2011 Ill. App. (1st) 101329-U

FIRST DIVISION
October 31, 2011

No. 1-10-1329

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THOMAS VASILJEVICH,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 06 CH 15083
	)	
STEVEN LEVIT,	)	Honorable
	)	Stuart E. Palmer,
Defendant-Appellee,	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

ORDER

¶ 1 ***HELD***: We affirmed the dismissal of plaintiff's claims for legal malpractice, aiding and abetting a breach of fiduciary duty, and interference with a testamentary expectation for failure to state causes of action. We affirmed the denial of plaintiff's motion for leave to file an amended aiding and abetting count because the amended count did not cure the defect in the original pleading.

¶ 2 Plaintiff, Thomas Vasiljevich, filed a first-amended complaint alleging legal malpractice, aiding and abetting a breach of fiduciary duty, and interference with a testamentary expectation against defendant, Steven Levit. The circuit court dismissed the legal malpractice and aiding and abetting counts with prejudice, and dismissed the interference with a testamentary expectation count

without prejudice. Plaintiff filed a motion for leave to file an amended count for aiding and abetting a breach of fiduciary duty. The circuit court denied the motion. Plaintiff filed a second-amended complaint, repleading his count for interference with a testamentary expectation. The circuit court dismissed the second-amended complaint with prejudice and denied his motion to reconsider. Plaintiff appeals, contending the circuit court erred by: (1) dismissing the legal malpractice and aiding and abetting counts alleged in the first-amended complaint; (2) denying him leave to file an amended aiding and abetting count in the second-amended complaint; (3) dismissing the interference with a testamentary expectation count alleged in the second-amended complaint; and (4) denying his motion to reconsider. We affirm.

¶ 3 Facts

¶ 4 Plaintiff filed a verified complaint for professional malpractice and breach of fiduciary duty against defendant. Defendant filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2006)), arguing that no causes of action had been pleaded, and that the professional malpractice and breach of fiduciary duty counts were duplicative. Upon agreement, the complaint was stricken and plaintiff was granted leave to file a first-amended complaint.

¶ 5 In his first-amended complaint, plaintiff alleged that he, Maria, and Nick were the three children of George and Ivanka Vasiljevich. Plaintiff is a tax and ERISA attorney who had devoted substantial time to managing his parents' financial affairs. Plaintiff pleaded that, on information and belief, his brother Nick was diagnosed with paranoid schizophrenia disorder in the early 1980's which has caused him to lose touch with reality. Since the early 1980's, Nick has lived with parents,

George and Ivanka.

¶ 6 Plaintiff pleaded that George had a "very limited formal education through age 13," and worked as a bellman during the latter part of his life. After retiring in 1989, George's weight rose to over 400 pounds, causing him to have a number of medical problems, including high blood pressure, water retention, and poor circulation in his legs. George also suffered from depression and had been prescribed several antidepressant medications. Plaintiff alleged, on information and belief, that George also had a "psychologically uncontrollable preoccupation with gambling."

¶ 7 Plaintiff alleged that George's wife, Ivanka, was a successful real estate investor who acquired valuable commercial property for herself and for George.

¶ 8 Plaintiff alleged that Ivanka created the "Ivanka Vasiljevich Living Trust" holding valuable real estate, investment accounts, cash, receivables and other assets. The trust agreement, dated July 26, 1995, was attached to plaintiff's first-amended complaint and designated Ivanka as the grantor and trustee of the trust. In the event Ivanka was unable or unwilling to serve as trustee, George was designated as the successor trustee, to be followed, in order, by plaintiff and Maria. Under the terms of Ivanka's trust, a share of her trust estate, designated as the "marital share," was to be distributed to George "outright and free of any trust" if Ivanka predeceased him. The rest of her trust estate was to be kept in a residuary trust for George as the sole beneficiary. Following George's death, any "unappointed portion of the then remaining trust estate" of the residuary trust was to be distributed *per stirpes* among Ivanka's then-living descendants. Plaintiff and Maria were to receive any such shares "outright and free of trust," whereas Nick was to receive any such shares in trust for his benefit.

