2011 IL App (1st) 103113-U

FOURTH DIVISION
November 3, 2011

No. 1-10-3113

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

ABRAHAM UNTERMYER,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 09 L 3646
	)	
REED SMITH, f/k/a SACHNOFF WEAVER,	)	The Honorable
	)	Kathy M. Flanagan,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Pucinski and Sterba concurred in the judgment.

ORDER

HELD: Plaintiff's fifth amended complaint was properly dismissed pursuant to section 2-615 of the Illinois Code of Civil Procedure when he (1) failed to allege sufficient facts to demonstrate that his father's intent, in establishing his relationship with defendant in the preparation of his testamentary documents, was to benefit plaintiff by avoiding all estate taxes; and (2) failed to allege sufficient facts to demonstrate that defendant owed him a duty in the representation of his father's estate in probate.

¶ 1 Plaintiff-appellant Abraham Untermyer (plaintiff) brought suit against defendant-

appellee the law firm of Reed Smith, f/k/a Sachnoff Weaver (defendant), alleging legal negligence in the drafting of his father's estate planning documents and in the representation of the estate in probate. Following the filing of his complaint and five amended complaints, plaintiff's suit was dismissed in its entirety. He appeals, contending that the trial court erred in dismissing his suit because he alleged sufficient facts to support his pleadings, including that defendant owed him a duty of care as a beneficiary of the estate, that defendant breached this duty, that he was damaged by this breach and that his damages were proximately caused by defendant's breach. He asks that we reverse the judgment of the trial court. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 The facts of this cause are relatively undisputed.

¶ 4 Plaintiff's father, Frank Untermyer, retained defendant to prepare testamentary documents for his estate, including his will, a first codicil, a trust in the name of his second wife Marcia Baum (the Baum Trust), and an amendment to that trust (the Amended Baum Trust). These documents indicated that plaintiff, as well as his siblings and others, were to be the beneficiaries of the estate. Frank died in October 2004, and his estate, under the representation of defendant, was submitted to probate on October 24, 2004.

¶ 5 In April 2005, Marcia brought suit against the estate challenging the Baum Trust, which had been part of an antenuptial agreement to protect Frank's assets, and asserting that Frank was of unsound mind and undue influence when he executed the Amended Baum Trust and his will. By August 2005, defendant, as attorneys for the estate, negotiated a settlement with Baum.

Upon reaching an agreement with her, defendant sought plaintiff's approval of the settlement, as he was a beneficiary of the estate. Plaintiff objected and did not sign the settlement agreement; however, the other beneficiaries did. Accordingly, Baum eventually withdrew her suit against the estate in exchange for $600,000.

¶ 6 By January 2007, the estate submitted its final report. It was valued at $6,250,000; $2,800,000 was paid in estate taxes, defendant collected $155,000 in attorney fees, and $530,000 was to be paid to each of the beneficiaries. In March 2007, defendant received approval of its report and an accounting from the probate court and released the final shares of the estate to the beneficiaries, including plaintiff. Plaintiff did not sign his receipt and approval of the closing of the estate.

¶ 7 In March 2009, plaintiff filed a complaint for legal malpractice and "professional negligence" against defendant regarding how defendant handled the estate. Plaintiff alleged that defendant committed "a serious and unforgiveable [*sic*] error" in that it should have sheltered more of Frank's assets from probate and estate taxes; he also alleged that defendant was negligent in advising the estate to settle the Baum litigation and billed unreasonable and unnecessary fees. Plaintiff claimed that, because of defendant's conduct, he was damaged in the "approximate amount of $700,000," an amount he calculated he would have enjoyed as his part of his share of the estate had defendant acted properly. In response, defendant filed a motion to dismiss. The trial court granted defendant's motion, but allowed plaintiff leave to refile his complaint.

¶ 8 Plaintiff filed an amended complaint. In addition to his prior claims, plaintiff alleged that

