THIRD DIVISION
September 30, 2015

No. 1-14-1622

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LEOPOLDO RODRIGUEZ, CHICAGO PALLET SERVICE, INC., and LARZ, LLC.,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	No. 13 L 10791
DENNIS NOLAN, individually and as agent of LAW OFFICES OF DENNIS NOLAN, P.C.; LAW OFFICE OF DENNIS M. NOLAN, P.C.; STEPHEN CLEARY, individually and as agent of CLEARY & ASSOCIATES, LTD.; and CLEARY & ASSOCIATES, LTD.,	)	
Defendants-Appellees.	)	The Honorable Margaret Ann Brennan Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting defendants' motion to dismiss under section 2-619(a)(5) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(5) (West 2012)), where plaintiffs' allegations showed that the complaint was filed outside the six-year statute of repose for legal malpractice actions (735 ILCS 5/13-214.3(c) (West 2012)). In addition, the doctrine of equitable estoppel did not toll the statute of repose. Furthermore, we decline to sanction plaintiffs as defendants requested.

¶ 2 This appeal arises from the trial court's order granting a section 2-619(a)(5) motion to dismiss filed by defendants Dennis Nolan, individually and as agent of Law Offices of Dennis Nolan, P.C. and Law Office of Dennis M. Nolan, P.C. (Nolan) against plaintiffs Leopoldo Rodriguez, Chicago Pallet Service, Inc., and Larz, LLC (735 ILCS 5/2-619(a)(5) (West 2012)). On appeal, plaintiffs contend that the trial court erred in dismissing the malpractice action against Nolan because the complaint was timely filed under both the statute of limitations and the statute of repose (735 ILCS 5/13-214.3(b), (c) (West 2012)). In the alternative, plaintiffs contend their cause of action was not untimely because the doctrine of equitable estoppel tolled the statute of repose. In rebuttal, Nolan contends this court should enter sanctions against plaintiffs pursuant to Illinois Supreme Court Rule 375. Ill. Sup. Ct. R. 375 (eff. Feb. 1, 1994). We affirm.

¶ 3 I. BACKGROUND

¶ 4 We recite only those facts necessary to understand the issues raised on appeal. Rodriguez was the founder and owner of Chicago Pallet Service, Inc. and Larz, LLC. Chicago Pallet was an Illinois corporation in the business of repairing, customizing, manufacturing, and delivering pallet products. In 2006, Chicago Pallet sought to enter into a loan with Charter One Bank that would allow Chicago Pallet to purchase a new facility in Elk Grove Village, Illinois. At this time, Rodriguez created Larz, an Illinois limited liability company, intending for Larz to purchase and own the new facility.

¶ 5 Charter One presented a series of loan documents to plaintiffs, including a term note, a line of credit, and an interest rate swap agreement (the 2006 loan). Plaintiffs hired Nolan as legal counsel to represent plaintiffs in the purchase and closing of the Elk Grove property. After Nolan reviewed and approved the loan documents, plaintiffs executed the 2006 loan with Charter One. On August 15, 2006, plaintiffs closed on the Elk Grove Village property.

¶ 6 In 2009, Charter One made a demand calling the 2006 loan based on a technical default. Thereafter, plaintiffs hired Stephen Cleary, who was not a party to this appeal, to represent plaintiffs during negotiations with Charter One. In April 2011, the parties agreed on a new set of loan documents (the 2011 loan) that required plaintiffs to provide Charter One with additional security and performance covenants. Charter One, however, began pressuring plaintiffs about performance provisions in the 2011 loan and plaintiffs decided to pursue a new loan with Chase Bank. Consequently, plaintiffs hired their current counsel, Zane D. Smith & Associates, Ltd. (Smith), to represent plaintiffs in negotiations. In December 2011, Smith reviewed the 2006 loan and the 2011 loan, and advised plaintiffs that if they wished to switch to Chase Bank, they would be liable to pay a prepayment penalty under the swap agreement incorporated in the 2006 loan. In July 2012, plaintiffs executed a new loan agreement with Chase Bank and paid a prepayment penalty of $427,000.00, pursuant to the swap agreement. We note that Nolan continued to represent plaintiffs through August 2013, by filing tax appeals for the properties used as collateral for the 2006 loan and 2011 loan.

