

FIRST DIVISION
August 31, 2015

No. 1-14-0768

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

MAHMOUD M. SALEH,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	
)	
AZULAY SEIDEN LAW GROUP, AZULAY,)	No. 12 L 8274
HORN, & SEIDEN, LLC, GLENN SEIDEN,)	
STANLEY HORN, LINDA BABICH, ROLAND)	
LARA, SHANNON M. SHEPARD, and JOANE)	
ACOSTA,)	Honorable
)	Lynn M. Egan,
Defendants-Appellees.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

Held: We hold that the dismissal of plaintiff's complaint pursuant to section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)) is proper because plaintiff's claim regarding defendants' alleged improper legal representation is not a legally recognized cause of action under the Illinois Consumer Fraud and Deceptive Practices Act (815 ILCS 505/1 *et seq.* (West 2014)).

¶ 1 Plaintiff, Mahmoud Salah, filed a two-count verified amended complaint alleging defendants Azulay Seiden Law Group; Azulay, Horn, & Seiden, LLC; Glenn Seiden; Stanley Horn; Linda Babich; Roland Lara; Shannon Shepherd; and Joane Acosta¹ violated the Illinois Consumer Fraud and Deceptive Practices Act (Act) (815 ILCS 505/1 *et seq.* (West 2014)) and committed a breach of their fiduciary duties. Plaintiff's allegations are based on defendants' alleged fraudulent and deceptive legal representation of his relative in both Illinois criminal proceedings and federal deportation proceedings. Defendants filed a combined motion to dismiss pursuant to section 2-619.1 of the Illinois Code of Civil Procedure (Code). 735 ILCS 5/2-619.1 (West 2012). The circuit court found plaintiff's claims were time-barred, and granted defendants' motion pursuant to section 2-619(a)(5) of the Code. 735 ILCS 5/2-619(a)(5) (West 2012).

¶ 2 Plaintiff, *pro se*, raises no claim of error regarding the dismissal of his allegation of breach of fiduciary duty, but he does raise the following issues for our review addressing his claim under the Act: (1) whether the negligent continuous representation rule, the discovery rule, defendants' alleged fraudulent concealment, the doctrine of equitable estoppel, or the unclean hands doctrine negate defendants' statute of limitations defense; (2) whether Illinois should adopt the continuous representation rule; and (3) whether this court should, *sua sponte*, ask the Illinois Attorney Registration & Disciplinary Commission (ARDC) to investigate defendants. We do not, however, need to address plaintiff's claims of error due the combination of plaintiff's procedural defaults, our conclusion in this matter, and our ability to affirm the circuit court on

¹ Defendants Azulay Seiden Law Group and Azulay, Horn, & Seiden, LLC, are law firms while the remaining defendants are either attorneys or employees of one or both of the law firms. Defendants have presented a unified defense and we will refer to them collectively to avoid confusion.

any basis found in the record. Accordingly, we hold that the dismissal of plaintiff's complaint pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)) is proper because plaintiff's claim of defendants' allegedly improper legal representation is not a legally recognized cause of action under the Act. We therefore affirm the judgment of the circuit court.

¶ 3 JURISDICTION

¶ 4 On February 19, 2014, the circuit court denied plaintiff's motion for reconsideration. On March 17, 2014, plaintiff timely appealed. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb.1, 1994); R. 303 (eff. May 30, 2008).

¶ 5 BACKGROUND

¶ 6 On July 24, 2012, plaintiff, *pro se*, filed his initial four-count complaint against defendants.² Plaintiff's initial complaint contained the following counts: count I, breach of contract; count II, "breach of duty;" count III, breach of contract "regarding Charter One Bank;" and count IV, "breach of duty to account for legal fees." Defendants filed an amended combined motion to dismiss pursuant to section 2-619.1 of the Code. 735 ILCS 5/2-619.1 (West 2012). The circuit court considered plaintiff's allegations as a claim for legal malpractice, despite plaintiff's labeling of the counts in his complaint. The circuit court then granted defendants' motion to dismiss counts I through III of plaintiff's complaint, with prejudice, as being time-barred pursuant to section 2-619(a)(5) of the Code. 735 ILCS 5/2-619(a)(5) (West 2012). The circuit court struck count IV, titled by plaintiff as "breach of

² Plaintiff named the following parties as defendants in his initial complaint who are not parties to either plaintiff's subsequently filed amended complaint or this appeal: Nicole Peterson; Mimi Ko; Daisy E. Simon; Rita E. Spears; Jessica Webb; and Gloria Anguina. He did not name Stanley Horn as a defendant, but later named him as a defendant in his amended complaint. Also, unlike his amended complaint, he only named himself as a plaintiff.

duty to account for legal fees," pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)) and allowed him leave to amend count IV.

