2015 IL App (1st) 141710-U

SECOND DIVISION
November 10, 2015

No. 14-1710

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

VERNON NELSON and JOHN Q. NELSON, Individually and as Administrators of the Estate of EVA NELSON, deceased Plaintiffs-Appellants, v. CASCINO VAUGHAN LAW OFFICES, LTD., MICHAEL CASCINO, ALLEN D. VAUGHAN, ROBERT MCCOY, AND JOHN NOLAND, Defendants-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 13 L 13628 Honorable William E. Gomolinski, Judge Presiding

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JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed plaintiffs' claim for legal malpractice that stemmed from defendants' representation of plaintiffs in a wrongful death law suit. Plaintiffs' actions were barred by the statute of repose and the statute of limitations.

¶ 2 This case is before us on appeal of the trial court's order granting defendants' motion to dismiss plaintiffs' legal malpractice claim pursuant to section 2-619(a)(9). 735 ILCS 5/2-619(a)(9) (West 2012). Plaintiffs argue on appeal that the trial court improperly held that their

legal malpractice claim was barred by the statute of repose and the statute of limitations. For the following reasons, we affirm the judgment of the trial court.

¶ 3 BACKGROUND

¶ 4 Plaintiffs' decedent, Eva Nelson, retained defendants as her attorneys on September 7, 2004, to represent her for the injuries she sustained from her exposure to asbestos. Eva died on January 9, 2005. Subsequently plaintiffs, as administrators of Eva's estate, retained defendants to pursue the legal action initiated for Eva against various companies that exposed her to asbestos, including Aurora Equipment Company (Aurora) and Plastics Engineering Company (Plenco). Defendants added a wrongful death action from asbestos exposure on behalf of plaintiffs to the previous legal proceedings.

¶ 5 On May 15, 2007, the circuit court presiding over the underlying asbestos litigation action entered an order stating that "fact discovery against all parties is closed." On November 13, 2007, summary judgment was entered against plaintiffs and in favor of both Aurora and Plenco. However, the underlying litigation proceeded for several years and defendants continued to represent plaintiffs until April 20, 2011, when they were granted leave to withdraw. During this time, defendants negotiated several settlements with different companies on plaintiffs' behalf.

¶ 6 Plaintiffs retained new counsel who filed an appearance in the underlying asbestos litigation action on June 15, 2011. Plaintiffs' new counsel filed a motion to reopen discovery in the underlying case on September 20, 2011. The circuit court judge denied the motion and entered summary judgment in favor of Plenco on December 1, 2011.[1]

[1] The record is silent as to why summary judgment was entered twice in favor of Plenco, once on November 13, 2007 and again on December 1, 2011.

¶ 7 On November 27, 2013, plaintiffs filed a legal malpractice claim against defendants. The plaintiffs' complaint stated in relevant part, that defendants failed to conduct full and complete discovery prior to May 15, 2007, when the court closed all discovery matters in the underlying asbestos action. Plaintiffs alleged that defendants were negligent when they failed to obtain evidence essential to their claims in the underlying asbestos litigation prior to the close of discovery and that summary judgment would not have been entered in favor of Aurora but for defendants' negligent actions. Plaintiffs contended that defendants never told them that discovery closed or that summary judgment was granted in favor of Aurora. Plaintiffs alleged that defendants encouraged plaintiffs to continue gathering information on product identification, witnesses, and other relevant evidence in the underlying action.

¶ 8 On February 14, 2014, defendants filed a section 2-619 motion to dismiss where they claimed that plaintiffs' claim was barred by the statute of repose and the statute of limitations. Defendant argued that the malpractice action was filed more than 6 years after the acts of omission took place, namely defendants' alleged failure to complete discovery prior to the close of discovery of May 15, 2007. In the alternative, defendants argued that plaintiffs' claim was filed more than 2 years after they discovered the malpractice in July 2011.

¶ 9 On March 31, 2014, plaintiffs filed their response in opposition to defendants' motion to dismiss where they argued that the defendants' continuous course of negligent representation of plaintiffs tolled the limitations periods. In addition, plaintiffs argued that the statute of repose was effectively tolled because defendants fraudulently concealed plaintiffs' cause of action for legal malpractice. In his affidavit filed with plaintiffs' response, plaintiff John Nelson stated that he was first aware of the May 15, 2015, discovery closure order in the Aurora and Plenco cases when new counsel reviewed the file in "June or July 2011."

