

Date : 9/9/2023 2:07:04 PM

From : "Barb Dulberg"

To : "Alphonse Talarico"

BCc : "Barb Dulberg"

Subject : Fwd: 8/29/2023

Tom should be sending you something based on this

Begin forwarded message:

From: Barb Dulberg <dulbergbarb@gmail.com>

Subject: 8/29/2023

Date: September 6, 2023 at 4:49:46 PM CDT

To: Tom Kost <tkost999@gmail.com>

Judge Otto: Sorry everyone. This is case number 2022L010905 Dulberg vs Baudin. Let's see, you got a couple of people still joining. Anybody waiting for a court reporter or no?

Boder: We did not your honor.

Judge Otto: Okay, alright. So originally this had been scheduled for hearing for summary judgement by defendant Allstate as well as the motion to dismiss. Both reset. The motion for summary judgement. That's going to be a future date but we kept this for hearing on the Baudin defendants motion to dismiss. I have read the motion, response and reply. Now that it is fully briefed. It looks like Mr I'm sorry I Can't, is it Mr Bader?

Boder: It's Boder your honor.

Judge Otto: Every time and I get it wrong.

Boder: It's quite alright.

Judge Otto: So Mr Boder, it's your motion so I have Mr Boder 1st and last and Mr Talarico in between unless there is anything anybody wants to talk about before hand.

(Indiscernible)

Boder: (Indiscernible) read through our standing arguments as well as the fact that you previously held a hearing relative to certain co defendants motions to dismiss on very similar issues but I do want to highlight a couple points. First of all we had sought dismissal for multiple independent reasons primarily one plaintiff cannot possibly establish proximate cause and two plaintiff's claim is barred by the two year statute of limitations applicable to claims against lawyers. Proximate cause, there is

no dispute that the underlying personal injury claim was owned by the bankruptcy trustee at the time of the underlying personal injury was submitted to and ultimately resolved at mediation. The Plaintiff Mr. Dulberg did not own that claim, he had no rights in that claim and he likewise neither owned or had any rights in the recovery on that claim. As such, he can not prove anything that happened at or leading up to mediation and ultimate resolution and payment of the award on that claim proximately caused any damages to him. As for the statute of limitations, that mediation...

Judge Otto: Well come back on the statute of limitations. I understand the gist of what your saying but I think that what Mr Talarico is saying in response is that, well, Mr Dulberg got a distribution, I mean, which is kind of unusual, at the end of his bankruptcy. It was, so there was more than enough money to pay all the creditors, the argument is that distribution would have been greater had it not been for the high low, because the ultimate award was for 561 but the high low capped it at three so he would have 261 thousand dollars more. Im not, I mean there's some intuitive appeal to that isn't there, why is that, why is there a lack of proximate causation there?

Boder: There is an intuitive appeal to that, however here is the problem with that. It's a high low whether it was entered into by Mr Dulberg or agreed to by Mr Dulberg, the decision to move forward with a high low was within the province entirely of the bankruptcy trustee who owned the claim. That was not Mr. Dulberg's decision to be made. It was not my clients decision to be made. It was entirely within the province of the owner of the claim, the Bankruptcy trustee who made that decision. Now, the argument could be made that my clients should have told the bankruptcy trustee to do something different. They have no obligation to do so. Nor is there any allegation that they gave the bankruptcy trustee incorrect advice. What really matters is the bankruptcy trustee as is evident through the pleadings filed in bankruptcy court as well as the transcripts attached to plaintiff's own complaint, the bankruptcy trustee made the ultimate decision to pursue his claim, the bankruptcy estates claim, pursuant to a high low. There is nothing that the lawyers could or should have done to change that. So, yes, is it possible that under another set of circumstances a larger recovery could have been made, yes. But the lawyers had no ability nor obligation to pursue a larger recovery. That decision was up to the bankruptcy trustee who owned the claim.

Judge Otto: Was the argument that Dulberg wasn't the Baudin defendants client at the time?

Boder: That is not the argument. The argument is that Mr Dulberg didn't have any ability nor did any lawyers on his behalf including my clients. Did not have the ability to affect the bankruptcy trustees decision to go forward under a high low. That was the bankruptcy trustees decision whether or not he was advised by the same lawyers who also represented Mr Dulberg is immaterial. It was the bankruptcy trustees decision and it was a decision the bankruptcy trustee made. It would be, the

decision was not only made but then they proceeded forward with the mediation in accord with that decision.

Judge Otto: Okay, I understand the argument Mr Border, thank you. You were going to say a couple points about the statute of limitations before all that right?