defendant failed to assist Frank to utilize ways to avoid probate taxes even though he was "interested" in doing so, as evidenced by his establishment of the Baum Trust. Defendant filed a motion to dismiss and, on August 21, 2009, the trial court granted its motion without leave to replead. However, plaintiff filed a motion to reconsider, as well as a proposed second amended complaint. This time, he alleged that Frank's establishment of the Baum Trust showed his "intent" to avoid probate taxes. On October 2, 2009, in an order upon reconsideration, the trial court granted plaintiff's motion in part and denied it in part. The court stated that plaintiff was essentially presenting two different categories of alleged malpractice: allegations of negligence following Frank's death in representing the estate, and allegations of negligence prior to his death in the drafting of the estate documents. The court noted that while plaintiff had no standing under the former since attorneys of an estate owe no duty to beneficiaries, there could potentially be a viable claim under the latter if plaintiff could prove up negligence. However, regarding plaintiff's complaint, amended complaint and proposed second amended complaint, the court found that, as of this point, none of these contained "the requisite degree of factual specificity to satisfy a cause of action for legal malpractice." Accordingly, the court vacated its August 21, 2009 order; it then reaffirmed its grant of defendant's motion to dismiss with respect to the legal malpractice count regarding defendant’s handling of the estate, and allowed plaintiff leave replead his count of legal malpractice with respect to the drafting of the estate documents. The trial court cautioned plaintiff that, for this remaining count, he must present specific allegations of how the documents were drafted, how they should have been drafted but were not, what the affect would have been had they been correctly drafted, and how the erroneously drafted

documents resulted in the estate having to incur the taxes it did.

¶ 9 On October 28, 2009, plaintiff filed his third amended complaint. This time, with the dismissal of his count regarding defendant's handling of the estate in effect,[1] plaintiff alleged that defendant committed a "planning error" in drafting the estate documents when it failed to use an "AB Trust" to shelter Frank's assets. Defendant again filed a motion to dismiss and, on February 1, 2009, the trial court again granted its motion. In its order, the court noted that while plaintiff seemingly attempted to allege the points the court asked him to previously when it allowed him to replead this remaining count, he did so "in a conclusory fashion without setting forth the specific, relevant facts which support the conclusory allegations." Accordingly, it found that plaintiff's complaint was "insufficiently pled." However, the court, once again, allowed plaintiff leave to replead his remaining count regarding defendant's drafting of the estate documents.

¶ 10 In February 2010, plaintiff filed a fourth amended complaint, which was very similar to his third amended complaint alleging defendant's failure to use an AB Trust in drafting Frank's estate documents to minimize taxes. Defendant again filed a motion to dismiss for lack of sufficient pleadings, stating that plaintiff failed to allege any facts to show that defendant had a duty to minimize Frank's estate taxes for plaintiff's benefit, that Frank intended to shelter his assets for plaintiff's benefit, that Frank communicated this intent to defendant, or how the documents should have been drafted. On June 14, 2010, the trial court again granted defendant's

[1]Again, this count was dismissed with prejudice. However, we note for the record that plaintiff continued to replead it in this, and his subsequent, amended complaints in order to properly preserve the issue for appeal.

motion. In its order, the court stated that, "[d]espite a few changes to the current pleading, *** [p]laintiff continues to plead in a conclusory fashion without setting forth the specific, relevant facts which support the conclusory allegations." Thus, once again finding that plaintiff's complaint was "insufficiently pled," the court dismissed his fourth amended complaint but allowed him to replead.

¶ 11 In July 2010, plaintiff filed a fifth amended complaint (*i.e.*, his sixth pleading in this cause). Upon abandoning his assertions regarding defendant's failure to use an AB Trust, plaintiff now alleged that defendant was negligent in its drafting of Frank's estate documents because it failed to use an irrevocable trust to shelter Frank's assets from taxes. Plaintiff claimed that had defendant done so, Frank would have increased his income while alive, would have been able to make lifetime gifts out of such a trust and, consequently, would not have had to pay any estate taxes upon his death. Once again, defendant moved to dismiss. In addition to explaining that the type of trust plaintiff described was a legal impossibility under tax laws, defendant again asserted that plaintiff's complaint failed to alleged any facts to show that defendant had a duty to minimize Frank's estate taxes for plaintiff's benefit, that Frank intended to shelter his assets for plaintiff's benefit, that Frank communicated this intent to defendant, or how the estate documents should have otherwise been drafted.

¶ 12 On October 12, 2010, the trial court granted defendant's motion to dismiss, this time with prejudice. Again outlining the specific facts plaintiff needed to allege to sustain a proper complaint, the court stated that, "[f]or the sixth time, *** [p]laintiff has failed to heed this Court's instructions and has continued to plead in a conclusory fashion without setting forth the

specific, relevant facts which support the conclusory allegations." Therefore, in addition to finding that his amended complaint "again, fails to state a cause of action," the court stated that, "[a]fter six failed attempts, and in light of the circumstances here, it does not appear [p]laintiff will be able to state a cause of action [and] *** there is no point in allowing another attempt at re-pleading."