¶ 7 On September 27, 2013, plaintiffs filed a four-count complaint against Nolan and Cleary[1] asserting claims for attorney malpractice and breach of fiduciary duty. Specifically, Count I contended that plaintiffs and Nolan had an attorney-client relationship under which Nolan owed a duty to read the 2006 loan documents, including the incorporated swap agreement, and explain the nature of the documents to plaintiffs. Specifically, plaintiffs contended that Nolan failed to (1) fully explain the nature of the swap agreement and its attendant obligations; (2) advise plaintiffs that the swap agreement was a separate agreement from the other loan documents and was entered into with different counterparties; and (3) notify plaintiffs that if they terminated the

[1] Although plaintiffs' complaint alleged two counts against Cleary for attorney malpractice (Count III) and breach of fiduciary duty (Count IV), the matter was still pending below and Cleary was not a party to this appeal.

swap agreement before the end of the original loan term, they would be subject to a prepayment penalty. In addition, Count IV contended that Nolan breached its fiduciary duty to plaintiffs.

¶ 8 On November 15, 2013, Nolan moved to dismiss Counts I and II of the complaint pursuant to 735 ILCS 5/2-619(a)(5) (West 2012). Nolan argued that Counts I and II were untimely because they were filed outside of the two-year statute of limitations and the six-year statute of repose (735 ILCS 5/13-214.3(b), (c) (West 2012). On April 24, 2014, the trial court conducted a hearing and entered an order dismissing Counts I and II of the complaint against Nolan with prejudice. In addition, the trial court determined pursuant to Illinois Supreme Court Rule 304(a) that there was no just reason to delay the enforcement or appeal of this dismissal order. Plaintiffs then filed a timely notice of appeal.

¶ 9 II. ANALYSIS

¶ 10 Plaintiffs contend that the trial court erred in granting Nolan's motion to dismiss Counts I and II of the complaint because it was timely filed under both the statute of limitations and the statute of repose (735 ILCS 5/13-214.3(b), (c) (West 2012)). A motion to dismiss under section 2-619 of the Code "admits the legal sufficiency of the plaintiffs' complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiffs' claim." *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). In reviewing a motion to dismiss under section 2-619, the court accepts as true all well-pleaded facts in plaintiffs' complaint and any reasonable inferences drawn therefrom. *Purmal v. Robert N. Wadington & Associates*, 354 Ill. App. 3d 715, 720 (2004). The court "must determine whether the existence of a material fact should have precluded the dismissal or, absent such an issue of fact, whether the dismissal is proper as a matter of law." *Carlen v. First State Bank of Beecher City*, 367 Ill. App. 3d 1051, 1056 (2006). This court reviews *de novo* orders dismissing claims as time-barred under section 2-619(a)(5) of

the Code (735 ILCS 5/2-619(a)(5) (West 2012)). *Peregrine Financial Group, Inc. v. Futronix Trading, Ltd.*, 401 Ill. App. 3d 659, 660 (2010).

¶ 11 At the outset, we note plaintiffs' brief suffers from several deficiencies. Plaintiffs fail to raise cohesive legal arguments, cite to relevant legal authority, and continuously fail to cite to the record in violation of Illinois Supreme Court Rule 341(h)(7). See Ill. Sup. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (argument portion of brief shall contain the contentions of the appellant and the reasons therefore, with citation of the authorities and the pages of the record relied on, and points not argued are waived); *TruServ Corporation v. Ernst & Young, LLP*, 376 Ill. App. 3d 218, 227 (2007) (the party forfeited an issue on appeal because the party "failed to cite pertinent authority in support of its argument"). Nonetheless, we review plaintiffs' overarching argument.

