2015 IL App (1st) 141523-U

No. 1-14-1523

Fourth Division
September 3, 2015

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

CHARLES JOHNSON,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
v.	)	
	)	No. 13 L 63040
DAVIN STEIN and STEIN & STEIN, LTD.,	)	
	)	Honorable
	)	Thomas Mulroy,
Defendants-Appellees.	)	Judge, presiding.
	)	

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Ellis concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court did not err when it dismissed plaintiff's complaint alleging legal malpractice where the complaint was filed more than two years after the purported injury and therefore was barred by the statute of limitations.

¶ 2 Plaintiff, Charles Johnson, filed a complaint against defendants, David Stein and Stein & Stein, Ltd. for legal malpractice based on a breach of contract theory. Plaintiff alleged that defendants, his attorneys, breached their agreement when they inadequately represented him in the drafting and entry of his Marriage Settlement Agreement (MSA). Defendants filed a

combined motion to dismiss pursuant to section 2-619.1 of the Illinois Code of Civil Procedure (the Code) and it was granted. 735 ILCS 5/2-619.1 (West 2012).

¶ 3 Plaintiff appeals contending that the trial court erred in dismissing the complaint because: 1) the discovery rule applies in this case, creating a factual question as to when the statute of limitations began to run; 2) the doctrine of judicial estoppel has no application in this matter; 3) his complaint contained sufficient well-pleaded facts and; 4) that he should have been given leave to file an amended complaint. For the reasons that follow, we affirm.

¶ 4 BACKGROUND

¶ 5 On December 2, 2008, plaintiff retained defendants to represent him in his marriage dissolution and they memorialized their relationship in a written agreement (Agreement). During the course of the marriage dissolution, defendants represented plaintiff in the drafting and entry of the MSA between plaintiff and his then spouse, Patricia Johnson. The MSA was the result of months of negotiations and settlement proceedings. Plaintiff alleges that during the entire time of representation, he complained to defendants about the terms and conditions of the MSA. However, defendants continuously assured him that it was "the best possible arrangement for him" and "that the court would undoubtedly enter, should a trial be conducted, a judgment much less favorable to him."

¶ 6 Under the terms of the MSA, plaintiff was required to pay Patricia maintenance of $13,000 a month for the first two years and $11,000 a month thereafter, with the payments deductible from plaintiff's income and taxable to Patricia. The maintenance provision was based on plaintiff earning $340,000 or $350,000 per year. Plaintiff's sole source of income was from his business, Johnson Consulting, a real estate and hospitality consulting company.

¶ 7 On March 4, 2011, at a prove-up hearing, plaintiff testified that he believed the MSA was fair and equitable and that he voluntarily and freely entered into the agreement, "free of any duress or coercion and with full knowledge and understanding of each and every provision contained in the [MSA] as well as the consequences thereof." He agreed to be bound by the MSA and stated that he understood that he was waiving his right to a trial. The court ratified the terms of the MSA and found that it was reasonable and not unconscionable. Accordingly, the MSA was executed and incorporated into the Judgment of Dissolution.

¶ 8 Subsequently, plaintiff sent defendants emails stating that he could not pay Patricia the maintenance award. On May 16, 2011, plaintiff wrote:

> "The problem is this- we did not convey accurately my true income. While we calculated the cash that was taken, the bills that were not paid were not accounted for. That big liability is still there; Now that I got last year's payroll taxes paid, I now have another full quarter's of those taxes and 401k payments due. I still have not gotten a paycheck for myself."

¶ 9 Then again, on May 31, 2011, in an email to defendants, plaintiff acknowledged the error in reporting his income:

> "1. My income is not as high as reported[.]
>
> 2. I have no capacity to dig out of the payables hole I am in if I continue to distribute as much to Patty as is structured today[.]"

¶ 10 Defendants continued to represent plaintiff until approximately January 25, 2012. On January 31, 2012, with new counsel, plaintiff filed a motion to modify maintenance and for other relief, alleging a substantial change in circumstances. In the motion, plaintiff

maintained that Johnson Consulting's gross receipts from the previous year decreased by 36% after the entry of the MSA.