¶ 13 ANALYSIS

¶ 14 Plaintiff appeals from all of the trial court's orders in this cause, *i.e.*, its August 21, 2009 dismissal order, its October 2, 2009 partial denial of his motion to reconsider, and its February 2, 2010, June 14, 2010 and October 12, 2010 dismissal orders. Just as in the lower court, he makes two main claims on appeal. First, he alleges that the trial court's dismissal of his count for negligence in defendant's drafting of Frank's estate documents was erroneous because he, as a direct beneficiary of the estate, alleged sufficient facts to support this claim, including Frank's intent, how the documents should have been drafted, how they were drafted, and the effect of defendant's errors. Second, he alleges that the trial court's dismissal of his count for negligence in defendant's representation of Frank's estate was erroneous because he sufficiently alleged that defendant should not have settled Baum's claim against the estate and that defendant's fees were excessive.

¶ 15 We begin with the appropriate standard of review for this cause. Plaintiff's complaint and all his amended complaints were dismissed pursuant to section 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2008)). A motion to dismiss pursuant to section 2-615 attacks the legal sufficiency of the complaint by alleging defects on its face. See

Fitch v. McDermott, Will and Emery, LLP, 401 Ill. App. 3d 1006, 1010 (2010); *Bunting v. Progressive Corp.*, 348 Ill. App. 3d 575, 580 (2004). Upon review of the grant of a section 2-615 motion, we examine the allegations of the complaint in the light most favorable to the plaintiff and accept as true all well-pled facts and reasonable inferences therefrom. See *Fitch*, 401 Ill. App. 3d at 1011; *Bunting*, 348 Ill. App. 3d at 380.

¶ 16 However, it is well-established that Illinois is a fact-pleading jurisdiction, mandating that plaintiffs allege facts sufficient to bring their claims within the scope of the cause of action being asserted. See *Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 408 (1996). Therefore, all the elements of a cause of action, while not required to be proven at this stage in the litigation process, must be alleged with specificity in order to survive a motion to dismiss; conclusions of law and conclusory allegations unsupported by specific facts are not deemed admitted and, therefore, cannot support a plaintiff's cause of action. See *Visvardis v. Eric P. Ferleger, P.C.*, 375 Ill. App. 3d 719, 724 (2007). If a plaintiff's allegations are not sufficient to state a cause of action upon which relief may be granted, then dismissal of his cause is appropriate. See *Pecoraro v. Balkonis*, 383 Ill. App. 3d 1028, 1033 (2008). Ultimately, our review follows a *de novo* standard. See *Fitch*, 401 Ill. App. 3d at 1011 (appeal from dismissals pursuant to section 2-615 are reviewed *de novo*).

¶ 17 A cause of action for legal malpractice or legal negligence requires, in addition to an attorney-client relationship, a duty arising from that relationship, a breach of that duty, and actual damages proximately caused by the breach. See *Fitch*, 401 Ill. App. 3d at 1023; *Palmros v. Barcelona*, 284 Ill. App. 3d 642, 646 (1996). Accordingly, a plaintiff must allege sufficient

facts to support each and every one of these elements to survive a section 2-615 motion to dismiss. See, *e.g.*, *Bianchi v. Savino Del Bene International Freight Forwarders, Inc.*, 329 Ill. App. 3d 908, 918 (2002); *Palmros*, 284 Ill. App. 3d at 646-47. If he fails to allege even one element with accompanying sufficient facts, his cause of action must be dismissed. See, *e.g.*, *Bianchi*, 329 Ill. App. 3d at 918 (finding section 2-615 dismissal proper where the plaintiff's pleadings were legally defective because she did not plead sufficient facts alleging one element of negligence); *Palmros*, 284 Ill. App. 3d at 646-47 (with even just one element missing, no cause of action can stand).

¶ 18 As noted above, plaintiff presents two contentions on appeal. We address each separately.

¶ 19 A. Alleged Negligence in Drafting the Estate Documents

¶ 20 Plaintiff's first contention on appeal is that the trial court erred in dismissing his claim against defendant for legal malpractice in its drafting of Frank's estate documents. His position is that, as a direct and intended beneficiary of the estate, defendant owed him a duty to "ensure that the documents were designed to fulfill the intent of Frank," and to "review the documents carefully to ascertain that they would benefit him [plaintiff]." He asserts that he provided more than sufficient facts in his fifth amended complaint to sufficiently allege the required elements when he discussed defendant's duty to shelter Frank's assets for plaintiff's benefit, defendant's breach of this duty when it did not draft the estate documents accordingly, and the damages he suffered proximately caused by this breach.