¶ 9 Plaintiff alleged that George created the "George Vasiljevich Living Trust," which also held valuable real estate, investment accounts, cash, receivables and other assets. The trust agreement, dated July 26, 1995, was attached to plaintiff's first-amended complaint and designated George as the grantor and trustee of the trust. In the event George was unable or unwilling to serve as trustee, Ivanka was designated as the successor trustee, to be followed, in order, by plaintiff and Maria. Under the terms of George's trust, a share of his trust estate, designated as the "marital share," was to be distributed to Ivanka "outright and free of any trust" if George predeceased her. The rest of his trust estate was to be kept in a residuary trust for Ivanka as the sole beneficiary. Following Ivanka's death, any "unappointed portion of the then remaining trust estate" of the residuary trust was to be distributed *per stirpes* among George's then-living descendants. Plaintiff and Maria were to receive any such shares "outright and free of trust," whereas Nick was to receive any such shares in trust for his benefit.

¶ 10 Plaintiff pleaded defendant was the attorney for George Vasiljevich and for the "George Vasiljevich Living Trust." Plaintiff failed to plead how the attorney-client relationship between defendant and George Vasiljevich and between defendant and the "George Vasiljevich Living Trust" arose. Plaintiff also failed to plead the date defendant was hired to represent George Vasiljevich and the "George Vasiljevich Living Trust," and he failed to plead the terms of defendant's employment.

¶ 11 Plaintiff pleaded that Ivanka died in 1996. Following Ivanka's death, George "aged rapidly" and his health problems worsened. George came to rely more on Nick, and he reposed trust and confidence in Nick regarding the handling of his affairs.

¶ 12 Plaintiff pleaded that, by 2003, Nick had grown resentful of plaintiff because of his

educational and vocational successes as well as his skills in managing George's assets. In the late summer of 2003, Nick changed the locks on the door to the house to "control physical access to [George]." Nick also began "slowly weaning George from his reliance on [plaintiff] so that Nick could manage and control the finances himself."

¶ 13 Plaintiff pleaded that Nick was George's agent under powers of attorney dated November 17, 2003, and became an authorized signer on George's bank accounts. Plaintiff further pleaded that, by late 2003, Nick and George had a fiduciary relationship as "evidenced by the fact that Nick exercised dominance over George and George was dependent upon Nick for his daily activities, for the payment of his bills, for the control of his finances as well as his physical and emotional needs."

¶ 14 Plaintiff alleged that the "George Vasiljevich Living Trust" was purportedly amended by a first amendment on November 17, 2003, by a second amendment on September 10, 2004, and by a third amendment on September 22, 2005. The amendments were attached to plaintiff's first-amended complaint. The amendments removed plaintiff as successor trustee, named Nick as successor trustee, and also changed the dispositive provisions of the trust so that, upon George's death, the following portions of the trust estate would be left solely to Nick: (1) George's home and automobile; (2) real estate located at 5642 N. Jersey Avenue in Chicago; (3) George's bank accounts; and (4) real estate located at 2468-72 N. Orchard Street in Chicago. Any unappointed portion of the then-remaining trust estate of the residuary trust would be distributed *per stirpes* among George's living descendants.

¶ 15 No amendments to the "Ivanka Vasiljevich Living Trust" have been made.

¶ 16 Plaintiff alleged, on information and belief that, in March 2005, defendant, as counsel to the

"George Vasiljevich Living Trust," "advised and facilitated the sale of one of the properties held jointly by the Trust and Ivanka's trust, a residential multi-tenant building located at 1947 West Leland Avenue, Chicago." The sales price was $975,000. Plaintiff alleged that, on information and belief at the time of the sale, the fair-market value of the building was between $1.2 million and $1.3 million.

¶ 17 In count I of plaintiff's first-amended complaint, plaintiff alleged defendant committed legal malpractice by facilitating the sale of 1947 West Leland Avenue for less than its fair-market value. In count II, plaintiff alleged that, by facilitating, assisting and inducing the trustees of the "George Vasiljevich Living Trust" and the "Ivanka Vasiljevich Living Trust" to sell 1947 West Leland Avenue for less than its fair-market value, defendant aided and abetted the trustees in breaching their fiduciary duties to the beneficiaries of the trusts and caused substantial damage to plaintiff. In count III, plaintiff alleged defendant intentionally interfered with the plaintiff's testamentary expectation in the assets of the "George Vasiljevich Living Trust" by: (1) facilitating and drafting the amendments which named Nick as successor trustee in place of plaintiff and which left George's bank accounts, automobile, home, and certain real property solely to Nick; and (2) exerting undue influence over George to create and/or to execute the aforementioned trust amendments favoring Nick.

