Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-341

FEBRUARY TERM, 2007

Ronald Saldi, Sr.	}	APPEALED FROM:
	}	
	}	
v.	}	Orange Superior Court
	}	
M. Jerome Diamond	}	
	}	DOCKET NO. 164-8-05 Oecv
		Trial Judge: Mary Miles Teachout

In the above-entitled cause, the Clerk will enter:

In this attorney malpractice action, plaintiff appeals the superior court's grant of summary judgment in favor of defendant based on its determination that the action is barred by the applicable statute of limitations. We affirm.

Plaintiff Ronald Saldi, Sr. was the owner and president of International Collection Services, Inc. (ICS), a debt collection agency, when defendant M. Jerome Diamond represented him and his company in 1988 in connection with a consumer fraud action brought by the state against ICS. Upon the advice of defendant, plaintiff agreed to settle the consumer fraud action pursuant to a consent decree signed by plaintiff in June 1993. The consent decree outlined a judgment against ICS in the amount of $400,000 to be paid to the state over ten years. Plaintiff expressly agreed to be the guarantor of ICS's performance under the consent decree. ICS's performance was further secured by mortgages on specified real estate owned by plaintiff and his family. In November 1994, after ICS and plaintiff failed to make a required payment under the decree, the state filed suit against plaintiff and his family to foreclose on the property securing plaintiff's promise as a guarantor. In March 1999, the superior court issued a consolidated judgment order, decree of foreclosure and order for a public sale against plaintiff which reflected a debt of $475,250. After the state foreclosed on the mortgaged properties, a deficiency remained. In 2001, the state brought suit to collect the deficiency, and in 2003 obtained a judgment exceeding $500,000.

On August 30, 2005, plaintiff filed the instant attorney malpractice action, alleging that defendant was negligent in advising him that his personal liability as a guarantor would not extend beyond the proceeds from the sale of the real estate that he had offered to secure his obligations under the consent decree. Viewing the evidence most favorably to plaintiff, the superior court concluded, as a matter of law, that plaintiff's action was barred by the six-year statute of limitations set forth in 12 V.S.A. § 511 (providing that a civil action shall be commenced within six years after the cause of action accrues).

On appeal, plaintiff argues that the court erred by granting defendant summary judgment because genuine issues of material fact remain in dispute and because his legal malpractice action did not accrue until 2001 when the State sued him to obtain a deficiency judgment. Plaintiff argues that two issues of material fact remain unresolved: (1) whether he knew at the time of either the consent decree or the state's foreclosure action that he was personally liable for any deficiency and judgment interest; and (2) whether he knew by August 19, 2005 that the sale from the proceeds of his real estate were insufficient to cover ICS's $475,250 debt to the state. According to plaintiff, because defendant told him that the only consequence of his failure to meet the payment obligations under the consent decree would be the state's right to foreclose on the real estate securing his obligations under the decree, he was unaware of his personal liability for the ICS debt until 2001 when the state sued him to recover a post-foreclosure deficiency and accrued interest. Plaintiff contends that, until then, he had no reason to doubt defendant's alleged earlier assurance that the loss of his family's land would be the extent of his personal liability on the debt.

We find no merit to these arguments. Both parties acknowledge that the six-year statute of limitations set forth in 12 V.S.A. § 511 applies to attorney malpractice actions alleging economic loss, see Fitzgerald v. Congleton, 155 Vt. 283, 293 (1990), and that the discovery rule applies to such suits, Howard Bank v. Estate of Pope, 156 Vt. 537, 538-39 (1991). Under the discovery rule, a plaintiff's cause of action is deemed to have accrued "at the earliest point at which [the] plaintiff discovers an injury and its possible cause." Earle v. State, 170 Vt. 183, 190 (1999). "Accordingly, the limitations period begins to run 'when the plaintiff has or should have discovered both the injury and the fact that it may have been caused by the defendant's negligence or other breach of duty.' " Rodrigue v. VALCO Enters., 169 Vt. 539, 541 (1999) (mem.) (quoting Lillicrap v. Martin, 156 Vt. 165, 175 (1989)); see Agency of Natural Res. v. Towns, 168 Vt. 449, 452 (1998) (holding that a cause of action accrues upon the discovery of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would make the person aware of a possible cause of action). In determining when a cause of action accrued, the plaintiff is ultimately chargeable with knowing all facts that could have been obtained with reasonable diligence, and specifically is presumed to be aware of all facts communicated to an agent, including the plaintiff's attorney. Towns, 168 Vt. at 452-53.