¶ 21 The parties both focus their arguments on Frank's intent at the time he had defendant

prepare his testamentary documents, and rightly so. Just as the trial court noted in its partial grant of plaintiff's motion to reconsider, in a testamentary situation as is present here, a nonclient third-party may have a cause of action for negligence against an attorney regarding the drafting of documents, even though he did not have a contract with that attorney for services. See *Jewish Hospital of St. Louis, Missouri v. Boatmen's National Bank of Belleville*, 261 Ill. App. 3d 750, 759 (1994); *Rutkoski v. Hollis*, 235 Ill. App. 3d 744, 749 (1992). However, to properly allege such a cause of action, the nonclient must first demonstrate that he is a third-party intended beneficiary of the relationship between the attorney and the client from which the documents resulted. See *Jewish Hospital*, 261 Ill. App. 3d at 759; accord *McLane v. Russell*, 131 Ill. 2d 509, 517-18 (1989); *Rutkoski*, 235 Ill. App. 3d at 748. In other words, he must plead and prove that the primary purpose and intent of the relationship the client formed with the attorney was to benefit the nonclient, rather than the client. See *Jewish Hospital*, 261 Ill. App. 3d at 759; *Rutkoski*, 235 Ill. App. 3d at 749 (citing *McLane*, 131 Ill. 2d at 515). Whether this was truly the case turns on the intent of the client and the attorney. See *Jewish Hospital*, 261 Ill. App. 3d at 760; *Rutkoski*, 235 Ill. App. 3d at 749. "Evidence of that intention is derived from a consideration of all the circumstances surrounding the parties" at the time of the execution of the testamentary documents and the time period during which the attorney provided tax advice to the client. *Jewish Hospital*, 261 Ill. App. 3d at 760.

¶ 22 Accordingly, the key to the instant case is Frank's and defendant's intent at the time Frank had defendant execute his testamentary documents and he accepted its tax advice. More specifically, we must determine whether plaintiff adequately pled and provided sufficient factual

support for his conclusion that Frank's intent while working with defendant was to benefit him (plaintiff) as a beneficiary, rather than Frank himself as the client.

¶ 23 The crux of plaintiff's fifth amended complaint is his allegation that defendant was negligent in failing to use an irrevocable trust to shelter Frank's assets to avoid the payment of any estate taxes, thereby increasing the distribution to him, as Frank's beneficiary, upon Frank's death. In asserting that he pled sufficient factual allegations to support a conclusion that Frank's intent was to benefit him in this way, namely, by avoiding the payment of any estate tax, plaintiff points to his allegations contained in paragraphs 7, 13, 14 and 22 of that complaint. These paragraphs state:

> "7. At the time that he retained [defendant], it was Frank Untermyer's stated intent that (a) a large portion of his assets would pass to his children, including [plaintiff] and (b) his estate would be shielded to the greatest extent allowed by law from estate taxes.
>
> ***
>
> 13. Frank Untermyer retained [defendant] for the purpose of (a) maximizing distribution of his assets to his intended beneficiaries and (b) shielding his estate from taxes to the greatest extent allowed by law.
>
> 14. For instance, Frank Untermyer's Will makes provision for a Generation-Skipping Trust ("GST") and states that 'it is my intention to take full advantage of my GST exemption and the trustee (or my executor, as the case may be) shall take whatever tax elections and allocations the trustees deem necessary

> or advisable to fulfill this intention.' Among other things, this statement shows that Frank Untermyer wanted to maximize the assets of his Estate for its direct and intended beneficiaries.
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> ***
>
> 22. [Defendant] failed to utilize ways to avoid excessive probate taxes. As shown by his establishment of the GST and the irrevocable trust of Ethel Untermyer, Frank Untermyer's intent was to utilize legitimate methods of tax avoidance to further benefit [plaintiff] and the other direct and intended beneficiaries. The irrevocable trust was not drafted by [defendant], but demonstrates Frank Untermyer's interest in utilizing such estate planning mechanisms to limit taxation and maximize transfers to the intended beneficiaries."

However, upon examination of these paragraphs, it is clear that they do not provide sufficient facts to support the conclusion, as plaintiff claims, that it was Frank's intent to benefit plaintiff with the establishment of his attorney-client relationship with defendant.

¶ 24 First, paragraphs 7 and 13 are merely conclusory statements wherein plaintiff fails to provide any facts. That is, in them, plaintiff asserts that Frank's "stated intent" and "purpose" in hiring defendant was to minimize his estate taxes as much as possible and maximize the distribution of assets to plaintiff, one of his beneficiaries. However, this is all that plaintiff includes in these paragraphs. He does not present any facts to demonstrate where or to whom he made his "stated intent" and "purpose" known, nor does he indicate in any way that Frank

wanted to form an irrevocable trust, whereby he would have had to give up control of his assets while alive, to later avoid the payment of estate taxes. As we noted earlier, conclusions of law and conclusory allegations unsupported by specific facts are not deemed admitted and, therefore, cannot support a plaintiff's cause of action. See *Visvardis*, 375 Ill. App. 3d at 724. Therefore, these paragraphs cannot be considered.