¶ 18 Defendant filed a section 2-615 motion to dismiss, arguing that plaintiff had failed to plead any actionable conduct on the part of defendant, and otherwise failed to state a cause of action. The circuit court dismissed counts I (legal malpractice) and II (aiding and abetting the breach of fiduciary duty) with prejudice and dismissed count III (interference with a testamentary expectation)

without prejudice.

¶ 19 Plaintiff filed a motion for leave to file an amended count for aiding and abetting a breach of fiduciary duty in his second-amended complaint. The amended count deleted the allegation defendant aided and abetted the trustees of the "George Vasiljevich Living Trust" and the "Ivanka Vasiljevich Living Trust" in breaching their fiduciary duties to the beneficiaries of their trusts by selling 1947 West Leland Avenue at below market value. Instead, the amended count alleged, on information and belief, that Nick hired defendant "for George and Nick", and defendant then aided and abetted Nick's breach of his fiduciary duty to George by preparing the amendments to the "George Vasiljevich Living Trust" which named Nick as successor trustee in place of plaintiff and which changed the dispositive provisions of the trust to favor Nick. The amended count alleged that plaintiff was damaged thereby because his interests in the trusts were reduced and diminished. The circuit court denied leave to file the amended aiding and abetting a breach of fiduciary duty count.

¶ 20 Plaintiff filed his verified, two-count second-amended complaint. Count I contained the amended aiding and abetting a breach of fiduciary duty claim described above; since the trial court had denied plaintiff leave to file this amended claim, the court entered an order stating defendant was not required to file any responsive pleadings thereto.

¶ 21 Count II of plaintiff's second-amended complaint alleged interference with a testamentary expectation based on defendant's actions in facilitating and drafting the amendments to the "George Vasiljevich Living Trust" which named Nick as successor trustee in place of plaintiff and increased Nick's share of the trust estate to plaintiff's detriment. Plaintiff deleted the allegations from the interference with a testamentary expectation count in the first-amended complaint defendant had

exerted "undue influence" over George.

¶ 22 Defendant filed a combined section 2-615 and section 2-619 motion to dismiss. In pertinent part for purposes of this appeal, defendant argued that, pursuant to section 2-615, plaintiff had failed to plead any specific facts demonstrating defendant had intentionally and tortiously interfered with plaintiff's testamentary expectation. The circuit court dismissed the interference with testamentary expectation count without prejudice pursuant to section 2-615 and 2-619 and granted plaintiff 30 days to replead that claim.

¶ 23 Instead of amending within the extended time allowed, plaintiff filed a motion for reconsideration, arguing for the first time that the pleading standard should be relaxed and/or defendant's deposition should be taken before dismissing his second-amended complaint. The circuit court denied plaintiff's motion to reconsider and dismissed the second-amended complaint with prejudice pursuant to section 2-615 and 2-619.

¶ 24 Plaintiff filed this timely appeal. For the reasons that follow, we affirm the dismissal of plaintiff's first and second-amended complaints pursuant to section 2-615; accordingly, we need not discuss the section 2-619 arguments.

¶ 25 Analysis

¶ 26 Dismissal of a cause of action pursuant to section 2–615 is appropriate only when it clearly appears no set of facts could ever be proved under the pleadings that would entitle plaintiff to recover. *Mt. Zion State Bank & Trust v. Consolidated Communications, Inc.*, 169 Ill. 2d 110, 115 (1995). On review of an order granting a section 2–615 motion, all well-pleaded facts and all reasonable inferences from them are taken as true. *Id*. at 115. Whether a complaint states a valid

cause of action is a question of law, and our review of a dismissal pursuant to a section 2–615 motion is *de novo*. *Majumdar v. Lurie*, 274 Ill. App. 3d 267, 268 (1995).