¶ 10 Following the parties' oral argument, the circuit court granted defendants' motion to dismiss and denied plaintiffs' leave to amend the complaint. The court held that the act or omission that gave rise to plaintiffs' injury and malpractice action occurred on May 15, 2007, when discovery in the underlying action closed, and therefore was barred by the statute of repose. The court noted that even if the repose period commenced with the entry of summary judgment in the underlying action on November 13, 2007, the legal malpractice suit was still filed more than 6 years after that order. The court held that plaintiffs' malpractice action was also barred by the statute of limitations because it was filed more than two years after the date that plaintiff John Nelson knew that discovery was closed in the underlying litigation. The court denied plaintiffs' leave to amend the complaint stating that it did not see how an amended complaint could possibly change the operative dates for purposes of the statute of repose and the statute of limitations.

¶ 11 ANALYSIS

¶ 12 Plaintiffs argue that the trial court erred when it granted defendants' section 2-619 motion to dismiss based on the statute of repose and the statute of limitations. Plaintiffs contend that the continuous course of negligent representation doctrine and, in the alternative, the fraudulent concealment doctrine applicable in the instant case tolled the limitations periods. A motion to dismiss, pursuant to section 2–619 of the Civil Code of Procedure, admits the legal sufficiency of a plaintiff's complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiff's claim. *DeLuna v. Burciaga,* 223 Ill. 2d 49, 59 (2006). A trial court's grant of a Section 2–619 motions is subject to a *de novo* review. *Id.*

¶ 13 I. Statute of Repose

¶ 14 A legal malpractice case "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). The statute of repose differs from a statute of limitations in that a statute of limitations governs the time within which lawsuits may be commenced after a cause of action has accrued, while a statute of repose extinguishes the action itself after a fixed period of time, regardless of when the action accrued. *Ferguson v. McKenzie*, 202 Ill. 2d 304, 311 (2001). The statute of repose is intended to terminate the possibility of liability after a defined period of time, regardless of a potential plaintiff's lack of knowledge of his or her cause of action. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 61 (2006).

¶ 15 In the instant case, plaintiffs' complaint alleged that their claims against Aurora and Plenco were impaired by defendants' negligent failure to complete discovery in the underlying asbestos action before it closed on May 15, 2007. Plaintiffs contended that their malpractice action also stemmed from defendant's failure to inform plaintiffs that the discovery in the underlying action had closed on May 15, 2007, and that summary judgment was granted in favor of Aurora on November 13, 2007. Plaintiffs were required to pursue their legal malpractice claim no more than 6 years after defendants' alleged error occurred, no later than May 15, 2013. Plaintiffs filed their legal malpractice suit on November 27, 2013, more than 6 years after plaintiffs' alleged negligence occurred. Therefore, plaintiffs' malpractice claim was barred by the statute of repose.

¶ 16 Plaintiffs seek to extend the period of repose by alleging that defendants were engaged in a continuous course of negligent conduct from the time discovery closed on May 15, 2007, to the time that defendants withdrew from plaintiffs' case, on April 20, 2011. Plaintiffs argue that this

court should apply the continuous course of negligent representation doctrine recognized in medical malpractice cases. Under that doctrine, if a physician engages in a continuous and unbroken course of negligent treatment, and the treatment is "so related as to constitute one continuing wrong," the statute of repose will not start to run until the last date of negligent treatment. *Cunningham v. Huffman*, 154 Ill. 2d 398, 406 (1993). Based on the continuous course of negligent representation doctrine, plaintiffs contend that the operative date for purposes of the statute of repose should be the date that such negligent conduct ended—namely, April 2011, when defendants withdrew from representing plaintiffs.

¶ 17 However, in *Mauer v. Rubin*, 409 Ill. App. 3d 630, 640 (2010), this court declined to recognize a continuing course of negligent representation doctrine in the legal malpractice cases holding that the malpractice occurred at the time when the judgment of dissolution of marriage incorporating the alleged defective agreement was entered, and not 4 years later when defendants withdrew the 2-1401 petition for relief from judgment seeking to correct the problem. *Id*. at 644-45. This court in *Mauer* noted that plaintiff's injury was complete at the time the judgment was entered even though the defendants continued to represent the plaintiff for four more years. *Id*. at 645.

¶ 18 Similarly, in the instant case, the complaint identifies the malpractice as defendants' failure to complete the discovery needed to prosecute the Aurora and the Plenco claims prior to the May 15, 2007 order that closed discovery against all parties. Although defendants continued to represent plaintiffs after this date, just as in *Mauer*, the repose period commenced on May 15, 2007, when the "event creating the malpractice occurred regardless of whether any injury has yet resulted so as to cause an action to accrue." *Id*. at 639; see also *Serafin v. Seith*, 284 Ill. App. 3d 577 (rejecting the continuing course of negligent representation doctrine in a legal malpractice

case and holding that the statute of repose was not tolled by events that occurred after the negligent act, including the law firm's failure to remedy the harm). Therefore, the statute of repose was not tolled when defendants continued to represent plaintiffs beyond May 15, 2007. Instead, plaintiffs' claim was barred be the statute of repose when they filed their malpractice action on November 27, 2013, more than 6 years after the defendant's alleged negligent conduct occurred.

¶ 19 II. Fraudulent Concealment

¶ 20 Plaintiffs argue next that even if the statute of repose was triggered on May 15, 2007, the trial court erred when it failed to apply the fraudulent concealment statute pursuant to section 13-215 of the Code of Civil Procedure. 735 ILCS 5/13-215 (West 2012). Specifically, plaintiffs contend that defendants fraudulently concealed their own legal malpractice because defendants failed to inform plaintiffs about the closure of discovery on May 15, 2007, or about the court's grant of summary judgment in favor of Aurora. Plaintiffs argue that defendants' fraudulent concealment triggered a five-year statute of limitations from July 2011, the time they discovered defendants' negligent actions.

¶ 21 Initially, we address defendants' contention that plaintiffs waived the fraudulent concealment issue by failing to properly plead it in their complaint. This court has consistently held that issues not raised before the circuit court are forfeited and cannot be raised for the first time on appeal. *Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 453 (2007). Although plaintiffs did not raise the fraudulent concealment issue in their complaint, they did raise it in their response in opposition to defendants' motion to dismiss and during the hearing on defendants' motion. Thus, we will address the issue because it was raised

in the proceedings before the trial court. See *Toepper v. Brookwood Country Club Road Ass'n,* 204 Ill. App. 3d 479, 490 (1990).

¶ 22 Under the fraudulent concealment doctrine"[i]f a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled hereto, the action may be commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such cause of action, and not afterwards." 735 ILCS 5/13–215 (West 2012). If applicable in a particular case, this section provides an exception to both the statute of limitations and the statute of repose. *DeLuna v. Burciaga,* 223 Ill. 2d 49, 67–68 (2006). However, "[b]y its terms, section 13–215 applies only to fraudulent concealment cases [where] a party is unwittingly induced not to file his action until after expiration of the limitations period." *Muskat v. Sternberg,* 211 Ill. App. 3d 1052, 1061 (1991). Once a party discovers the fraud, it is no longer concealed, and if time remains within which to file the action, section 13–215 cannot operate to toll the limitations period. *Morris v. Margulis,* 197 Ill. 2d 28, 38 (2001).

¶ 23 In the instant case, plaintiffs assert that defendants' failure to disclose the dismissal of the Aurora action and the closure of discovery in the underlying asbestos action constitutes actual concealment. Even if defendants fraudulently concealed plaintiffs' cause of action, "courts have declined to apply fraudulent concealment ***to toll the statute of repose in cases where 'the claimant discovers the fraudulent concealment, or should have discovered it through ordinary diligence, and a reasonable time remains within the remaining limitations period. *Mauer v. Rubin,* 401 Ill. App .3d at 649 (quoting *Smith v. Cook County Hospital,* 164 Ill. App. 3d 857, 862 (1987)).

¶ 24 Here, the record reflects that plaintiffs discovered defendants' alleged fraudulent concealment in June or July 2011, when the new counsel informed them that discovery had

closed in the underlying action and that summary judgment was granted in favor of Aurora and Plenco. On July 2011, 22 months remained under the statute of repose for the plaintiffs to file their malpractice claims. Nonetheless, plaintiffs filed the legal malpractice suit on November 27, 2013, after the statute of repose expired on May 15, 2013. As plaintiffs discovered the alleged fraudulent concealment and 22 months is a reasonable amount of time in which to file their suit within the repose period, the fraudulent concealment exception does not apply to save plaintiffs' action. See *Mauer v. Rubin*, 401 Ill. App .3d at 650 (a year and eight months from a plaintiffs' admitted realization to file his malpractice action within the period of repose "certainly qualifies as ample time."); *Butler v. Mayer, Brown & Platt*, 301 Ill. App. 3d 919, 926 (1998) ("We have held that as little as six months remaining in a statute of limitations period is 'ample time' for a plaintiff to bring suit"); *Sabath v. Mansfield*, 60 Ill. App. 3d 1008, 1015 (1978) ("eight months in which to file suit after any inducement for delay had passed * * *, as a matter of law, was ample time"); *Smith*, 164 Ill. App. 3d at 864 ("six months was a reasonable time within which [the plaintiff] could have filed his complaint after the alleged fraud was discovered"). Therefore, the court did not err in dismissing plaintiffs' complaint as time barred on this basis.