¶ 25 Next, in paragraph 14, plaintiff mentions a provision contained in Frank's will for a GST exemption and his "intention" to take advantage of it and "whatever tax elections" necessary to make this happen. Granted, plaintiff in this paragraph does point to facts; *i.e.*, unlike paragraphs 7 and 13, paragraph 14 asserts at least some factual basis regarding the relationship between Frank and defendant.

¶ 26 However, this assertion does not support a conclusion that Frank intended, with his relationship with defendant, to avoid paying any estate tax so as to thereby benefit plaintiff. Rather, the assertion has nothing to do with the estate as a whole nor with Frank's intent to avoid paying any estate taxes. Upon our examination of Frank's will, which is included in the record, we note that "Article Seventh" orders his trustee to create two separate trusts: a GST Exempt Trust and a GST Non-Exempt Trust. Frank then states that the GST Exempt Trust is to contain an amount equal to his federal GST exemption otherwise remaining unallocated at his death and that the trustee should allocate any remainder of the trust estate to the GST Non-Exempt Trust, in an effort to "take full advantage of [his] GST exemption." Frank's intentions regarding the establishment of a GST are clear: this article in his will demonstrates that Frank wanted to take advantage of a *GST exemption*. And, defendant drafted the article accordingly–obtaining the

GST exemption for Frank to avoid taxation on the assets contained in the GST. It does not mention or even allude to any probate taxation to which his estate *as a whole* would be subject. Without more, the fact that Frank had defendant create a GST for him in an effort to obtain a GST exemption for the property contained in that trust does not support the conclusion that Frank sought to avoid paying any estate tax in order to benefit plaintiff.

¶ 27 Nor does the fact he states in paragraph 22 concerning Frank's establishment of an irrevocable trust for this first wife, Ethel. Plaintiff admits in this paragraph that defendant did not even draft this trust for Frank; while defendant drafted the Baum Trust for Frank's second wife, the trust established for Ethel was created before Frank's relationship with defendant. Plaintiff does not allege anywhere in his fifth amended complaint that defendant was even aware of the Ethel trust, nor is Ethel mentioned anywhere in any of the testamentary documents defendant drafted for Frank (the will, codicil, the Baum Trust or the Amended Baum Trust). Moreover, plaintiff provides no facts to indicate the terms of the Ethel trust show that Frank created it to avoid estate taxation, that it did avoid taxation, and that Frank established it for plaintiff's advantage. Furthermore, the contradiction here is not lost on us: interestingly, the trust Frank created for first-wife Ethel (prior to his relationship with defendant) was irrevocable, whereas the trust he had defendant create for second-wife Baum was revocable. In fact, in paragraph 16 of his own complaint, plaintiff admits that "[l]earning from his bitter divorce" from Ethel, wherein she received "a valuable house and a very favorable irrevocable trust," Frank established the revocable trust for Baum as part of an antenuptial agreement. This would indicate to us a clear intent on Frank's part to retain control over his property, rather than to place

it all in an irrevocable trust as plaintiff contends was his intent, to benefit his beneficiaries by avoiding probate taxation. Ultimately, regarding paragraph 22, we fail to see how plaintiff's citation to Frank's creation of the Ethel trust, before Frank's relationship with defendant was even formed and of which there is no proof that defendant was aware, has any significance in demonstrating that Frank's intention in hiring defendant to prepare the testamentary documents at issue (of which the Ethel trust is not included) was to benefit plaintiff.

¶ 28 In addition to plaintiff's failure to allege sufficient facts in his fifth amended complaint to show Frank's intent in retaining defendant was to benefit him by avoiding all estate taxation so as to establish a cause of action of legal negligence regarding defendant's drafting of Frank's testamentary documents, we also note, as defendant does, that several of plaintiff's allegations and exhibits attached to his fifth amended complaint actually contradict his conclusion. In paragraphs 25 and 28 of his fifth amended complaint, as well as throughout his appellate brief, plaintiff alleges that Frank "gave gifts" and was committed to "make gifts" of his assets throughout his life. However, had defendant created an irrevocable trust of Frank's assets to avoid estate taxation, as plaintiff alleges it was negligent in not doing, Frank would have lost all control over his assets and would have been prohibited from making gifts of them, as plaintiff claims he often did. See *People v. Northern Trust Company*, 324 Ill. 625, 628-29 (1927) (with an irrevocable trust, the donor retains no income or control over the *res* of the trust); see, *e.g.*, *Dennis v. Dennis*, 132 Ill. App. 2d 952 (1971) (irrevocable trusts require donor to relinquish control over trust assets).