¶ 27 First, plaintiff contends the circuit court erred by dismissing the legal malpractice count alleged in the first-amended complaint. Defendant argues that plaintiff waived review of this issue by failing to replead his cause of action for legal malpractice in his second-amended complaint. See *Foxcroft Townhome Owners Association v. Hoffman Rosner Corp.*, 96 Ill. 2d 150, 154 (1983) (quoting *Bowman v. County of Lake*, 29 Ill. 2d 268, 272 (1963) (" 'Where an amendment is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be a part of the record for most purposes, being in effect abandoned and withdrawn.' ") See also *Vilardo v. Barrington Community School District 220*, 406 Ill. App. 3d 713, 719 (2010) (quoting *Tabora v. Gottlieb Memorial Hospital*, 279 Ill. App. 3d 108, 114 (1996) (" '[a] simple paragraph or footnote in the amended pleadings notifying [the] defendants and the court that [the] plaintiff was preserving the dismissed portions of his former complaints for appeal' is sufficient to protect against forfeiture under *Foxcroft*.")))

¶ 28 Plaintiff responds that, an exception to the waiver rule exists "where, as here, all Complaints and Amended Complaints are verified." First, review of the record indicates that plaintiff's first-amended complaint was not verified. Moreover, the exception cited by plaintiff provides only that admissions in a verified pleading are considered judicial admissions that remain binding on plaintiff even when the pleading is amended and superseded; the exception does not otherwise preserve a cause of action after it has been pleaded over. See *Burdin v. Jefferson Trust & Savings Bank of Peoria*, 133 Ill. App. 2d 703, 708 (1971); *In re Marriage of O'Brien*, 247 Ill. App. 3d 745, 749

(1993); *Konstant Products, Inc. v. Liberty Mutual Fire Insurance Co.*, 401 Ill. App. 3d 83, 86 (2010).

¶ 29 Even if we were to consider the legal malpractice count pleaded in the first-amended complaint, we would hold that it failed to state a cause of action.

¶ 30 To state a cause of action for legal malpractice, plaintiff must plead: (1) defendant owed him a duty of care arising from the attorney-client relationship; (2) defendant breached the duty; and (3) as a proximate result, plaintiff suffered injury. *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 225-26 (2006). The general rule is that an attorney is only liable to his own client, not to third persons. *Pelham v. Griesheimer*, 92 Ill. 2d 13, 19 (1982). Our supreme court has held though, that an exception exists where plaintiff pleads and proves facts demonstrating he is "in the nature of [a] third-party beneficiar[y] of the relationship between the client and the attorney." *Id*. at 20.

¶ 31 In the present case, plaintiff contends he falls within this exception applicable to third-party beneficiaries. However, that exception is narrowly defined in *Pelham*, which held: "to establish a duty owed by the defendant attorney to the nonclient the nonclient must allege and prove that the intent of the client to benefit the nonclient third party was *the primary or direct purpose* of the transaction or relationship." (Emphasis added.) *Id.* at 20-21. Here, plaintiff alleged in his first-amended complaint that the primary purpose and intent of the attorney-client relationship between defendant and the "George Vasiljevich Living Trust," with respect to the sale of 1947 West Leland Avenue, was to benefit the "Ivanka Vasiljevich Living Trust," of which plaintiff was one of three remainder beneficiaries (along with Maria and Nick); however, there is no allegation that the primary or direct purpose was to specifically benefit plaintiff personally or individually. Further,

at the time of the sale of 1947 West Leland Avenue in March 2005, the "Ivanka Vasiljevich Living Trust" expressly provided the remainder of Ivanka's trust estate that had not been distributed to George as his marital share was to be kept in a residuary trust for George as the "sole beneficiary." Thus, to the extent that the sale of 1947 West Leland Avenue was to benefit the "Ivanka Vasiljevich Living Trust," George (and not plaintiff) was the third-party beneficiary thereof. Accordingly, plaintiff failed to plead he was a third-party beneficiary of the relationship between defendant and the "George Vasiljevich Living Trust," and therefore, he failed to state a cause of action for legal malpractice.