¶ 7 On April 5, 2013, an attorney appeared on plaintiff's behalf and filed a two-count verified first amended complaint.³ Relevant to this appeal, count I of plaintiff's amended complaint alleged that defendants violated the Act.⁴ 815 ILCS 505/1 *et seq.* (West 2014). Plaintiff alleged that defendants represented his relative, Tarek Albitar, a citizen of Jordan, in both criminal proceedings in the circuit court of Cook County and in federal deportation proceedings. Plaintiff alleged that Albitar was arrested and charged with aggravated unlawful use of a weapon and then released on bond. While on bond, Albitar was arrested and charged with murder, conspiracy to commit murder, conspiracy to commit armed robbery, and conspiracy to commit aggravated kidnapping. Albitar subsequently plead guilty to aggravated unlawful use of a weapon, and a " 'hold' " was placed on Albitar's immigration proceedings. On October 21, 2004, plaintiff met with defendants to discuss Albitar's legal issues. According to plaintiff, defendants advised him and his family to provide \$125,000 for Albitar's bond, which would result in federal deportation proceedings being initiated against Albitar. Defendants would then immediately request a " 'voluntary departure' " for Albitar. Defendants advised plaintiff that Albitar's deportation would result in both the dropping of any Illinois criminal charges and the return of the \$125,000 used for Albitar's bond. Plaintiff stressed in his complaint that he was not a client of defendants. Rather, Albitar was defendants' client.

³ In addition to plaintiff, Yousef Albitar and Rita Tutanji were also listed as plaintiffs. Yousef Albitar and Rita Tutanji, however, are not parties to this appeal and it is unclear what their status is in this litigation. The amended complaint states that plaintiff "was appointed as the spokesman for this family group."

⁴ As previously discussed, plaintiff has raised no claim of error before this court regarding count II of his amended complaint for breach of fiduciary duty.

¶ 8 On November 10, 2004, Albitar's request for voluntary departure was granted, and Albitar returned to Jordan on February 2, 2005. On April 21, 2005, plaintiff appeared before the circuit court of Cook County and motioned the court to enter an order returning the funds he provided for Albitar's bond. Plaintiff thought that defendants would appear on his behalf and inform the court that he was a surety holder, but defendants did not appear. On June 20, 2005, the circuit court entered a bond forfeiture order and issued a no bail arrest warrant for Albitar. Plaintiff attempted to intervene, but the prosecution objected and the court entered a bond forfeiture order due to Albitar's failure to appear. On July 19, 2005, defendants filed a motion for the entry of a cash refund to the surety, which the circuit court denied on August 29, 2005. Defendants appealed the order, and on June 29, 2007, this court affirmed the judgment of the circuit court. *People v. Albitar*, 374 Ill. App. 3d 718 (2007). Plaintiff alleged defendants did not notify him of this court's decision until September 30, 2008. Plaintiff further alleged that he did not become aware of defendants' deception until his own release from federal custody on January 31, 2010. At the time of the filing of plaintiff's amended complaint, Albitar was in Jordan and criminal charges remained pending against him. Notably, plaintiff did not reference or in any way incorporate his previously dismissed complaint. He also asked for both compensatory and punitive damages.