¶ 29 Moreover, again, we note that Frank had defendant establish the Baum Trust as a

revocable trust. As exhibited by the trust itself, which is also contained in the record, it states that Frank retained the right amend or revoke it; we further know that Frank did so multiple times, as there are several amendments to the originally drafted Baum Trust in the record before us. Clearly, Frank was more concerned with retaining control over at least some of his property than he was with defendant helping him to avoid all estate taxation through the use of an irrevocable trust in order to benefit his heirs, as plaintiff asserts. See, *e.g.*, *Dennis*, 132 Ill. App. 2d 952 (comparing irrevocable trusts where control is lost to revocable trusts where donor maintains control over assets therein).

¶ 30 Finally, whereas plaintiff himself has called attention to certain limited articles of Frank's will in the record in an effort to allege he wanted to avoid estate taxation, our review of his will as a whole yields a different result. In direct contradiction to plaintiff's allegations, there are several, and repeated, provisions in Frank's will demonstrating that Frank knew that not all of his assets would be sheltered from estate taxes. For example, at its outset, Frank's will states that his executor "shall pay from the residue of my estate all estate and inheritance taxes." He also refers repeatedly to "property in which [he] may have a qualifying income interest for life" and "property over which [he] may have power of appointment" at the time of his death, signifying an intent to retain control over at least some of his assets--not to place them all in an irrevocable trust to be managed by someone else for the sake of avoiding estate taxes. In addition, Frank mentions "tax" payments and "tax effects" throughout his will.

¶ 31 From all this, we find that plaintiff did not adequately plead and provided sufficient factual support for his conclusion that Frank's intent while working with defendant was to benefit

him (plaintiff) as a beneficiary, rather than Frank himself as the client, as is required to sustain a cause of action for legal negligence in the drafting of testamentary documents. See *Jewish Hospital*, 261 Ill. App. 3d at 759; accord *McLane*, 131 Ill. 2d at 517-18; *Rutkoski*, 235 Ill. App. 3d at 748. While plaintiff does allege some facts related to Frank's relationship with defendant, they do not solidly ascertain Frank's intent nor are they in line with other facts evident in the record that contradict plaintiff's assertions. Accordingly, we conclude that the dismissal of plaintiff's claim against defendant for legal malpractice in its drafting of Frank's estate documents pursuant to section 2-615 of the Code was appropriate.

¶ 32 B. Alleged Negligence in Representing the Estate

¶ 33 Plaintiff’s second, and final, contention on appeal is that the trial court erred in dismissing his claim against defendant for the negligent representation of Frank’s estate following Frank’s death, which the court did with prejudice in its October 2, 2009 order. The trial court explained that plaintiff had no standing to assert such a claim; however, plaintiff continued to reassert this claim in each of his subsequent amended complaints in an effort to preserve the issue for appeal.

¶ 34 Upon our review of the record in this cause, as well as the pertinent case law, we, too, find that plaintiff’s claim fails, for multiple reasons.

¶ 35 Similar to plaintiff's claim regarding the drafting of estate documents, our courts have long held that an attorney for an estate does not owe any duty to the beneficiaries of an estate regarding his representation of the estate. See *Grimes v. Saikley*, 388 Ill. App. 3d 802, 818 (2009); *In re Estate of Lis*, 365 Ill. App. 3d 1, 18 (2006); *Neal v. Baker*, 194 Ill. App. 3d 485,

486 (1990). Their explanation is well-reasoned. See *Grimes*, 388 Ill. App. 3d at 816-18 (citing numerous cases to detail this reasoning). Generally, a fiduciary relationship triggering a legal duty arises only between an attorney and his client. See *Grimes*, 388 Ill. App. 3d at 817 (citing *Neal*, 194 Ill. App. 3d at 487, citing *Pelham v. Griesheimer*, 92 Ill. 2d 13, 20-23 (1982)). Thus, an attorney does not owe a nonclient a duty arising out of the attorney-client relationship, except under the most limited circumstances. See *Grimes*, 388 Ill. App. 3d at 817 (citing *Neal*, 194 Ill. App. 3d at 487, citing *Pelham*, 92 Ill. 2d 13, 20-21). Such a circumstance in a testamentary situation would require the nonclient to prove that the attorney-client relationship was formed with the specific purpose and intent to benefit the nonclient, so that the attorney's representation was clearly intended to confer a benefit upon him, rather than upon the client. See *Grimes*, 388 Ill. App. 3d at 817 (citing *Neal*, 194 Ill. App. 3d at 487, citing *Pelham*, 92 Ill. 2d 13, 20-21). Otherwise, an attorney who represents the estate owes his "first and only allegiance" to the estate, not to any beneficiary. *Gagliardo v. Caffrey*, 344 Ill. App. 3d 219, 228 (2003); see also *Lis*, 365 Ill. App. 3d at 17. Therefore, even though a beneficiary is intended to benefit from the estate, the attorney for the estate cannot be held to owe a duty to the beneficiary due to the potentially adverse relationship between the estate's interest in properly administering the assets among all the beneficiaries and the beneficiary's own interest in obtaining these assets for himself. See *Lis*, 365 Ill. App. 3d at 18. Accordingly, a beneficiary of an estate cannot maintain a claim of legal negligence or malpractice against the attorney of the estate regarding his representation of the estate. See *Lis*, 365 Ill. App. 3d at 17-18 (and its citations of multiples cases holding same).