¶ 11 Thereafter, on July 28, 2013, plaintiff filed a complaint against defendants for legal malpractice. In the complaint, he alleged that defendants breached the implied term in their Agreement that defendants would use the skill, care and knowledge ordinarily used by a reasonably well-qualified attorney practicing divorce law in the Chicagoland area. Plaintiff maintained that throughout defendants' representation, he complained to defendants about the terms of the MSA but that they constantly reassured him that the terms were favorable. Plaintiff asserted that at the time the MSA was entered into, he again complained that the maintenance award was too high but defendants told him "he had no choice in the matter and that a trial would end in an even worse result." Plaintiff further claimed that at no time did defendants advise him not to execute the MSA or that he would be unable to change the terms of the MSA once it was executed. According to plaintiff, he was never given an adequate explanation regarding the effects of the MSA, its permanency, or the substantial amounts of money he would be continuously required to pay without regard to his actual earnings. Additionally, defendants failed to appreciate that the maintenance of $13,000 a month was an impossibility for him, failed to bring to the court's attention within 30 days that there was an error in reporting his income, and that "but for the wrongful conduct of [defendants], [he] would have been saved from a sizeable maintenance award of $13,000.00 per month, or, $156,000.00 per year."

¶ 12 In response, defendants filed a combined motion to dismiss under section 2-619.1 of the Code. 735 ILCS 5/2-619.1. Defendants asserted that plaintiff's complaint must be dismissed under section 2-619 of the Code because plaintiff is estopped from challenging the MSA

because he signed it of his own free will and testified under oath that he fully understood its terms and consequences. Defendants also cited section 13-214.3 of the Code and argued that plaintiff's claim was time-barred because it was filed after the two-year statute of limitations governing legal malpractice actions. 735 ILCS 5/13-214.3. In addition, defendants contended that plaintiffs' complaint should be dismissed under section 2-615 of the Code because plaintiff alleged no facts that, if proven, would establish that, but for defendants' actions, he would have received a lower maintenance award or none at all. Subsequently, the court determined that the statute of limitations barred plaintiff's claim and granted defendants' section 2-619.1 motion to dismiss on that ground, from which this appeal follows.

¶ 13 ANALYSIS

¶ 14 This appeal arises from the involuntary dismissal of the complaint based on defects and defenses under section 2-619 of the Code, thus, our standard of review is *de novo*. *O'Brien v. Scovil*, 332 Ill. App. 3d 1088, 1090 (2002). "Generally, section 2-619 affords a 'means of obtaining *** a summary disposition of issues of law or of easily proved issues of fact.' [Citations.]" *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993). Here, the court dismissed the complaint pursuant to section 2-619(5), which authorizes the dismissal of a complaint for failure to file within the required limitations period. 735 ILCS 5/2–619(5) (West 2012); See also *O'Brien*, 332 Ill. App. 3d at 1090.

¶ 15 When considering a section 2-619 motion to dismiss, the court construes the pleadings in the light most favorable to the nonmoving party, and must accept as true all well-pleaded facts, as well as any inferences that may reasonably be drawn from them. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55. The court will only dismiss a complaint when there is no set

of facts that would entitle the plaintiff to relief. *Webb v. Damisch*, 362 Ill. App. 3d 1032, 1037 (2005).

¶ 16 The statute of limitations for a legal malpractice claim is set forth in section 13-214.3 of the Code. 735 ILCS 5/13-214.3. It provides, in relevant part:

> "An action for damages based on tort, contract, or otherwise (i) against an attorney arising out of an act or omission in the performance of professional services or (ii) against a non-attorney employee arising out of an act or omission in the course of his or her employment by an attorney to assist the attorney in performing professional services must be commenced within two years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought." 735 ILCS 5/13-214.3(b).

