2015 IL App (2d) 141157-U
No. 2-14-1157
Order filed August 24, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PETER GAKUBA,	)	Appeal from the Circuit Court
	)	of Winnebago County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 13-L-382
	)	
DEBRA SCHAFER, DANIEL CAIN, and	)	
SREENAN & CAIN, P.C.,	)	Honorable
	)	Eugene G. Doherty,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court properly dismissed as untimely plaintiff's claims for consumer fraud and intentional infliction of emotional distress against his former attorneys: the limitations periods began to run when he allegedly fired his attorneys (and thus had reason to investigate whether their conduct was actionable), not when he learned that their conduct was actually actionable; (2) the trial court properly dismissed plaintiff's common-law fraud claim for failure to state a cause of action, as the claim was based on puffery and opinion, which are not actionable.

¶ 2 On December 19, 2013, plaintiff, Peter Gakuba filed a three-count *pro se* complaint in the circuit court of Winnebago County against defendants, Debra Schafer, Daniel Cain, and the law firm of Sreenen & Cain, P.C., seeking recovery for a violation of the Illinois Consumer

Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2012)) (count I), for common law fraud (count II), and for intentional infliction of emotional distress (count III). Defendants moved for dismissal of counts I and III pursuant to section 2-619(a)(5) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(5) (West 2012)) on the basis that the claims set forth in those counts were not commenced within the time limited by law. The trial court granted the motion and dismissed counts I and III with prejudice. The trial court also granted defendants' motion pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)) to dismiss count II for failure to state a cause of action. However, the trial court granted plaintiff leave to amend that count. Plaintiff filed an amended complaint and defendants again moved to dismiss count II for failure to state a cause of action. The trial court granted the motion and dismissed the amended complaint with prejudice. Plaintiff now appeals, *pro se*. We affirm.

¶ 3 In his complaint, plaintiff alleged that Schafer and Cain are criminal defense attorneys with the law firm of Sreenen and Cain. In November 2006, plaintiff retained defendants to represent him in a criminal matter in Winnebago County. Plaintiff alleged that Schafer and Cain told him that they were the best criminal defense lawyers in Rockford. Cain allegedly stated that he had tried more cases in Winnebago County than any other lawyer. Schafer stated that one year she obtained six consecutive acquittals. In December 2006, plaintiff was charged with "3 felony counts." The alleged victim of the offenses was a minor. According to plaintiff, defendants advised him that the case would be dismissed because the alleged victim was uncooperative and would decline to press charges upon reaching the age of majority. Therefore, according to plaintiff, defendants did nothing to prepare for trial.

¶ 4 Plaintiff alleged that the case was ultimately set for trial in September 2010. At that point, plaintiff "fired" defendants. In April 2013, plaintiff opted to represent himself in the criminal proceedings and then had access, for the first time, to discovery material. Prior thereto, a protective order denied him access to discovery materials. Plaintiff claimed that, once permitted to review the discovery materials, he was able to "confirm what he had long suspected," namely that the State's case rested on evidence collected in violation of the Fourth amendment and the Video Privacy Protection Act of 1988 (VPPA) (18 U.S.C. § 2710 (2012)). At that point plaintiff became aware that, during the nearly four-year period defendants represented him, they collected legal fees while performing no legal work of value, when they could have raised a defense based on the fourth amendment and the VPPA violations.

¶ 5 The gravamen of both plaintiff's Consumer Fraud Act claim and his common-law fraud claim was that defendants deceived him by telling him that there would be no trial because the alleged victim would not cooperate with the prosecution and that, in the unlikely event the matter did proceed to trial, defendants would zealously defend plaintiff. Plaintiff alleged that defendants knew that he would rely upon this deceit and "pay them [legal fees] they were neither entitled to receive nor earned as they were not hired to perform piecemeal, per diem, part-time work, or work which was worthless." Also, according to plaintiff, "by subjecting Plaintiff to such humiliating and degrading conduct, [defendants intended] to inflict severe emotional distress on the Plaintiff, and knew that their conduct would cause Plaintiff to suffer severe emotional distress." Plaintiff alleged that as a result of defendants' "outrageous conduct," he had experienced "constant fear and anxiety, nightmares, sleep disruption, depression, and a recurring fear of illegal seizures, attempted false arrests, and conspiracies to maliciously prosecute him by peace officers and/or engage in malicious abuses of process."