¶ 32 Next, plaintiff contends the circuit court erred by dismissing his aiding and abetting a breach of fiduciary duty count in his first-amended complaint. Plaintiff alleged that, by facilitating, assisting and inducing the trustees of the "George Vasiljevich Living Trust" and the "Ivanka Vasiljevich Living Trust" to sell 1947 West Leland Avenue for less than its fair-market value, defendant thereby aided and abetted the trustees in breaching their fiduciary duties to the beneficiaries of the trusts and caused substantial damage to plaintiff. Plaintiff waived review by failing to replead this claim in his second-amended complaint. See *Foxcroft*, 96 Ill. 2d at 154; *Vilardo v. Barrington Community School District 220*, 406 Ill. App. 3d at 718-19.

¶ 33 Even if we were to consider the aiding and abetting count pleaded in the first-amended complaint, we would hold that it failed to state a cause of action.

¶ 34 *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15 (2003) is instructive. In *Thornwood*, Thomas A. Thornton and James Follensbee formed the Thornwood Venture Limited Partnership (Partnership) to develop Mr. Thornton's farm as a residential community and golf course

(Thornwood Golf Course). *Id.* at 18. Despite Mr. Thornton's investment of more than $8 million in the Partnership, Mr. Follensbee failed in his initial attempts to convince the PGA Tour Golf Course Properties, Inc. (PGA) and the Potomac Sports Properties, Inc. (Potomac) to work with the Partnership to develop Thornwood Golf Course as a PGA Tournament Players Course (TPC). *Id.* at 18-19. After Mr. Follensbee notified Mr. Thornton that the PGA's and Potomac's "involvement in the development project was not feasible," he continued to secretly negotiate a deal with the PGA and Potomac that would significantly increase the value of the Partnership. *Id.* at 19-20. Mr. Follensbee retained Jenner & Block to help him buy out Mr. Thornton's Partnership interest and to negotiate with the PGA and Potomac. *Id.* at 20. Jenner & Block drafted a settlement agreement between Mr. Follensbee and Mr. Thornton that included a release for breach of fiduciary duties and non-disclosure of opportunities regarding the Partnership finances. *Id.* Mr. Thornton also executed a release that relieved Jenner & Block from any claims. *Id.* Approximately four years after he signed the releases, Mr. Thornton found out about Mr. Follensbee's negotiations and brought suit against Jenner & Block for aiding and abetting a breach of fiduciary duty, aiding and abetting a scheme to defraud, and aiding and abetting a scheme of fraudulent inducement. *Id.* at 18. The circuit court dismissed Mr. Thornton's complaint. *Id.* at 21.

¶ 35 On appeal, we held that to state a claim for aiding and abetting, a plaintiff must show: " '(1) the party whom the defendant aids must perform a wrongful act which causes an injury; (2) the defendant must be regularly aware of his role as part of the overall or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation.' " See *Id.* at 27-28 (quoting *Wolf v. Liberis*, 153 Ill. App. 3d 488, 496 (1987)).

¶ 36 In discussing the requirements for Mr. Thornton to state a claim against Jenner & Block for aiding and abetting Mr. Follensbee's breach of fiduciary duty, we stated:

> "Certainly *** mere receipt of copies of letters authored by Follensbee, which expose his breach of fiduciary duty, probably does not constitute aiding and abetting under Illinois law. Here, however, Thornton *** alleges that Jenner & Block aided and abetted by knowingly and substantially assisting Follensbee in breaching his fiduciary duty by (1) communicating the competitive advantages available to the Partnership from the PGA/TPC plan to other parties, but specifically not to Thornton; (2) expressing Follensbee's interest in purchasing Thornton's interest in the Partnership and negotiating the purchase of that interest without disclosing to Thornton the continued negotiations with the PGA and Potomac; (3) reviewing and counseling Follensbee with regard to the production of investment offering memoranda, financial projections, and marketing literature, which purposely failed to identify Thornton as a partner; and (4) drafting, negotiating, reviewing, and executing documents, including the Jenner & Block and Follensbee Releases, relating to the purchase of Thornton's interest and the PGA/TPC Plan with knowledge that Thornton was not aware of the PGA/TPC plan All of these acts are alleged to have been perpetrated by Jenner & Block while it had knowledge that Thornton and Follensbee were partners, that Follensbee had a duty to disclose the PGA/TPC plan to Thornton, and that Follensbee did not disclose the PGA/TPC plan to Thornton despite having the opportunity and duty to do so." *Id.* at 29.