Boder: Yes and I will be very brief there. Your honor has already addressed this issue relative to certain codefendants, there was a two year statute of limitations for claims against lawyers. I don't believe that Mr Dulberg disagrees with that proposition. We know that the mediation proceeded 6 years to the day before this lawsuit was filed. We also know that within a month following the mediation Mr Dulberg was aware of the mediation result whether or not he agreed to the high low he was aware that it was submitted pursuant to a high low agreement. If he says that he did not approve of the high low agreement, well, he should have known that at the same exact time and all of this happened 5 years and a number of months before he filed suit. As such, very clearly knew or should have known of any injury he is claiming in this lawsuit and he would have had two years within which to investigate that and decide who to sue. The fact the matter is he did do an investigation and he did sue another lawyer in another jurisdiction I believe within that time period but he did not sue my clients. He had two years in which to do so under the statute of limitations and nearly 6 years bars his claim.

Judge Otto: Alright, thank you Mr. Boder. You will have last word still if you wish. Mr Talarico.

Talarico: Good morning your honor. Good morning counsel. Where should we start? He talked about proximate cause, let's talk about proximate cause. Judge as you have ascertained I will say that there is the possibility I am right that Mr Dulberg suffered a financial loss of 261 thousand dollars as the ultimate beneficiary of the estate, a positive bankruptcy estate. The second matter is that question of whether or not the trustee abandon the claim and then it became Mr Dulberg's total interest. What we can ascertain Judge by looking at the documents is that although the defendant Mr Baudin recommended to the trustee the binding arbitration agreement document no such agreement was ever signed either by Paul Dulberg or by the trustee. Not only that but the binding arbitration was done in the name of MR Dulberg and not in the name of the estate. ...

Judge Otto: Mr Talarico, If you'll permit I had a question about that because I knew you made that argument in the brief. The bankruptcy court approved the judgement that was entered as a result of the mediation. So, the theory that you're now raising to have any legs at all, you'd have to move to reopen the bankruptcy case. I mean I can't say that, I can't very well let a case move forward on the grounds that the bankruptcy court erred when it approved the distribution of the estate including the money it received from the mediation. So how does that save the case as things stand now?

Talarico: As things stand now Judge we have to, with all due respect, I have to bring up to the court again the fact that the Judge in the bankruptcy case was deceived by, my allegations are by the Baudins and by the trustee. He was told that Mr Dulberg wanted to do this and that's why the Judge agreed to it, not independently. I have submitted documents, testimony and reports of proceedings that say, he was told that Mr Dulberg said that he was afraid of a jury trial and that Dulberg was a terrible witness and Dulberg doesn't/didn't want to go to the jury trial. That's all misleading the Judge. The court was misled and therefore said okay. And when the response came back, all he knew was, I had been told that Mr Dulberg wanted to do this, here's the money, okay I approve, distribute it. It's all based initially on the fact that the court itself was not told the true facts.

Judge Otto: So, why not move to reopen on the grounds of fraud?

Talarico: It is a possibility your honor, I may have to go in that direction, no question about that but right now I'm dealing with it here in the trial court before you sir.

Judge Otto: Well, okay. ...

Talarico: I have more sir.

Judge Otto: Please.

Talarico: Back to the proximate cause. Alright, I'm going to switch to the two year statute of limitations. The two year statute of limitations is only going to be effective when Mr Dulberg knows or learns of the fraudulent activities of the Baudin's and trustee. He was unaware of that until October 2022. ...

Judge Otto: Okay, That's that's not the test, the test is not when he knows something wrong was done, it's when he is in possession of facts that would put a reasonable person on inquiry notice. I understand that you allege he didn't learned till 2022 that someone has put his name on this agreement without his consent or approval or knowledge but that is not the only relevant fact there's no question, none, that very shortly after the mediation he was aware of the result and the high low and what that meant to him financially, I mean there is no question he...

Talarico: All of that, excuse me sir...

Judge Otto: Its okay, go on.

Talarico: All of that is correct but that doesn't lead to a conclusion that the trustee who held the interest of the residual beneficiary and all the creditors, his own attorneys the Baudins and the Judge, which they told Mr Dulberg had to order him into this. All he knew was this is the amount of money I received and legally all 3 people have signed on board for this. He had to learn it the hard way. Just because

he got a lesser amount then he would have liked doesn't put him on notice that say's someone committed malpractice. You don't find that out till you get and look at the documents and say look this is all wrong, why does it do this why was I ordered into this, the judge didn't really order him into it, he just allowed it based on the trustee's recommendation based on the Baudins recommendation. Number one, the fraud hides it. The fraud by the Baudins and by the Trustee. That fraud, I plead that fraud in the...

Judge Otto: What fraud? You're just stating who committed it. I'm asking you what the fraud is that they committed against Mr Dulberg?

Talarico: They informed him, more than once, that he was entrusted and has to go and has to do a binding mediation by the Judge in the bankruptcy court. That's fraud.