¶ 17 Plaintiff contends that the discovery rule applies in legal malpractice cases. We agree, as the discovery rule has clearly been incorporated in to section 13-214.3(b). 735 ILCS 5/13-214.3(b); *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 10. The discovery rule tolls the time for the statute of limitations to begin until the plaintiff knows or reasonably should know that an injury has occurred and that it was wrongfully caused. *Gredell v. Wyeth Laboratories, Inc.*, 346 Ill. App. 3d 51, 58 (2004) (citing *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 77 (1995)). Actual knowledge of the alleged malpractice is not necessary to trigger the running of the statute of limitations. *Blue Water Partners, Inc. v. Edwin D. Mason, Foley & Lardner*, 2012 IL App (1st) 102165, ¶ 51 (citing *SK Partners I, LP v. Metro Consultants, Inc.*, 408 Ill. App. 3d 127, 130 (2011)). Once a party knows or reasonably should know of an injury, the party is obligated to inquire further to determine if the injury was wrongfully caused and by whom. *Gredell*, 346 Ill. App. 3d at 58. Therefore, if plaintiff

knew or should have known of defendants' alleged breach more than two years before July 28, 2013, this action is time-barred by the statute of limitations.

¶ 18 Whether a plaintiff had the requisite knowledge to know or should know of an injury is generally a question of fact. *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill. 2d 240, 250 (1994) (citing *County of Du Page v. Graham, Anderson, Probst & White, Inc.*, 109 Ill. 2d 143, 154 (1985)). However, if the undisputed facts only allow for one conclusion–that plaintiff knew or should have known of the injury more than two years before he filed the complaint–then the complaint can properly be dismissed. *Id.*

¶ 19 Here, it is undisputed that plaintiff was dissatisfied with the terms of the MSA during negotiations and his dissatisfaction continued when it was entered. He admits in his complaint that "[d]uring the entire time of representation [plaintiff] complained of the terms and conditions of the MSA." Furthermore, soon after the MSA was incorporated into the Judgment of Dissolution, plaintiff sent defendants emails that indicate he was aware that the maintenance amount was based on an incorrect income level. On May 16, 2011, plaintiff emailed defendants and informed them that they "did not convey accurately [plaintiff's] true income." Plaintiff went on to explain that "[w]hile we calculated the cash that was taken, the bills that were not paid were not accounted for." Additionally, on May 31, 2011, plaintiff reiterated that there was a problem with the reporting of his income. He stated, "[m]y income is not as high as reported" and "I have no capacity to dig out of the payables hole I am in if I continue to distribute as much to Patty as is structured today[.]" These emails unequivocally demonstrate that in May 2011, plaintiff knew that his income was incorrectly reported.

¶ 20 Based on these facts, plaintiff had the necessary knowledge to ascertain that he had a cause of action for legal malpractice in May 2011. Plaintiff was aware that the MSA was

predicated on him making $340,000 to $350,000 a year and, and at that time, he knew that this was not an accurate reporting of his income. Therefore, all agree that plaintiff had knowledge of the injury. Assuming defendants actually engaged in malpractice, further inquiry would have made plaintiff aware that the injury was wrongfully caused. In fact, it is apparent that plaintiff had sufficient knowledge to become aware of the malpractice cause of action in May 2011 because the instant action is based on the same facts known then–that the maintenance payments were too high and that his income was incorrectly reported.

¶ 21 Plaintiff argues that, despite this knowledge, he was not aware of the legal malpractice claim until 2012 because of defendants' consistent assurances that the terms of the MSA were "the best he could get" and that "he had no choice in the matter and [] a trial would end in an even worse result." Plaintiff contends that because defendants were his attorneys, he trusted their legal expertise. Thus, he argues, the statute of limitations did not commence until he retained new counsel in June 2012 and became aware that the unfavorable terms of the MSA were the result of defendants' malpractice.

¶ 22 Although plaintiff does not explicitly make the argument that defendants fraudulently concealed his cause of action, plaintiff asserts that defendants' assurances prevented him from recognizing the legal malpractice, which we perceive as a fraudulent concealment argument. We note that Supreme Court Rule 341(h) requires that parties make sufficient argument and citation to the record. Ill. S. Ct. R. 341(h) (eff. Feb. 6, 2013). Plaintiff's lack of argument on this issue does not comply with 341(h)'s requirements, and therefore, we could consider this argument waived. *Id.* However, we choose to exercise our discretion and address this issue on its merits because we can discern the legal question that needs to be resolved. *Id.*; *Dillon v. Evanston Hospital,* 199 Ill. 2d 483, 493 (2002).