Given this standard, the record plainly shows that, as a matter of law, plaintiff was aware or should have been aware of a possible attorney malpractice action against defendant more than six years before he filed the instant lawsuit. As noted, the gist of plaintiff's complaint is that defendant never informed him that he would be personally liable for any deficiency and accrued interest in the event that the mortgaged real estate was insufficient to cover the debt he owed as guarantor under the consent decree. The consent decree provided that plaintiff, as owner and president of ICS, would be "subject to the Court's jurisdiction as guarantor of ICS' obligations under this Consent Decree and, as a guarantor only, shall be bound by all of the terms of this Consent Decree." Although the decree did not specifically indicate that the state would be entitled to any deficiency if the mortgaged premises were insufficient to cover the debt, it provided, in relevant part, that if the guarantor failed to make the required payments, "the entire balance of the judgment due under this Consent Decree shall immediately become due and payable in full." Thus, on its face, the consent decree made plaintiff personally liable for the entire debt as guarantor if ICS were unable to fulfill its obligations under the decree. Nothing in the decree suggested either that the state would be limited to the value

of the mortgaged real estate in collecting on the debt, or that plaintiff's liability for the debt would not include the normal obligation to pay the accrual of interest on an unpaid debt.

In 1994, when the state filed a foreclosure complaint based on plaintiff's failure to perform his obligations under the consent decree, it specifically asked the court to assess an appropriate judgment against plaintiff "in the event of a deficiency." At that time, plaintiff was represented by the same attorney who filed the complaint against defendant nine years later. In his answer to the foreclosure complaint, plaintiff effectively acknowledged that he was a guarantor under the consent decree and that he had reviewed the state's complaint. Thus, at least by the time of the state's complaint in 1994, plaintiff was aware that the state was seeking payment from him in the event of a deficiency, and that any alleged advice that his liability would be limited to the mortgaged property was potentially wrong. In other words, plaintiff had information that should have made him aware of a possible malpractice action claiming that defendant had led him to believe that the most he would lose in the event of a default was his family's real estate.

Moreover, even if we were to assume that the state's foreclosure complaint was insufficient to put plaintiff on notice of a possible malpractice action against defendant, the foreclosure judgment order certainly provided plaintiff with such notice. In that March 28, 1999 order, the superior court expressly stated as follows:

> The Court acknowledges that the parties disagree [as] to whether the Plaintiff State may be entitled pursuant to the Consent Decree to pursue a deficiency judgment against any of the Defendants and shall retain jurisdiction to hear any such claim, if raised by the Plaintiff State upon motion.

The order also set forth not only the principal sum owed but also the interest and other costs that would be added to the total debt. At that time, if not before, plaintiff and his attorney were on notice of the State's claim of a right to collect any deficiency and accrued interest from plaintiff—and thus of a possible attorney malpractice action against defendant. Furthermore, on August 19, 1999, still more than six years before plaintiff filed his malpractice action, a report of sale was filed demonstrating that a deficiency existed. Hence, at that point, plaintiff was aware of the deficiency and of the state's claim that it had a right to a deficiency.

As we explained in Rodrigue, a plaintiff "need not have an airtight case before the limitations period begins to run" because "the discovery rule seeks to establish the appropriate time from which to commence the running of the limitations period." 169 Vt. at 540-41 (emphasis added). Thus, the limitations period may begin to run well before a plaintiff is aware of the extent or amount of the damages that may accrue. See Fritzeen v. Gravel, 2003 VT 54, ¶¶ 12-14, 175 Vt. 537 (mem.). In this case, the record manifestly demonstrates, as a matter of law, that more than six years before he filed suit against defendant, plaintiff was aware of information that should have put him on notice of a possible malpractice suit claiming that defendant failed to inform him of the extent of his potential liability under the consent decree. Accordingly, the superior court did not err in granting summary judgment to defendant. See Galfetti v. Berg, Carmolli & Kent Real Estate, 171 Vt. 523, 526 (2000) (mem.) (deciding as a matter of law that the plaintiffs' claims were barred by the

applicable limitations period); Rodrigue, 169 Vt. at 541 (same).

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice