

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-130

JANINE MARIE BALISTRERI

vs.

MATTHEW MARTIN.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Janine Marie Balistreri, appeals from a judgment dismissing her complaint against the defendant, her former attorney Matthew Martin. Essentially for the reasons stated by the motion judge, we affirm.

"We review the allowance of a motion to dismiss de novo," accepting the allegations in the complaint as true and drawing every reasonable inference in Balistreri's favor. See Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011). To determine whether Balistreri's allegations state a claim on which relief can be granted, see Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), "we look beyond the conclusory allegations in the complaint and focus on whether the factual allegations plausibly suggest an entitlement to relief." Curtis, supra, citing Iannacchino v. Ford Motor Co., 451 Mass. 623, 635-636

(2008). A "complaint which shows on its face that the statute of limitations has run prior to the date the action was commenced" may properly be dismissed under rule 12 (b) (6). See Babco Indus., Inc. v. New England Merchants Nat'l Bank, 6 Mass. App. Ct. 929, 929 (1978).

The gravamen of Balistreri's complaint is that Martin failed to obtain a valuation of her ex-husband's business, and that his failure adversely affected her divorce judgment. The complaint alleges violations of S.J.C. Rule 3:07, as amended, 480 Mass. 1315 (2018) (Massachusetts Rules of Professional Conduct), misrepresentation, breach of contract, and negligence. "Actions of contract or tort for malpractice, error or mistake against attorneys" must be brought within three years of when the cause of action accrues. G. L. c. 260, § 4. The statute of limitations for claims of misrepresentation is also three years. See G. L. c. 260, § 2A; McEneaney v. Chestnut Hill Realty Corp., 38 Mass. App. Ct. 573, 576 (1995). A violation of the Rules of Professional Conduct is not a freestanding cause of action, but may be evidence of malpractice. See Fishman v. Brooks, 396 Mass. 643, 649 (1986).

Balistreri filed her complaint on July 18, 2017. To be within the statute of limitations, the underlying cause of action must have accrued on or after July 18, 2014. Balistreri claims that her action is not time barred because she did not

know of the harm until, at the earliest, the final divorce judgment entered on August 6, 2014. "The statute of limitations applicable to a legal malpractice claim begins to run when a client 'knows or reasonably should know that he or she has sustained appreciable harm as a result of the lawyer's conduct.'" Lyons v. Nutt, 436 Mass. 244, 247 (2002), quoting Williams v. Ely, 423 Mass. 467, 473 (1996). Appreciable harm is "'injury, loss or detriment' that is 'capable of being measured or perceived.'" Kennedy v. Goffstein, 62 Mass. App. Ct. 230, 233 (2004), quoting Black's Law Dictionary 97, 722 (7th ed. 1999).

Martin moved to withdraw as Balistreri's attorney in December 2013. By March 2014, Cynthia Brandt, the accountant whom Martin and Balistreri had retained to perform the valuation, informed Balistreri that she was unable to complete the work or to testify at the divorce trial because Martin had not provided her with the documents she needed. Recognizing the importance of obtaining the valuation, on or about March 20, 2014, Martin's successor counsel in the divorce proceedings filed a motion to compel Brandt to testify. Thus, Balistreri knew or should have known by March 2014, a date outside of the statute of limitations, that she had been harmed by Martin's alleged malpractice. "That a case is ongoing and not finally adjudicated through the trial or appellate stage does not mean

that there is no duty of inquiry into the harm and its connection to the attorney's conduct and no accrual of a legal malpractice claim; the risks of a statute of limitations bar on a legal malpractice claim are not left back stage, suspended to the final curtain call." Frankston v. Denniston, 74 Mass. App. Ct. 366, 375 (2009).

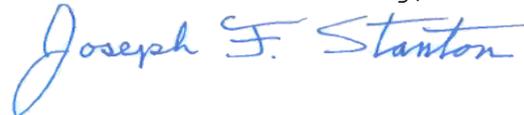
Balistreri also contends that her contract claim (with a six-year statute of limitations) is distinct from her malpractice claim; however, the allegations underlying her claim reveal otherwise. "A plaintiff may not . . . escape the consequences of a . . . statute of limitations on tort actions merely by labelling the claim as contractual." Anthony's Pier Four, Inc. v. Crandall Dry Dock Eng'rs, Inc., 396 Mass. 818, 823 (1986). Indeed, recognizing that professional malpractice claims generally arise in contract and in tort from a shared set of facts, the Legislature specifically included both types of claims under the umbrella of G. L. c. 260, § 4.

In her complaint, Balistreri alleges that Martin committed a breach of contract by failing to give Brandt the necessary documents to complete the valuation, causing Balistreri "economic and emotional injury." Although Balistreri labeled this a contract claim, it is plainly the same claim, arising from the same set of operative facts, as her malpractice claim. To establish that she was truly proceeding in contract rather

than in tort, Balistreri would have needed to identify specific portions of her contract with Martin in which he made a specific promise or assumed a higher standard of care than the "standard of reasonable care required of members of his profession." Klein v. Catalano, 386 Mass. 701, 719 (1982). She has not done so here.

Judgment affirmed.

By the Court (Meade,
Maldonado & Massing, JJ.¹),



Clerk

Entered: January 13, 2020.

¹ The panelists are listed in order of seniority.