¶ 25 Next, plaintiffs argue the trial court erred in determining that a reasonable amount of time remained in the repose period as a matter of law when the reasonable time rule involved questions of fact that should have been decided by a jury. However, the question of "reasonable time" may be determined by the court as a matter of law without a hearing on that issue if it is clear that a reasonable time did in fact remain within the statute of repose. See e.g., *Kheirkhahvash v. Baniassadi*, 407 Ill. App. 3d 171, 183 (2011); *Mauer v. Rubin*, 401 Ill. App. 3d at 650; *Turner v. Nama*, 294 Ill. App. 3d 19, 28 (1997); see also *Smith v. Cook County Hospital*, 164 Ill. App. 3d at 863. Here, the court did not err in determining, as a matter of law, that 22

months was a reasonable time remaining for plaintiffs to file their suit after they discovered defendants' alleged fraudulent conduct.

¶ 26 III. Statute of Limitations

¶ 27 Plaintiffs further contend that their malpractice action was not barred by the statute of limitations because they discovered defendants' malpractice in December 2011, when summary judgment against Plenco was entered, and they filed the legal malpractice action within the 2-year limitation period on November 27, 2013. Plaintiffs argue that the repose period should be tolled for a 2-year period to coincide with the statute of limitations.

¶ 28 The statute of limitations for a legal malpractice claim provides that such an action must be filed 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) (West 2012). The statute of limitations incorporates the discovery rule, "which 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). 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. 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.

¶ 29 Here, plaintiff John Nelson, admitted in an affidavit filed in opposition to defendants' motion to dismiss that defendants' negligent conduct was discovered in June or July 2011, when successor counsel advised him about the problem created by the May 15, 2007 discovery closure order. Accordingly, plaintiffs' admitted knowledge of the discovery closure order that could

have harmed their ability to recover in the underlying asbestos action commenced the two year statute of limitations and not the grant of the summary judgment, for the second time, in favor of Plenco in December 2011. See *Carlson v. Fish* , 2015 IL App (1st) 140526 (holding that the statute of limitations began to run when the plaintiff discovered the cause of action even if the plaintiff did not know exactly what defendants may have done wrong or that they had a cause of action for malpractice). The statute of limitations started to run at the latest on July 2011 and it expired by the time plaintiffs filed their malpractice claim on November 27, 2013. As such, plaintiffs' claim is barred by the statute of limitations as well as by the statute of repose.

¶ 30 IV. Leave to Amend

¶ 31 Finally, plaintiffs argue that the circuit court abused its discretion in dismissing their complaint with prejudice and refusing to allow them to amend their complaint. In determining whether to allow an amended complaint, the trial court must consider the following factors: (1) whether the proposed amendment would cure the defective pleading, (2) whether other parties would be prejudiced or surprised by the proposed amended complaint, (3) whether the plaintiff had previous opportunities to amend the complaint, and (4) whether the proposed amendment is timely. *Muirfield Village-Vernon Hills, LLC v. K. Reinke, Jr. & Co.*, 349 Ill. App. 3d 178, 195 (2004). The plaintiff must meet all four factors, and "if the proposed amendment does not state a cognizable claim, and thus, fails the first factor, courts of review will often not proceed with further analysis." *I.C.S. Illinois, Inc. v. Waste Mgmt. of Illinois, Inc.*, 403 Ill. App. 3d 211, 220 (2010). A trial court's decision to grant or deny leave to amend is reviewed on an abuse of discretion standard. *Id*.

¶ 32 In the instant case, as established previously, plaintiffs' legal malpractice claim is barred by the statute of repose and the statute of limitations. Moreover, no additional allegations could

cure this deficiency because the complaint as well as plaintiff John Nelson's affidavit conclusively established that plaintiffs' claim was untimely. Any amendment would therefore be futile and the trial court did not abuse its discretion in dismissing plaintiffs' complaint with prejudice.

¶ 33 CONCLUSION

¶ 34 Based on the foregoing, we affirm the trial court's judgment.

¶ 35 Affirmed.