¶ 6 In their motion to dismiss, defendants contended that plaintiff's claim under the Consumer Fraud Act was barred by its three-year statute of limitations (see 815 ILCS 505/10a (West 2012)) and that the claim of intentional infliction of emotional distress was barred by the two-year statute of limitations applicable to actions for personal injury (see 735 ILCS 5/13-202 (West 2012)); see also *Pavlik v. Kornhaber*, 326 Ill. App. 3d 731, 744 (2001) ("Emotional distress is a species of personal injury and is thus governed by the two-year prescriptive period ***.")) Defendants further contended that plaintiff's common-law fraud claim was defective because defendants' alleged misrepresentations were mere opinions and therefore were not actionable.

¶ 7 As noted, although the trial court permitted plaintiff to replead his common-law fraud claim, the court dismissed the Consumer Fraud Act and intentional-infliction-of-emotional-distress claims with prejudice. Nonetheless, plaintiff's amended complaint advanced all three claims. In addition to the allegations of the original complaint, plaintiff alleged that Schafer and Cain (who were both former prosecutors) advised him that they had a close working relationship with the assistant State's Attorney assigned to the case, Kate Kurtz, and that Kurtz had revealed to them that the alleged victim had no desire to proceed with the prosecution. Plaintiff further alleged that Schafer and Kurtz had both discussed the criminal case with another attorney. According to plaintiff, Schafer and Kurtz had previously had "romantic affairs" with that attorney. Plaintiff alleged that Schafer explained that she had not engaged in vigorous discovery because doing so would be offensive to Kurtz. Plaintiff alleged that "from December 2006 until September 2010 the impression that Schafer and Cain left on [plaintiff], and did so deliberately and fraudulently, was that by being former state prosecutors who were friends (outside the

courtroom) with [Kurtz] they knew how this prosecutor would exercise prosecutorial discretion because they functioned as a cabal—all three (3) of them, together."

¶ 8 Defendants successfully moved for dismissal of plaintiff's amended complaint, and plaintiff filed a timely notice of appeal.

¶ 9 We first consider whether the trial court erred in dismissing, pursuant to section 2-619 of the Code, plaintiff's Consumer Fraud Act and intentional-infliction-of-emotional-distress-claims. Section 2-619 provides that an action may be dismissed, on the motion of the defendant, based on various enumerated defenses (735 ILCS 5/2-619(a)(1)-(8) (West 2012)), including the defense that "the action was not commenced within the time limited by law" (735 ILCS 5/2-619(a)(5) (West 2012)). A court ruling on a section 2-619 motion "must accept as true all well-pleaded facts, as well as any reasonable inferences that may arise from them [citation], but a court cannot accept as true mere conclusions unsupported by specific facts [citation]." *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. A section 2-619 motion must be supported by affidavits establishing grounds for dismissal that do not appear on the face of the complaint. 735 ILCS 5/2-619(a) (West 2012); *Becker v. Zellner*, 292 Ill. App. 3d 116, 124 (1997). However, in deciding the motion, the trial court may consider facts of which it may take judicial notice. *Village of Riverwoods v. BG Limited Partnership*, 276 Ill. App. 3d 720, 724 (1995). As our supreme court has noted, "[a]n appeal from a section 2-619 dismissal is similar to an appeal following a grant of summary judgment, and both are subject to *de novo* review." *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 254 (2004). The question on appeal is "whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether the dismissal is proper as a matter of law." *Id.*