¶ 36 This legal reasoning leads us to several points that defeat the viability of plaintiff's claim of defendant's alleged negligence in representing Frank's estate following his death. First, from this well-established case law comes the clear legal concept that plaintiff, as one of the beneficiaries of Frank's estate, does not, nor ever did, have standing to assert the instant claim. Standing, which is required to institute a lawsuit, requires some injury in fact to a legally cognizable interest. See *Fitch*, 401 Ill. App. 3d at 1028 (citing *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999). It prevents those who have no real interest in a controversy from bringing a meritless lawsuit by ensuring that issues are raised by those with a real interest in the outcome of the controversy at hand. See *Fitch*, 401 Ill. App. 3d at 1028. As we noted at the outset of our decision, the assertion of a claim of legal malpractice for negligence requires the assertion and factual support of an attorney-client relationship. See *Fitch*, 401 Ill. App. 3d at 1023; *Palmros*, 284 Ill. App. 3d at 646. Simply put, defendant's client was Frank and after his death, Frank's estate; defendant's first and only allegiance, then, was to them–never to plaintiff. Thus, because a beneficiary of an estate cannot maintain a claim of negligence or malpractice against the attorney of the estate, plaintiff has no standing to do so here; plaintiff has no legally cognizable interest.

¶ 37 Next, even if plaintiff had standing, his claim was properly dismissed because he cannot legally allege the required duty element of his claim against defendant. This is because, not only does the law make clear that in a testamentary situation the only duty owed by the estate's attorney is to the estate, but also because that duty is not assignable to anyone else, including to a beneficiary, or heir, of that estate. See *Grimes*, 388 Ill. App. 3d at 816-17. Again, as we noted at

the outset of our decision, in addition to an attorney-client relationship, a plaintiff asserting a claim of legal negligence must sufficiently plead that he was owed a duty arising from that relationship; if he cannot, his claim must be dismissed. See *Fitch*, 401 Ill. App. 3d at 1023; *Palmros*, 284 Ill. App. 3d at 646. Pursuant to the case law we have just reviewed, any duty defendant owed was solely to Frank and Frank's estate. See *Grimes*, 388 Ill. App. 3d at 817; *Lis*, 365 Ill. App. 3d at 17; *Neal*, 194 Ill. App. 3d at 487. This duty is not assignable to plaintiff, precisely because of the personal relationship between Frank and defendant and the potential for abuse. See *Grimes*, 388 Ill. App. 3d at 816. This is our state's public policy, and we find no reason to depart from it now, especially under the instant circumstances. See *Grimes*, 388 Ill. App. 3d at 816 (citing cases from multiple districts, including the First District's *Brandon Apparel Group v. Kirkland & Ellis*, 382 Ill. App. 3d 273, 282 (2008), to reaffirm that legal malpractice claims cannot be assigned in Illinois).

¶ 38 Finally, even if plaintiff could somehow bypass these standing and nonassignability principles, he, at the end of the day, did not sufficiently plead the duty requirement of his negligence action regarding defendant's representation of Frank's estate following his death.

¶ 39 We have recognized that our courts have mentioned that, under some extremely limited circumstances, an attorney may owe a nonclient a duty in a testamentary situation. See *Grimes*, 388 Ill. App. 3d at 817 (citing *Neal*, 194 Ill. App. 3d at 487, citing *Pelham*, 92 Ill. 2d 13, 20-21). However, as we stated earlier, in order to survive a motion to dismiss, this would require the nonclient to plead with sufficient factual support that the attorney-client relationship was formed with the specific purpose and intent to benefit the him, rather than the client. See *Grimes*, 388

Ill. App. 3d at 817 (citing *Neal*, 194 Ill. App. 3d at 487, citing *Pelham*, 92 Ill. 2d 13, 20-21).