¶ 12 The appropriate timeframe for filing a legal malpractice action is provided by section 13-214.3 of the Code (735 ILCS 5/13-214.3 (West 2012)). The statute of limitations provides that a legal malpractice action "must be commenced within 2 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) (West 2012). In addition, the statute of repose provides that a legal malpractice action "may not be commenced in any event more than 6 years after the date on which the act or omission occurred." 735 ILCS 5/13-214.3(c) (West 2012). Specifically, the statute of repose is designed to put a limit on the period of time that one can commence an action, "regardless of a potential plaintiff's lack of knowledge of his cause of action." *Goodman v. Harbor Market, Ltd.*, 278 Ill. App. 3d 684, 690 (1995). Because the omissions causing the injury must occur in the context of some affirmative act of representation, the period of repose must begin when the acts of representation end, even if continuing omissions may contribute to the injury." *O'Brien v. Scovil*, 332 Ill. App. 3d 1088, 1090 (2002).

¶ 13 Plaintiffs contend that the statute of repose does not bar this action because, although the omission occurred in August 2006, Nolan continued to represent plaintiffs until August 2013. We disagree. The statute of repose in a legal malpractice case begins to run as soon as an event giving rise to the malpractice claim occurs, regardless of whether plaintiff's injury has yet been realized. *Mauer v. Rubin*, 401 Ill. App. 3d 630, 639 (2010). Illinois courts do not recognize a continuous representation argument, and the statute of repose may not be tolled in an attorney malpractice action merely by the continuation of the attorney-client relationship. See *Id.* at 640 (the statute of repose began to run when the attorney initially drafted a defective marital settlement agreement, notwithstanding the defendants' ongoing duty to correct their error); *Lamet v. Levin*, 2015 IL App (1st) 143105, ¶ 23 (the statute of repose began to run in 1994 when the attorney failed to properly advise the plaintiff against his landlord; the attorney's continued representation and later failure to correct the omission was immaterial); *Hester v. Diaz*, 346 Ill. App. 3d 550, 554-55 (the statute of repose began to run when attorney defendants failed to appear at a hearing and the plaintiff's case was dismissed for want of prosecution; the continued case activity did not change the status of the case); *Sorenson v. Law Offices of Theodore Poehlmann*, 327 Ill. App. 3d 706, 710 (2002) (there is no continuous representation rule for tolling the statute of repose in legal malpractice cases); *Witt v. Jones & Jones Law Offices, P.C.*, 269 Ill. App. 3d 540, 544, (1995) (rejecting a "continuous representation" rule).

¶ 14 Here, even if Nolan failed to explain the swap agreement throughout his continued representation of plaintiffs, the statute of repose began to run in August 2006 when Nolan approved the loan documents and plaintiffs executed the 2006 loan with Charter One. Therefore, Nolan's failure to correct this omission throughout its continued representation of plaintiffs is immaterial. See *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 278-79 (2003) ("where there is a single

overt act from which subsequent damages may flow, the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so despite the continuing nature of the injury"). Further, we note that plaintiffs became aware of Nolan's alleged malpractice in December 2011, when Smith reviewed the loan documents. Thus, plaintiff's still had eight months to file this action before the statute of repose expired. Accordingly, plaintiffs' action is time-barred by the six-year statute of repose for legal malpractice actions. Consequently, because we hold that plaintiffs' claims are time-barred under the statute of repose, we need not address whether plaintiffs' claims are time-barred under the two-year statute of limitations. See *Lamet*, 2015 IL App (1st) 143105, ¶ 28 (where after ruling that plaintiff's claim was time-barred by the six-year statute of repose the reviewing court declined to address the statute of limitations); *Mauer*, 401 Ill. App. 3d at 638 (the court failed to consider plaintiff's contention that its claim was time-barred under the two-year statute of limitations because it found the statute of repose issue to be dispositive.)

¶ 15 In the alternative, plaintiffs contend their cause of action was not untimely because the doctrine of equitable estoppel tolled the statute of repose. While we acknowledge that plaintiffs failed to raise this issue in the trial court below, nevertheless, we exercise our discretion and review plaintiff's contention. See *Feret v. Schillerstrom*, 363 Ill. App. 3d 534, 539 (2006) ("[a]s our supreme court has long held, waiver is an admonition to the parties and not a limitation on the jurisdiction of a reviewing court").