¶ 9 On April 26, 2013, defendants filed a combined motion to dismiss pursuant to section 2-619.1 of the Code. 735 ILCS 5/2-619.1 (West 2012). Under the section 2-615 portion of the motion (735 ILCS 5/2-615 (West 2012)), defendants argued that plaintiff could not state a cause of action under the Act because the Act does not apply to the regulation of the conduct of attorneys in representing clients. Under the section 2-619(a)(5) portion of the motion (735 ILCS 5/2-619(a)(5) (West 2012)), defendants argued that plaintiff's claim was time-barred by the

three-year statute of limitations period provided for in the Act (815 ILCS 505/10(a)(e) (West 2012)), as well as the two-year statute of limitations period for legal malpractice actions or its six year repose period (735 ILCS 5/13-214.3(b),(c) (West 2012)). Plaintiff further argued, pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)) that plaintiff could not state a claim for legal malpractice, that the non-attorney defendants should be dismissed from the case, and that punitive damages are not recoverable in legal malpractice actions.

¶ 10 In response, plaintiff argued that his claim could be brought under the Act because he was not a client of defendants. Rather, he was a consumer and a surety of the bond. Plaintiff argued that his claims were not time-barred because the relevant statutes of limitations were tolled because of defendants' fraudulent concealment. Plaintiff further argued that the discovery rule, as well as the defenses of equitable estoppel and unclean hands negates defendants' statutes of limitations claims. Plaintiff maintained that he could seek punitive damages under the Act.

¶ 11 On July 29, 2013, the circuit court granted defendants' motion to dismiss pursuant to section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2012)), with prejudice, finding that plaintiff's claims were time-barred. The circuit court found that plaintiff's claim for relief under the Act is time-barred by the Act's three-year statute of limitation period because plaintiff did not file his cause of action until nearly eight years after the limitation period began to run. 815 ILCS 505/10(a)(e) (West 2012). The circuit court found that count II of plaintiff's complaint for breach of fiduciary duty was time-barred by both the two-year statute of limitation period provided for legal malpractice actions and its six-year repose period. 735 ILCS 5/13-214.3 (b),(c) (West 2012). The circuit court rejected plaintiff's arguments that defendants' alleged unclean hands, the doctrine of equitable estoppel, or the discovery rule negated

defendants' statute of limitations defense. Due to the circuit court's reliance on section 2-619(a)(5) of the Code (735 ILCS 5/2-619 (a)(5) (West 2012)), the circuit court did not address defendants' arguments brought pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)).

¶ 12 On August 27, 2013, plaintiff, *pro se*, filed a motion for reconsideration and a motion for substitution of judge for cause.⁵ On September 9, 2013, the circuit court entered a recusal order, and the matter was assigned to a different circuit court judge.

¶ 13 After a hearing on February 19, 2014, the circuit court denied plaintiff's motion for reconsideration. In denying plaintiff's motion, the circuit court found that plaintiff failed to present any newly discovered evidence, changes in the law, or errors in its prior application of the law. After the court announced its ruling, plaintiff made the following comment to the circuit court: "The ARDC, maybe you can invoke a disciplinary - - send a letter to the ARDC and tell them, '[y]ou know what? I would like you to look into these allegations that [plaintiff] has this claim on.'" The court responded that "[y]ou have a right to file that complaint."

¶ 14 On March 17, 2014, plaintiff timely appealed.

¶ 15 ANALYSIS

¶ 16 Plaintiff raises the following issues for our review: (1) whether the negligent continuous representation rule, the discovery rule, defendants' alleged fraudulent concealment, the doctrine of equitable estoppel, or the unclean hands doctrine negate defendants' statute of limitations defense; (2) whether Illinois should adopt the continuous representation rule; and (3) whether this court should, *sua sponte*, make a request to the ARDC to investigate defendants.

⁵ It is unclear from the record when, or if, plaintiff's counsel ever actually withdrew from this matter. At the hearing on his motion to reconsider, plaintiff argued on his own behalf.

¶ 17 In response, defendants note that plaintiff failed to raise any claim of error regarding count II of his amended complaint for breach of fiduciary duty. Defendants' brief, therefore, only addressed count I of plaintiff's amended complaint under the Act. Relevant to our conclusion in this matter, defendants argue that dismissal of plaintiff's complaint pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)) is proper because plaintiff failed to state a cause of action under the Act because the Act does not apply to defendants' actions providing legal services.

¶ 18 In reply, plaintiff did not address defendants' contentions that he failed to raise a claim of error regarding count II of his amended complaint or that he failed to state a claim under the Act.

¶ 19 Initially, we must discuss what is properly before us and what we will consider upon review. Illinois Supreme Court Rule 341 sets forth the requirements of briefs before this court. Ill. S. Ct. R. 341 (eff. Feb. 6, 2013). Illinois Supreme Court Rule 341(h)(7) provides that "[p]oints not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. S. Ct. R. 341(h)(7) (eff. Feb. 1, 1994). Furthermore, when a litigant files an amended pleading but fails to refer or adopt a prior pleading, the prior pleading is considered withdrawn or abandoned and the pleader waives any objection to the circuit court's ruling on the prior pleading. *Bonhomme v. St. James*, 2012 IL 112393, ¶ 17. Plaintiff's status as a *pro se* litigant does not relieve him of these pleading requirements. *Voris v. Voris*, 2011 IL App (1st) 103814, ¶ 8.

¶ 20 In this matter, plaintiff's original four-count complaint contained claims of breach of contract, "breach of duty," breach of contract "regarding Charter One Bank," and "breach of duty to account for legal fees." The circuit court dismissed plaintiff's breach of contract claims and "breach of duty" claim with prejudice and struck plaintiff's claim for "breach of duty to account for

legal fees." Plaintiff subsequently filed his two-count verified first amended complaint alleging a claim under the Act in count I and a claim for breach of fiduciary duty under count II. Plaintiff did not, however, incorporate or reference his initial complaint. Before this court, plaintiff's brief only raised claims of error concerning the Act as stated in count I of his amended complaint. Based on plaintiff's pleadings before both the circuit court and this court, plaintiff has only properly preserved for our review his claims of error relating to count I of his verified amended complaint addressing defendants' alleged violation of the Act. Plaintiff did not incorporate or reference any of his prior dismissed or stricken claims from his original complaint in his amended complaint. He also failed, in his opening brief, to raise any argument addressing his claim of breach of fiduciary duty as stated in count II of his amended complaint. Accordingly, our review will be limited to plaintiff's allegation that defendants violated the Act as alleged in count I of plaintiff's verified amended complaint.

¶ 21 We will also not consider plaintiff's request that we *sua sponte* ask the ARDC to investigate defendants. "It is well established that matters not presented to *or ruled upon by the trial court* may not be raised for the first time on appeal." (Emphasis added.) *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 229 (1986). Plaintiff did not ask the circuit court to refer defendants to the ARDC until after the circuit court had already ruled on his motion to reconsider. Specifically, plaintiff made the following statement to the circuit court after the court announced its ruling: "[t]he ARDC, maybe you can invoke a disciplinary - - send a letter to the ARDC and tell them, '[y]ou know what? I would like you to look into these allegations that [plaintiff] has this claim on.'" In response, the circuit court commented that "[y]ou have a right to file that complaint." The record does not show that the circuit court actually made a ruling on plaintiff's request or that the request was properly before the circuit court. Furthermore, the failure to cite persuasive

authority or present a well-reasoned argument violates Rule 341(h)(7) and results in the procedural default of that argument. *Sakellariadas v. Campbell*, 391 Ill. App. 3d 795, 804 (2009); *Gandy v. Kimbrough*, 406 Ill. App. 3d 867, 875 (2010). Plaintiff has not cited any persuasive or relevant authority that would allow this court to act upon his request. Accordingly, he is procedurally defaulted from raising this issue.

¶ 22 We also note that defendants filed a combined motion to dismiss pursuant to section 2-619.1 of the Code. 735 ILCS 5/2-619.1 (West 2012). Section 2-619.1 of the Code allows a litigant to file a combined motion to dismiss under both sections 2-615 and 2-619 of the Code. *Id.*; *Lutkauskas v. Ricker*, 2015 IL 117090, ¶ 29. The sections of defendants' combined motion to dismiss under section 2-619 of the Code (735 ILCS 5/2-619(a)(5) (West 2012)) focused on defendants' argument that plaintiff's claims were time-barred while the portion of defendants' motion brought under section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)) argued that plaintiff failed to state a cause of action. Relevant here, defendants argued that plaintiff could not state a viable cause of action under the Act because plaintiff's claim was based on defendants' actions as attorneys representing a client. The circuit court dismissed plaintiff's complaint pursuant to section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2012)), and found that plaintiff's claims were time-barred. The circuit court did not address the section 2-615 (735 ILCS 5/2-615 (West 2012)) portion of defendants' motion. This court, however, may affirm the circuit court on any basis that appears in the record. *Trustees of Wheaton College v. Peters*, 286 Ill. App. 3d 882, 887 (1997). Accordingly, we offer no opinion on the circuit court's ruling pursuant to section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2012)) because we choose to affirm the judgment of the circuit court based on the section 2-615 (735 ILCS 5/2-615 West 2012)) portion of defendants' motion. Furthermore, due to our conclusion, we need not

address plaintiff's arguments addressing the circuit court's finding that his claim is time-barred. Therefore, plaintiff's contentions regarding the negligent continuous representation rule, the discovery rule, defendants' alleged fraudulent concealment, the doctrine of equitable estoppel, or the unclean hands doctrine are not relevant to our analysis and do not need to be addressed.

¶ 23 A motion to dismiss brought pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)) attacks the legal sufficiency of the complaint. *Lutkauskas*, 2015 IL 117090, ¶ 29. All well-pleaded facts, and all reasonable inferences drawn from those facts, must be accepted as true by a court ruling on a section 2-615 motion to dismiss. *Bonhomme*, 2012 IL 112393, ¶ 34. A court may consider all facts apparent from the face of the pleadings, as well as any attached exhibits. *Cowper v. Nyberg*, 2015 IL 117811, ¶ 12. " '[A] pleading must be both legally and factually sufficient. It must assert a legally recognized cause of action and it must plead facts which bring the particular case within that cause of action.' " *Chandler v. Illinois Central R.R. Co.*, 207 Ill. 2d 331, 348 (2003) (quoting 3 R. Michael, Illinois Practice § 23.4 (1989)). "The critical inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Clark v. Children's Memorial Hospital*, 2011 IL 108656, ¶ 21. Dismissal pursuant to section 2-615 is proper where it is apparent that no set of facts that would entitle the plaintiff to the relief requested.. *Turcios v. The DeBruler Co.*, 2015 IL 117962, ¶ 15. Our review is *de novo*. *Bonhomme*, 2012 IL 112393, ¶ 34.

¶ 24 It is well-established that the Act (815 ILCS 505/1 *et seq.* (West 2014)) does not "apply to regulate the conduct of attorneys in representing clients." *Cripe v. Leiter*, 184 Ill. 2d 185, 199 (1998). Our supreme court has made clear that "where allegations of misconduct arise from a defendant's conduct in his or her capacity as an attorney representing a client, the

Consumer Fraud Act does not apply." *Id.* Accordingly, a litigant cannot bring a claim under the Act for the billing of a client for legal services. *Id.* Furthermore, a third party, such as plaintiff here, cannot bring a claim under the Act based on an attorney's alleged misconduct in representing another client. *Kosydor v. American Express Centurion Services Corp.*, 2012 IL App (5th) 120110, ¶ 37-39 ("the Act does not apply to the conduct of attorneys when representing any client in the practice of law, even against a third party.")

¶ 25 After reviewing count I of plaintiff's verified amended complaint, we hold that dismissal of the complaint is proper under section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)) because plaintiff has failed to allege a legally recognized cause of action. *Chandler*, 207 Ill. 2d at 348. Count I of plaintiff's amended complaint is based solely on defendants' conduct in providing legal representation to plaintiff's relative, Albitar, as well as defendants' legal advice to plaintiff and his family. It is well-established, however, that claims based on the conduct of attorneys representing clients are not amenable to a cause of action under the Act. *Cripe*, 184 Ill. 2d at 199. It does not matter that plaintiff specifically alleged that he was not a client of defendants because third parties also cannot bring a claim under the Act. *Kosydor*, 2012 IL App (5th) 120110, ¶ 37-39. Accordingly, plaintiff failed to assert a legally recognized cause of action. We therefore affirm the judgment of the circuit court.

¶ 26

CONCLUSION

¶ 27 The judgment of the circuit court of Cook County affirmed.

¶ 28 Affirmed.