¶ 37 We held that, even though Mr. Thornton may face "an uphill battle" in proving his claims, he had sufficiently pleaded a cause of action against Jenner & Block for aiding and abetting Mr.

Follensbee's breach of fiduciary duty. *Id.*

¶ 38 Applying the *Thornwood* test for aiding and abetting to the case at bar, plaintiff must plead and prove: (1) the trustees of the "George Vasiljevich Living Trust" and the "Ivanka Vasiljevich Living Trust" owed fiduciary duties to the beneficiaries of the trusts and they were breaching those fiduciary duties by selling 1947 West Leland Avenue at below market value; (2) defendant knowingly and substantially assisted the trustees in the sale of 1947 West Leland Avenue at below market value in breach of their fiduciary duties; and (3) defendant was regularly aware of his role in so assisting the trustees in their breach of fiduciary duties.

¶ 39 The parties dispute whether the allegations show that the trustees breached their fiduciary duties by selling 1947 West Leland Avenue at below market value. Even assuming that the sale did constitute a breach of fiduciary duties, plaintiff failed to adequately plead defendant was liable for aiding and abetting a breach of fiduciary duty. Unlike *Thornwood*, in which the plaintiff there pleaded the myriad actions knowingly taken by Jenner & Block to aid and abet Mr. Follensbee's breach of fiduciary duty, plaintiff here failed to allege defendant knew the sale constituted a breach of the trustees' fiduciary duties, and plaintiff failed to detail any of the actions taken by defendant that allegedly aided the trustees in the sale of the property below market value. Plaintiff alleged defendant "advised and facilitated" the sale of the property, but otherwise failed to specifically allege defendant's role in the sale. Therefore, plaintiff has failed to plead the substantial knowledge and assistance element necessary to state a cause of action for aiding and abetting a breach of fiduciary duty under *Thornwood*.

¶ 40 Next, plaintiff contends the circuit court erred by denying him leave to file an amended count

for aiding and abetting a breach of fiduciary duty based on defendant's conduct in preparing the amendments to the "George Vasiljevich Living Trust" which named Nick as successor trustee in place of plaintiff and changed the dispositive provisions of the trust to favor Nick. The decision whether to grant leave to file an amended count is within the sound discretion of the circuit court. In exercising its discretion, the circuit court should consider: (1) whether the proposed amendment would cure the defects in the original pleading; (2) whether the amendment would surprise or prejudice other parties; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading can be identified. *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992).

¶ 41 In the proposed amendment of the second-amended complaint, plaintiff alleged Nick owed a fiduciary duty to George based on the trust and confidence that George reposed in Nick regarding the handling of his financial affairs. Plaintiff contended Nick breached his fiduciary duty when he unduly influenced and pressured George to amend his trust for Nick's benefit, to the detriment of the other trust beneficiaries. The aiding and abetting allegation against defendant stated: "[o]n information and belief, Nick sought out, hired and worked with [defendant]," who prepared the trust amendments for Nick and George. However, plaintiff did not allege defendant knew or should have known that Nick had procured George's agreement to the amendments through improper means and in breach of his fiduciary duty. Plaintiff, therefore, failed to plead the knowledge element necessary to state a cause of action for aiding and abetting a breach of fiduciary duty under *Thornwood*. See our discussion *supra*. Accordingly, as the proposed amendment did not cure the defects in the original pleading, the circuit court committed no abuse of discretion in denying plaintiff leave to

amend.

¶ 42 Next, plaintiff contends the circuit court erred by dismissing his second-amended complaint for interference with a testamentary expectation based on defendant's actions in facilitating and drafting the amendments to the "George Vasiljevich Living Trust." To state a cause of action for interference with a testamentary expectation, plaintiff must plead: (1) the existence of an expectancy; (2) defendant's intentional interference therewith; (3) *tortious conduct such as undue influence, fraud, or duress*; (4) a reasonable certainty that the expectancy would have been realized but for the interference; and (5) damages. (Emphasis added.) *In re Estate of Roeseler*, 287 Ill. App. 3d 1003, 1021 (1997).