Judge Otto: How is that Fraudulent? Once the court approved it, he did have to.

Talarico: The court approved based on a lie. So, the Judge was deceived and Mr Dulberg was deceived...

Judge Otto: No, the Judge was deceived allegedly, taking the allegations in the complaint as true, but that's not a deception to MR Dulberg much less a concealment because fraud alone doesn't toll the statute of limitations. There is a statute of limitations for fraud. You have to have fraudulent concealment of the existence of the cause of action and what you're talking about now is conduct that predated the injury. The injury didn't even accrue until the mediation had run its course. So, well, I'm interrupting you, go ahead.

Talarico: Alright, the other issue I raised is Mr Dulberg's physical and mental disability. Now, I've raised once before, I raised it in the reply, I'm raising it again in court with you your honor, Mr Dulberg, from the time he was, from 2011, the time he was injured, the state of Illinois declared him to be a legally disabled person and what I now have, just obtained in the last week, is the sealed records which I would be glad to and Mr Dulberg has given me permission to turn over to the court in camera to see just how severe and what aspects of his existence was disabled. Now there is a statute on statutes which defines what is legal disability and Mr Dulberg fits that to a tee. That's 5 ILCS 70/1.06 titled persons under legal disability and what that means. So, with Mr Dulberg being totally disabled and the statute defining what a legal disability is which fits Mr Dulberg. The statute has to be tolled until a later date.

Judge Otto: Who is the guardian of the estate for Mr Dulberg?

Talarico: That's his brother.

Judge Otto: There is a guardian of the estate?

Talarico: Oh, I'm sorry, I misspoke, there is no I thought you were referring to the other argument about trustees. I'm sorry, I apologies, I was referring to the trustee. There is none, he is not under a legal guardianship but that's not what is required in the statute sir.

Judge Otto: Okay, and the records that you just got a week ago that you are proposing to submit in camera, those establish, your certain, that he is legally disabled for purposes of tolling the statute of limitations based on the physical injury he suffered?

Talarico: And the mental.

Judge Otto: What, I mean, there has not, that I recall, been any suggestion ever in any brief filed in this case that he has ever been diagnosed with any mental disability. Am I incorrect in my recollection?

Talarico: I think we have Judge, the letters from Dr Kujawa to the Baudins and also the deposition of Dr Kujawa and I think it's in my reply or I mean my response...

Judge Otto: A mental disability?

Talarico: Yes, both physical and mental.

Judge Otto: Well find me the exhibits that you filed because I sure don't remember it but I'm sure your memory is better than mine on this, its your case.

Talarico: Before I, I will take on the task your honor but what I also wanted to (indiscernible) forward is that it doesn't say that it has to be both, It says mental or physical. So, even if I'm wrong which I don't think I am, I wouldn't say that something before the court that I think I'm wrong on. Even just physical is sufficient.

Judge Otto: So, if someone is physically injured in a severe enough way the statute of limitations is just tolled forever?

Talarico: Until that disability is removed.

Judge Otto: Do you practice personal injury Mr Talarico? I'm not asking that in an passive aggressive way, I am just asking.

Talarico: Not in a long time, not for a long time.

Judge Otto: Because there is sure a whole lot of plaintiff's on the tort side at the daily center who filed cases because they have been catastrophically injured and some of those plaintiff's, some of those cases are dismissed on limitations grounds because they waited too long to sue after the injury, eh incident that caused the

injury and that an unfortunate result when that happens but I'm not aware of any authority that supports the argument that your making. I know you are relying on the fascial reading of the statute on statutes. Do you have any case law that supports the proposition that a physical injury of sufficient severity tolls the statute of limitations?

Talarico: I do not at the moment but I would request a sur reply which gives the opportunity to satisfy the court.

Judge Otto: Yeah, no. I mean you've had the opportunity to file a brief. You've made all the arguments you wanted to make. I just that I wanted to make sure I had an overlook at any authority that may have caught my attention. Do you have any other points you wish to make Mr Talarico?

Talarico: No.

Judge Otto: Okay, thank you. Mr Boder, you have the last word.