¶ 23 A party that pleads fraudulent concealment must " 'show affirmative acts or representations [by a defendant] that are calculated to lull or induce a claimant into delaying filing his [or her] claim or to prevent a claimant from discovering his [or her] claim.' " *Carlson v. Fish*, 2015 IL App (1st) 140526, ¶ 44 (quoting *Baratt v. Goldberg*, 296 Ill. App. 3d 252, 257 (1998)). Where there is a fiduciary relationship, such as an attorney-client relationship, if the fiduciary is silent and fails to disclose material facts regarding a cause of action, that omission is sufficient for fraudulent concealment. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 73, 76 (2006). When a cause of action is fraudulently concealed, the statute of limitations is tolled until a plaintiff knows or should have known of the injury and, once the injury is discovered, a suit must be brought within five years. 735 ILCS 5/13-215 (West 2012).

¶ 24 *Carlson v. Fish*, a recent appellate court case, is instructive on this issue. 2015 IL App (1st) 140526. In *Carlson*, the plaintiff in a legal malpractice action argued that he did not know of the alleged injury until he met with new attorneys because, instead of informing him of the possible legal malpractice claim, the defendants fraudulently concealed his claim by reassuring him that the underlying settlement agreement was "good under the circumstances and could have been much worse." *Id.* ¶ 45. To support his contention, the plaintiff cited *Deluna*, where the court found an attorney had fraudulently concealed a malpractice claim when he told the plaintiffs that their case was going well, when in fact, it had been dismissed. *DeLuna*, 223 Ill. 2d at 79-80. The *Carlson* court rejected the plaintiff's argument, finding that the defendants had no obligation to inform the plaintiff of a possible claim against them. *Carlson v. Fish*, 2015 IL App (1st) 140526, ¶ 45. The court reasoned that, unlike in *DeLuna*, the defendants in *Carlson* had merely reassured the plaintiff that the underlying settlement

agreement was good and that these assurances were not evidence of fraudulent concealment. *Id.* ¶¶ 45-46. Similarly, here, defendants merely assured plaintiff that the MSA was favorable. Plaintiff did not allege facts that they intentionally misled him or failed to inform him of material information about the case to prevent him from discovering his claim. Moreover, it is clear that this information was not concealed because plaintiff was aware of the terms of the MSA and understood them enough to be dissatisfied.[1] Like the court in *Carlson*, under the facts of this case, we do not believe defendants were obligated to inform plaintiff of a potential legal malpractice claim against them and we do not believe that their assurances are evidence of fraudulent concealment. Thus, the statute of limitations was not tolled and the extended time for filing a complaint did not apply.

¶ 25 Plaintiff also cursorily makes the argument that because of defendants' continuous representation, the injury was ongoing, and therefore the statute of limitations did not begin to run until after defendants no longer represented him. However, this court has found that, in Illinois, there is no continuous representation rule for tolling the statute of limitations in legal malpractice cases. *Sorenson v. Law Offices of Theodore Poehlmann,* 327 Ill. App. 3d 706, 710 (2002) (citing *Witt v. Jones & Jones Law Offices, P.C.,* 269 Ill. App. 3d 540, 544, (1995) (rejecting a "continuous representation" rule)). Moreover, for the exception to apply, there must be continuous wrongful acts, not just continuing ill effects from one wrongful act. *Mauer v. Rubin,* 401 Ill. App. 3d 630 (2010). Here, the alleged wrongful act for which plaintiff claims damages is the entry of the MSA with unfavorable terms, which occurred only once.

[1] Additionally, plaintiff swore under oath that he understood the terms of the MSA, believed them to be fair, and that he entered into the agreement voluntarily.

¶ 26 In the instant appeal, the complaint was filed on July 28, 2013–more than two years after plaintiff knew of the injury–and therefore, it was time-barred. As discussed above, neither the fraudulent concealment nor the continuous representation exceptions apply. Accordingly, the court did not err when it granted defendants' motion to dismiss.

¶ 27 Because we find that the statute of limitations barred plaintiff's claim, we decline to address the other issues raised by plaintiff regarding judicial estoppel, the legal sufficiency of the claim, and whether plaintiff should have been given leave to amend the complaint.

¶ 28 CONCLUSION

¶ 29 For the forgoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 30 Affirmed.