69 Ohio St.3d 591.

III. STATUTE OF LIMITATIONS

Pursuant to O.R.C. §2305.11, the statute of limitations on a legal malpractice claim is one year. It is well settled law that the statute begins to run upon the latter date of either a cognizable event whereby the client discovers or should have discovered an injury related to his counsel's action or inaction and the client has notice that he should seek remedies against counsel (known as the discovery rule), or when the attorney-client relationship for that specific undertaking is terminated. *Zimmie v. Calfee, Halter & Griswold* (1989), 43 Ohio St.3d 54, 538 N.E.2d 398, at syllabus (citing *Omni-Food & Fashion, Inc. v. Smith* (1988). 38 Ohio St.3d 385).

It is undisputed that Plaintiffs' claim accrued more than one year before the November 16, 2009 filing of the original complaint. It can be ascertained that the cognizable event whereby the client discovered or should have discovered an injury related to counsel's action is, on February 27, 2006, when the jury returned a verdict against GMACM. However, the attorney-client relationship between Plaintiffs and Defendants was terminated on March 10, 2006 when Plaintiffs' new counsel filed a notice of appearance and substitution of counsel in the underlying matter. Therefore, the relevant date for the accrual of the statute of limitations for Plaintiffs' malpractice claim is March 10, 2006.

The tolling agreement, referenced as exhibit A in Defendants' answer, states that it is "effective as of February 1, 2007, by and between The Law Offices of John D. Clunk Co., L.P.A., a corporation and GMAC Mortgage Corporation." The individual attorney Defendants are not named in the original tolling agreement nor any of the renewed tolling agreements. Plaintiffs' contend in their brief, that it was standard practice to name the law firm only and not the individual attorneys in tolling agreements related to legal malpractice claims. Plaintiffs further insist that they are entitled to the inference that the tolling agreements incorporated that standard

procedure as part of the agreement of the parties. Plaintiffs cite no case or other legal authority for these propositions. This Court disagrees with Plaintiffs' assertions and inferences.

The Defendants are correct in their declaration that, "a contractual agreement is unenforceable against a person or entity who was not a party to the contract." *Benjamin v. Pipoly* (2003), 155 Ohio App.3d 171, 2003 Ohio 5666, 800 N.E.2d 50, citing *Covington v. Lucia*, 151 Ohio App.3d 409, 784 N.E.2d 186. Therefore, the tolling agreement cannot be enforced against Defendants Wrentmore, Billick and Young, as they were not parties to the tolling agreement. Consequently, Plaintiffs' legal malpractice claim against the individual attorneys is time-barred and is dismissed with prejudice.

IV. APPLICATION OF THE *WUERTH* DECISION

In *Natl. Union Fire Ins. Co. of Pittsburgh, PA. V. Wuerth*, 119 Ohio St. 3d 1442, 893 N.E.2d 514, 2008-Ohio-4487, the Ohio Supreme Court held that a law firm does not engage in the practice of law and therefore cannot commit legal malpractice directly. The Court also held that a law firm is not vicariously liable for legal malpractice unless one of its principals or associates is liable for legal malpractice.

Plaintiffs' maintain in their brief, the tolling agreement entered into between The Law Offices of John D. Clunk Co., L.P.A. and GMAC Mortgage Corporation was executed before the *Wuerth* case was decided in July of 2009 and that there was "absolutely no reason to believe (and it would be an improper adverse inference in any event) that the change in the law effectuated by *Wuerth* was somehow contemplated by the parties." This Court finds Plaintiffs arguments without merit when reviewing multiple appellate decisions that apply *Wuerth* retroactively. More specifically, the 8th District Court of Appeals in *Bohan v. Dennis C. Jackson Co. L.P.A* ruled that *Wuerth* applies retroactively and "that timing does nothing to diminish the applicability of the

decision to this case." 188 Ohio App.3d 446, 935 N.E.2d 900. They further state "the rule governing application of a change in law to a case is that an intervening decision by the Supreme Court is applied retroactively unless the Supreme Court specifically decrees that the change in the law has only prospective application." Citing *State ex. rel. Bosch v. Indus. Comm.* (1982), 1 Ohio St.3d 94, 98, 438 N.E.2d 415.

The Law Offices of John D. Clunk Co., L.P.A. cannot be held liable for legal malpractice unless one of its attorneys is to be found liable for legal malpractice. Therefore, since the legal malpractice claim is time-barred against the individually named attorneys, the claim against The Law Offices of John D. Clunk Co., L.P.A is dismissed with prejudice pursuant the ruling in *Natl. Union Fire Ins. Co. of Pittsburgh, PA. V. Wuerth*.

V. CONCLUSION

It is, therefore, ORDERED, ADJUDGED, and DECREED:

Upon review of Defendants' motion for judgment on the pleadings, Plaintiffs' brief in opposition, and Defendants' reply brief; the Court finds that accepting the allegations of the operative pleadings as true, the claim fails as a matter of law. For the reasons previously stated, Defendants' Motion for Judgment on the Pleadings is well taken. Therefore, Defendant's Motion for Judgment on the Pleadings is granted and Plaintiffs' claim is dismissed with prejudice.

DATE: May 25, 2011



KATHLEEN ANN SUTULA, JUDGE

RECEIVED FOR FILING

MAY 25 2011

GERALD E. FUERST, CLERK
By  Deputy

CERTIFICATE OF SERVICE

A copy of the foregoing Journal Entry and Opinion has been sent via fax and regular U.S. mail on this 25th day of May, 2011, to the following:

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