¶ 43 Plaintiff pleaded: (1) he had an expectation in the assets of the "George Vasiljevich Living Trust;" (2) defendant intentionally interfered with that expectation by aiding and abetting Nick's breach of fiduciary duty by drafting the amendments to the trust that named Nick as successor trustee in place of plaintiff and increased Nick's share of the trust estate to plaintiff's detriment; (3) plaintiff had a reasonable certainty the trust assets would have been distributed in equal shares to plaintiff, Maria, and Nick but for defendant's interference; and (4) plaintiff suffered economic damages as a result of defendant's tortious interference.

¶ 44 Plaintiff failed to state a cause of action for interference with a testamentary expectation because he did not plead in his second-amended complaint defendant used any type of tortious conduct such as undue influence, fraud, or duress to manipulate George into amending his trust. Plaintiff argues, on appeal, that the allegations in his second-amended complaint "amount to constructive fraud" on the part of defendant against George. Constructive fraud arises only if a

confidential or fiduciary relationship exists between the parties. *Prodromos v. Everen Securities, Inc.*, 341 Ill. App. 3d 718, 726 (2003). To establish constructive fraud, plaintiff must show defendant breached his fiduciary duty to George and that he knew of the breach and accepted the fruits of the fraud. *Id*. at 726. Plaintiff never pleaded in his second-amended complaint defendant breached his fiduciary duty owed to George relative to the trust amendments, nor did he plead any knowledge by defendant regarding such a breach or his acceptance of the fruits of the fraud; accordingly, there was no constructive fraud committed by defendant.

¶ 45 In the absence of any allegations of tortious conduct such as undue influence, fraud, or duress on the part of defendant as to George, plaintiff failed to state a cause of action for interference with a testamentary expectation.

¶ 46 Finally, plaintiff contends the circuit court applied the wrong pleading standards when dismissing his first and second-amended complaints. Plaintiff argues "the circuit court should not have placed the burden on plaintiff to figure out and plead what was in the defendant attorney's mind, and in his files, when that attorney prepared trust amendments that divested the plaintiff of his interest in the trust, which amendments gave the brother who hired him all of the trust." Plaintiff contends he should have been permitted to depose defendant before any dismissal order was made final and appealable in this case.

¶ 47 In support, plaintiff cites *John Burns Construction Co. v. City of Chicago*, 234 Ill. App. 3d 1027 (1992), in which the John Burns Construction Company (Burns) filed suit for breach of contract against the City of Chicago seeking damages for delay in a construction project due to the city's failure to timely acquire the necessary rights-of-way and easements. *Id*. at 1028-29. The city

filed a motion to dismiss based, in part, on the no damages for delay clause. *Id*. at 1029. The trial court struck the complaint with leave to amend to bring the cause within any applicable exception to the rule that no damages for delay clauses are enforceable. *Id*. Burns filed a first-amended complaint alleging the city's "reckless indifference" to its obligations and breach of an "affirmative obligation." *Id*. The city filed a motion to dismiss. *Id*. In an agreed order, the trial court struck the motion to dismiss, with leave to amend. *Id*.

¶ 48 Burns filed a second-amended complaint alleging that in August 1982, the city issued its requirements for bidding and specifications for a monolithic sewer construction project. *Id*. Burns, a general contractor, submitted a bid and the city awarded him the contract. *Id*. Burns submitted a "critical path schedule" to the city, showing that all of the sewer construction work was to be finished before December 1, 1983. *Id*. The city promised to acquire the necessary easements allowing Burns access to the construction site so that it could proceed with the projected schedule of construction. *Id*.

¶ 49 Burns alleged the city failed to acquire the necessary easements until more than two months after the scheduled date of commencement. *Id*. Burns alleged it successfully completed the project on time despite the city's failure to comply with the contractual requirements. *Id*. at 1030. In count I, Burns alleged that the city's failure to acquire the easements demonstrated a wanton and reckless indifference to its legal obligation under the contract, and such reckless indifference was a recognized exception to the enforceability of the no-damage-for-delay clause contained in the contract. *Id*. Burns alleged that a result of the city's reckless failure to timely acquire the easements, it suffered damages of $2,200,000 resulting from substantial increased material, leasing and labor

costs, increased overhead and equipment costs, and lost profits. *Id*.