¶ 40 Reviewing plaintiff's complaint and amended complaints as contained in the record, it is clear that he never makes this allegation, let alone provides sufficient factual support for it. Rather, regarding his assertion of legal negligence in defendant's representation of Frank's estate, he claims only that defendant committed malpractice because it settled with Baum instead of defending the estate against her lawsuit (which he claimed was "baseless" and easily refutable by defendant), and because defendant charged the estate fees which he claimed were unreasonable, unnecessary, and unlike those other attorneys would have charged for the same work. However, other than these mere assertions, he does not provide any facts regarding why the Baum litigation was meritless or why defendant should not have settled, or how defendant's fees were unnecessary or excessive. In fact, plaintiff goes into no detail at all about the Baum litigation or how defendant charged Frank for its work.

¶ 41 Clearly, plaintiff fails to meet the requirement to allege and show with any factual support that Frank formed his relationship with defendant with the specific purpose and intent to benefit plaintiff rather then Frank, which would have otherwise provided an avenue for plaintiff to assert this claim for legal negligence. Instead, the closest plaintiff comes to doing so are his conclusions that Frank sought defendant's representation because he was "interested" in, and later, had the "intent" to, avoid estate taxes as evidenced by his creation of the Baum Trust. However, these allegations are just that: conclusions. Obviously, the Baum Trust had nothing to do with plaintiff; that legal creation was between Frank and defendant for Frank's second wife's interest. And, in his complaint and amended complaints, plaintiff states only that Frank's intent

in hiring defendant to represent his estate was to save money and avoid taxes. Plaintiff presents no facts to support that Frank was interested in or had the intent to have defendant represent his estate for the specific purpose to benefit plaintiff, rather than to, for example, benefit one of the other multiple beneficiaries of his estate or, simply, to just take care of his testamentary needs for his own peace of mind. Without more, plaintiff's allegations must fail.

¶ 42 Therefore, because he lacks standing to assert a claim of legal negligence regarding defendant's representation of Frank's estate, because there is no ascertainable duty for such a claim legally or under the present circumstances, and because he fails to allege with any factual specificity that one may have existed, we find that plaintiff did not plead a proper claim under this legal theory and, accordingly, that dismissal of his complaint and amended complaints was appropriate under section 2-615.

¶ 43 Ultimately, while our State fosters a liberal policy when it comes to allowing plaintiffs to amend their complaints, plaintiffs do not have an absolute right to do so. See *1515 North Wells L.P. v. 1513 North Wells, LLC*, 392 Ill. App. 3d 863, 870 (2009). Whether to allow a plaintiff to amend his complaint lies within the sound discretion of the trial court, and we as a reviewing court will not overturn its decision unless it committed an abuse of that discretion. See *1515 North Wells*, 392 Ill. App. 3d at 870. Here, the record shows that the trial court gave plaintiff six chances in which to file a proper complaint at law pleading a viable cause of action against defendant for legal negligence in compliance with all the required rules. Plaintiff took these opportunities but, after the trial court's repeated reminders that his amendments lacked the requisite degree of factual specificity, and even after its precise outline to plaintiff of what facts

he would need to allege to survive a motion to dismiss, plaintiff never heeded the court's advice. Instead, he made "a few changes to" his pleadings each time until, "[f]or the sixth time," he again asserted his pleadings in a conclusory fashion without setting forth specific, relevant facts to support his allegations.

¶ 44 We find this to have been ample opportunity for the plaintiff to file a viable complaint and, therefore, we cannot say that the trial court abused its discretion in dismissing plaintiff's case with prejudice. See, *e.g.*, *Schiller v. Mitchell*, 357 Ill. App. 3d 435, 453 (2005) (trial court's dismissal of amended complaint with prejudice was not abuse of discretion where it gave the plaintiff three chances to properly plead causes of action, amounting to "ample opportunity" to do so); *Plocar v. Dunkin' Donuts of America, Inc.*, 103 Ill. App. 3d 740, 750 (1981) (trial court properly brought to end litigation by dismissing second amended complaint with prejudice after having allowed the plaintiffs three opportunities to state cause of action); *Evans v. Bachman*, 78 Ill. App. 3d 1107, 1112 (1979) (trial court did not abuse discretion in refusing to allow the plaintiff to file third amended complaint).

¶ 45 CONCLUSION

¶ 46 Accordingly, for all the foregoing reasons, we affirm the judgment of the trial court dismissing plaintiff’s complaint and amended complaints for failure to state a cause of action for legal malpractice or negligence against defendant.

¶ 47 Affirmed.