¶ 10 There is no dispute that the limitations periods for plaintiff's intentional-infliction-of emotional-distress claim and his Consumer Fraud Act claim are two years and three years, respectively. A limitations period ordinarily begins to run when the plaintiff's cause of action accrues. *Wisniewski v. Diocese of Belleville*, 406 Ill. App. 3d 1119, 1151 (2011). As our supreme court has observed:

> "A cause of action 'accrues' when facts exist that authorize the bringing of a cause of action. Thus, a tort cause of action accrues when all its elements are present ***. [Citation.] A mechanical application of the statute of limitations, however, may result in the limitations period expiring before a plaintiff even knows of his or her cause of action. To ameliorate the potentially harsh results of such an application, this court has adopted the 'discovery rule,' the effect of which is to postpone the start of the period of limitations until the injured party knows or reasonably should know of the injury and knows or reasonably should know that the injury was wrongfully caused. [Citations.] At that point, the burden is on the injured person to inquire further as to the possible existence of a cause of action. [Citation.]" *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 20.

Knowledge of "wrongful cause" is imputed at the point when " 'the injured party becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved.' " *Solis v. BASF Corp.*, 2012 IL App (1st) 110875, ¶ 35 (quoting *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 416 (1981)). A plaintiff who invokes the discovery rule to postpone the start of the limitations period bears the burden of proving the date of discovery. *Id.* ¶ 28.

¶ 11 Plaintiff alleged that he "fired" defendants in September 2010. The trial court took judicial notice that on September 20, 2010, plaintiff filed a *pro* se motion in the criminal prosecution entitled "Motion for Continuance & Motion for Substitution of Counsel by Reason of Ineffective Assistance." In April 2013, plaintiff filed a motion expressing dissatisfaction with the performance of attorneys Michael Thompson and Beau Brindley, who had replaced defendants as counsel in the criminal matter. The trial court in the case at bar correctly reasoned that it was entitled to take judicial notice of its own records (see, *e.g.*, *People v. Jackson*, 182 Ill. 2d 30, 66 (1998)) and was therefore entitled to examine the court file from the criminal prosecution. Assuming that defendants failed to prepare for trial, plaintiff's motion filed in September 2010 establishes that by that time he was well aware of defendants' lack of preparation and would thus have known of the alleged deceit forming the basis of the Consumer Fraud Act and intentional-infliction-of-emotional-distress claims. Furthermore, according to the April 2013 motion, plaintiff brought the alleged VPPA violation to the attention of Thompson and Brindley in June 2011. Thus, the April 2013 motion directly contradicts plaintiff's contention that he was unaware of the alleged VPPA violation until 2013 when he had personal access to discovery materials.

¶ 12 Plaintiff argues that, by taking judicial notice of his *pro se* motions, the trial court violated the principle that, in ruling on a motion to dismiss under section 2-619, all well-pleaded allegations of the complaint must be taken as true. However, plaintiff's allegation that he did not discover his cause of action until 2013 is merely a conclusion, rather than a well-pleaded allegation of fact. It is clear from the face of the complaint itself that, in September 2010, plaintiff was aware both that defendants had not prepared for trial and that their assurances that the matter would not proceed to trial were false. That information was enough to put plaintiff on

inquiry whether defendants' conduct was actionable. Plaintiff's conclusory allegation regarding the date of discovery appears to be the product of a mistaken belief (which is apparent from his argument on appeal) that the limitations period does not begin until the plaintiff has sufficient knowledge of a claim to *actually bring suit*. To the contrary, as noted above, the discovery rule delays the start of the limitations period only until the plaintiff has knowledge of facts that would put a reasonable person on inquiry to determine the existence of a cause of action. *Solis*, 2012 IL App (1st) 110875, ¶ 35. Thus, plaintiff's allegation that, upon obtaining the full case file, including discovery material, he confirmed a long-held suspicion that the State's case was based on evidence that had been obtained illegally does not establish the date of discovery. Accordingly, the trial court did not err in taking judicial notice of facts bearing on the salient question of when plaintiff was put on inquiry that defendants had been neglecting his case under the false pretense that it would not go to trial.