Boder: Very briefly your honor. On the issue of proximate cause, the trustee did not abandon the claim, the trustee went forward with the mediation, resolved the matter at mediation, received the funds that were awarded pursuant to the mediation and then distributed a portion of the funds back to the plaintiff inclosing the bankruptcy estate. There was no abandonment. The argument that the bankruptcy court was deceived by my client has no merit. There is nothing in the record that my client made any representation whatsoever to the bankruptcy court other than that he was handling the underlying injury claim. No representation, the representations by Mr Talarico reference were made by the bankruptcy trustee to the court. Further on the issue of statute of limitations Mr Talarico acknowledged when his client sustained the personal injury or the alleged injury here when he received a lesser amount than he should have he had to investigate. He acknowledges then that he did not know who was responsible till he investigated it. That's the purpose of the two year statute of limitations. So that once he realized he had an injury he has two years within which to investigate, here it took him well over 5 years. The statute of limitations expired. On the issue of disability, I don't think we need to belabor this point but the statute provides that the person under legal disability would include someone who because of mental deterioration or physical incapacity is not fully able to manage his or her person or estate. The court has received and we simply have not seen any evidence that as a result of any personal injury that Mr Dulberg was unable to manage his or her person or estate. In fact as I understand it, the instant complaint is filed not only under Mr Dulberg's name but under the Paul R Dulberg revocable trust that as I understand is also trustee of and has filed suit in that capacity. I think that would be inconsistent with him being unable to manage his own affairs given that he is acting as the trustee for of trust. We have nothing further your honor.

Judge Otto: Alright, thank you both. I'm going to grant the motion on limitations grounds and I'll say this, I am not at all without sympathy for Mr Dulberg. The

allegations of the injury that he suffered are (indiscernible) put yourself in that situation but the statute of limitations is there for a reason. It's plain to me that the section 13 214.3 b applies this is as to the Baudin defendants in any event a legal malpractice claim. There is a two year clamp down. There is also a six year statute of repose as Mr Talarico pointed out on Mr Dulberg's behalf but those are not, not even consistent. A complaint is untimely if it's filed more than six years after or if its filed more than two years after and they both exist because their different exceptions that apply to each but here the argument for the exception to the two year statute of limitations is one fraudulent concealment and two disability. Fraudulent concealment I just, I don't see it, I don't see any facts pled even in all the facts asserted in the response brief I don't see any attempt to conceal the existence of a cause of action such that the statute of limitations should be tolled and the disability claims similarly there is no evidence that has been presented that suggests that Mr Dulberg was disabled, legally disabled to such an extent and for such an amount of time that less than two years passed during the time that he was not under such a disability. Certainly we know if there were question of people who were, what it seems to me that statute applies to is a situation where an individual might be in a coma as a result of catastrophic injuries your going to pull the statute of limitations while the person is in a coma but if the person is functional as aware as alert I really basically anything but you know a coma and you know really unable to take care of themselves or their affairs the statute doesn't toll. I see no evidence that suggests that there is any, that there was a disability to such an extent as to bring the plaintiff within the, within that tolling provision and I've said evidence, I suppose I should state no facts pled and no exhibits attached to the response which would support the argument made. I guess there is no reporter here so but anyway for clarity that's what I mean. Again, not without sympathy but the law is plain on this one. Because I am dismissing on limitations grounds I'm not going to reach the proximate cause argument. I think there's a, likely that is meritorious but I don't need to reach it. Don't need to reach the alternate ground. Motion is granted. On the Allstate defendants are coming back I think in September. Can someone remind me? Have that handy?

Allstate: Judge, I do have that, it's September twenty first.

Judge Otto: twenty first. Okay alright. So that day will stand. Are there other defendants still left in the case other than Allstate? Mr Talarico I guess I'm going to point that one at you.

Talarico: Judge there are, ADR out on motion amending the pleadings if the court accepts it. Allstate would be the only one left.

Judge Otto: I previously granted a motion to dismiss by ADR but you gotta file a motion to seek leave to amend the complaint as to them.

Talarico: Absolutely.

Judge Otto: Okay, yeah we'll cross that bridge when we come to it. The September twenty first date will stand for Allstate's motion on summary judgement. Is there anything else to talk about this morning?

Boder: Only briefly your honor, we did not seek a rule 304a finding at this time in that at this point there is only one co defendant left in the case and that motion for summary judgement hearing set for hearing I don't see a reason to do so. I just thought that I would mention that if that motion is denied or if indeed another party is brought in this case or brought back in this case then we may do that at a later point but we didn't want to burden the court with such a motion but we may not be prudent at this time.

Judge Otto: Yeah fair enough. You can in theory request 304a language down the road if you choose but as I just said to Mr Talarico we will cross that bridge when we come to it. Mr Talarico, anything else with respect to today?

Talarico: No, Just to say thank you to everyone and the court, especially the court. The last time I was absent due to a severe emergency in another country so thank you for all the courtesies.

Judge Otto: Well I'm um. These cases are important but sometimes you gotta be a little flexible. There's no thanks necessary. Thanks for your colleagues are certainly appropriate. They're more than willing to reset your briefing schedule. So that's appropriate. But from my perspective I'm, ya know what are you going to do. Sometimes life interferes and that's okay.

Talarico: well, thank you all.

Judge Otto: Mrs (indiscernible) Mr Jokem anything else?

Allstate: No your honor thank you

Jokem: No, thank you.

Boder: I will prepare the order and circulate it. Thank you.