¶ 16 Under the doctrine of equitable estoppel, plaintiffs must demonstrate the following:

> "(1) the other person misrepresented or concealed material facts; (2) the other person knew at the time he or she made the representations that they were untrue; (3) the party claiming estoppel did not know that the representations were untrue when they were

> made and when that party decided to act, or not, upon the representations; (4) the other person intended or reasonably expected that the party claiming estoppel would determine whether to act, or not, based upon the representations; (5) the party claiming estoppel reasonably relied upon the representations in good faith to his or her detriment; and (6) the party claiming estoppel would be prejudiced by his or her reliance on the representations if the other person is permitted to deny the truth thereof." *DeLuna v. Burciaga*, 223 Ill. 2d 49, 82-3(2006).

In addition, the defendant need not intentionally mislead the plaintiff or intend through its conduct to induce delay in filing suit. *Id.* at 83. The plaintiff may invoke the doctrine of equitable estoppel if he "reasonably [relied] on the defendant's conduct or representations in forbearing suit." *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill. 2d 240, 252 (1994).

¶ 17 Based on the record before us, plaintiffs became privy to Nolan's alleged malpractice in December 2011, which allowed them at least eight-months to file suit against Nolan. Plaintiffs have provided us no explanation for their failure to do so. Further, plaintiffs failed to establish that Nolan made a misrepresentation that they relied on in failing to file this action, thus, equitable estoppel is inapplicable to toll the statute of repose. See *Koczor v. Melnyk*, 407 Ill. App. 3d 994, 1002 (2011) (where plaintiffs "failed to establish that defendant made a misrepresentation that they relied on in forbearing suit, equitable estoppel [was] inapplicable to toll the statute of repose"); *Rajcan v. Donald Garvey and Associates, Inc.*, 347 Ill. App. 3d 403, 407 (2004) (to toll the statute of repose, the plaintiff must show "affirmative acts or representations designed to prevent discovery of the cause of action or to lull or induce a claimant into delaying the filing of his claim."); *Barratt v. Goldberg*, 296 Ill. App. 3d 252, 258 (1998) (there must be some misrepresentation by defendants that plaintiff relied upon to their

detriment to prevent filing their legal malpractice action). Therefore, because plaintiffs' complaint was filed after the statute of repose had expired, their complaint was untimely and the trial court properly dismissed the counts against Nolan.

¶ 18 Finally, Nolan implores this court to impose sanctions against plaintiffs under Illinois Supreme Court Rule 375(b) for filing a frivolous appeal. Ill. Sup. Ct. R. 375(b) (eff. Feb. 1, 1994). An appeal is considered frivolous if it is "not reasonably well grounded in fact and not warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law." *In re Estate of Hanley*, 2013 IL App (3d) 110264; ¶ 111 citing Ill. S.Ct. R. 375(b) (eff. Feb. 1, 1994). We have held on numerous occasions, however, that an unsuccessful appeal does not necessarily indicate that the appeal was frivolous, was taken in bad faith, or otherwise requires the imposition of sanctions. See *Greene Welding & Hardware v. Illinois Workers' Compensation Comm'n*, 396 Ill. App. 3d 754, 759 (2009); *Trogub v. Robinson*, 366 Ill. App. 3d 838, 847-48 (2006). The imposition of sanctions is a matter left strictly to the appellate court's discretion. *Kheirkhahvash v. Baniassadi*, 407 Ill. App. 3d 171, 182 (2011)

¶ 19 Under the circumstances of this appeal, we do not find that sanctions would be appropriate. While we are unpersuaded by plaintiffs' contentions, it is not unreasonable that plaintiffs would appeal the trial court's decision given that the primary issues on appeal were subject to *de novo* review and they suffered a substantial economic loss as a result of Nolan's alleged malpractice. See *RBS Citizens, National Association v. RTG-Oak Lawn, LLC*, 407 Ill. App. 3d 183, 194 (2011). In addition, Nolan fails to acknowledge the specific relief he is seeking. See Ill. Sup. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). We therefore deny Nolan's request for sanctions under Supreme Court Rule 375. Ill. Sup. Ct. R. 375(b) (eff. Feb. 1, 1994).

¶ 20 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 21 Affirmed.