¶ 13 Plaintiff argues that the trial court's decision rests on facts that are contradicted by the records of which the court took judicial notice. Plaintiff contends that his motion seeking to discharge defendants as counsel in the criminal case was denied, but that defendants were given leave to withdraw. According to plaintiff, the trial court misunderstood the chronology of the events and improperly rejected his argument that the denial of his motion reassured him that defendants had provided adequate representation. The record on appeal does not contain all the pertinent parts of the record in the criminal case that are necessary to facilitate review of this argument. Accordingly, we decline to consider it.

¶ 14 Defendant also contends that the court erroneously stated that the VPPA argument was raised in the criminal proceedings without success. According to plaintiff, the VPPA argument was successfully raised in the criminal proceedings after defendants were discharged. Whether

the VPPA argument succeeded is beside the point. For purposes of the statute of limitations, all that matters is when plaintiff was on inquiry that defendants were ignoring a possible defense strategy based on the VPPA.

¶ 15 In summary, the record establishes that when plaintiff "fired" defendants in September 2010 he was aware of facts that would place a reasonable person on inquiry to determine whether defendants' conduct was actionable. The limitations period for the intentional-infliction-of-emotional-distress claim expired in September 2012. The limitations period for the Consumer Fraud Act claim expired in September 2013. Plaintiffs complaint, which was filed in December 2013, was untimely as to both claims.

¶ 16 We next consider the dismissal, for failure to state a cause of action, of plaintiff's common-law-fraud claim. The following principles govern our review:

> "On review, the question is 'whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted.' (Internal quotation marks omitted.) [Citation.] 'In reviewing the sufficiency of a complaint, we accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts.' [Citation.] A cause of action should not be dismissed unless it is clearly apparent that no set of facts can be proven that would entitle the plaintiff to recover. [Citation.] Although a complaint does not need to contain evidence, it cannot be merely conclusory, and must allege facts sufficient to bring a claim within a legally recognized cause of action. [Citation.] The standard of review for a motion to dismiss brought under section 2-615 is *de novo*. [Citation.]" *Freedman v. Muller*, 2015 IL App (1st) 141410, ¶ 23.

¶ 17 In order to state a cause of action for common-law fraud, it is necessary to plead the following elements: (1) a false statement of material fact; (2) the defendant knew that the statement was false; (3) the defendant intended that the statement induce the plaintiff to act; (4) the plaintiff relied upon the truth of the statement; and (5) the plaintiff suffered damages from his reliance on the statement. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 496 (1996). The principal allegations of plaintiff's original complaint were that defendants falsely boasted of their legal prowess and that they falsely advised plaintiff that the case would not go to trial. Statements regarding legal prowess were mere puffery. " 'Puffing' signifies 'meaningless superlatives that no reasonable person would take seriously, and so it is not actionable as fraud.' " *Hanson-Suminski v. Rohrman Midwest Motors, Inc.*, 386 Ill. App. 3d 585, 594 (2008) (quoting *Speakers of Sport, Inc. v. ProServ, Inc.*, 178 F.3d 862, 866 (7th Cir. 1999)). Likewise, because "[s]tatements regarding future events are considered opinions, not statements of fact" (*People ex rel. Peters v. Murphy-Knight*, 248 Ill. App. 3d 382, 387 (1993)), defendants' alleged assurances to plaintiff that the criminal case would not go to trial are not actionable.

¶ 18 We agree with the trial court that the additional facts alleged in plaintiff's amended complaint did not cure its deficiencies. The crux of the new allegations was that defendants implied that their social and professional relationship with the prosecutor gave them insight into how she would exercise her prosecutorial discretion. Plaintiff alleged that defendants did so fraudulently, but he supplied no specific facts establishing fraud. Finally, we note that defendant has not argued that the trial court should have afforded him an additional opportunity to amend his complaint. Accordingly, we find no error in the dismissal of the complaint with prejudice.

¶ 19 For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed.

¶ 20 Affirmed.