¶ 50 In count II, Burns alleged that the city's failure to warn Burns prior to February 17, 1983, of its inability to acquire the easements indicated a " 'wanton and reckless indifference to their legal obligations.' " *Id*.

¶ 51 The trial court struck the second-amended complaint with prejudice and dismissed the cause. *Id*. at 1031. The court found that the delay caused by the city was the type of occurrence which Burns had agreed to exculpate the city from and that the second-amended complaint failed to allege facts in support of the conclusion that the city was grossly negligent or acted in bad faith in acquiring the easement. *Id*.

¶ 52 Burns filed a motion for reconsideration and a request for leave to amend the second-amended complaint. *Id*. At the hearing on the motion for reconsideration, Burns argued that it needed to conduct discovery to make more specific allegations regarding the relevant exceptions to the "no damages for delay" clause. *Id*. at 1033. Burns asked the court to vacate the dismissal order and allow discovery that would help it "define information that will lead us to the city's reckless indifference to our rights under this contract." *Id*. at 1032. The trial court denied the motion for reconsideration. *Id*. at 1031. On appeal, we reversed and remanded, stating:

> "We agree that this case should not be decided on the basis of the single pleading before us at this time. The precise reasons for the two month delay in commencement of work under this contract are not within plaintiff's knowledge. Plaintiff is not required to allege facts with precision where the *necessary information* is within the defendant's knowledge and plaintiff has not had the benefit of discovery. ***

* * *

> *[T]he allegations in the second amended complaint are sufficient to state a claim* that comes within the umbrella of the recognized exceptions to the 'no damage for delay' provisions in the contract. The third amended complaint which plaintiff unsuccessfully sought to file even more sharply purports to fall within these exceptions. Plaintiff at this juncture should not be required to plead those factual underpinnings to support his cause of action which are largely subjective and wholly within the possession of the defendant, without first being permitted sufficient discovery to ascertain those facts.
>
> Therefore, at this stage of the pleadings, we cannot say there is no set of facts which could be developed through discovery under the pleading at issue here which would permit plaintiff to recover under an exception to the 'no damages for delay' clause. Therefore, dismissal of this cause on the basis of defendant's section 2-615 motion [citation] is, at best, premature." (Emphasis added.) *Id*. at 1034-35.

¶ 53 In contrast to *John Burns*, in which the plaintiff there stated a claim even in the absence of the requested discovery, plaintiff here has failed to state a claim for legal malpractice, aiding and abetting a breach of fiduciary duty, and interference with a testamentary expectation. Further, unlike *John Burns* in which the plaintiff there specified that the purpose of the discovery request was to discover facts supporting its allegation that the city engaged in reckless indifference to its rights under the contract, plaintiff here failed to specify the underlying purpose behind his discovery request. Plaintiff's discovery request was first made in his motion to reconsider the circuit court's dismissal of his interference with a testamentary expectation claim in his second-amended

complaint. Plaintiff requested that he be allowed to depose defendant because defendant "has complete knowledge of what he knew, what he did and when he knew what he knew." Plaintiff failed to specify what "knowledge" he was referring to, or how said "knowledge" was necessary to assist him in stating causes of action for legal malpractice, aiding and abetting a breach of fiduciary duty, and interference with a testamentary expectation. In the absence of such a showing, plaintiff is not entitled to the less-stringent pleading standard utilized in *John Burns* where "necessary" information is within the knowledge and control of defendant and is unknown to plaintiff. Also, in the absence of any showing of "necessary" information within defendant's exclusive knowledge and control, plaintiff has failed to show that a set of facts could be developed through discovery that would permit him to state a cause of action. Accordingly, unlike in *John Burns*, plaintiff was not entitled to depose defendant prior to the court's ruling on defendant's motion to dismiss. The circuit court committed no error in denying plaintiff's motion to reconsider and dismissing the interference with a testamentary expectation count with prejudice. See *Bank of America, N.A. v. Ebro Foods, Inc.*, 409 Ill. App. 3d 704, 709 (2011) (*de novo* standard of review applies where, as here, plaintiff's motion to reconsider is based on the trial court's purported misapplication of existing law.)

¶ 54 Conclusion

¶ 55 For the foregoing reasons, we affirm the circuit court.

¶ 56 Affirmed.