2016 IL App (1st) 143685-U

No. 1-14-3685

FIFTH DIVISION
March 18, 2016

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DAMOR AMERICA, an Illinois Corporation, and ALA s.r.l., a Foreign Corporation, Plaintiffs-Appellants, v. HENRY GONZALEZ, CARLOS RODRIGUEZ, and DANIEL S. LEE of Rodriguez, O'Donnell, Gonzalez & Williams, P.C., Defendants-Appellees. (Rodriguez O'Donnell Ross Fuerst Gonzalez Williams & England, P.C., Defendant).	)	Appeal from the Circuit Court of Cook County. No. 14 L 4092 The Honorable Raymond W. Mitchell, Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Gordon concurred in the judgment.

O R D E R

¶ 1 *HELD*: Plaintiffs' complaint failed to establish fraudulent concealment by their attorneys; therefore, the circuit court properly dismissed the complaint as time-barred by the statute of repose.

¶ 2 Plaintiffs, Damor America (Damor), an Illinois corporation, and ALA, s.r.l., a foreign corporation, appeal the dismissal pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2014)) of their legal malpractice claim against defendants, Henry Gonzalez, Carlos Rodriguez, and Daniel Lee of Rodriguez, O'Donnell, Gonzalez and Williams, P.C. Plaintiffs contend their claim was not barred by the statutes of limitations or repose where their complaint alleged facts demonstrating fraudulent concealment by a fiduciary, which was discovered within the requisite five-year time period for filing a claim when asserting such an allegation. Based on the following, we affirm.

¶ 3 FACTS

¶ 4 Damor was a company that purchased and imported pharmaceutical burn cream from ALA, s.r.l. (ALA), an Italian company.[1] Lee Mugnolo and his brother, Andrea Mugnolo Jr., were the principle shareholders of Damor. Since 1989, their father, Andrea Mugnolo Sr., arranged for the shipment of the product from Italy. In December 2004, Damor purchased approximately $1.3 million worth of cream (2410 cases) and ALA hired a company named Schenker to arrange the transportation of the goods to the United States. The cargo arrived at a warehouse in Melrose Park, Illinois on February 14, 2005. However, in transit from Salerno, Italy, to Melrose Park, the cargo was irreparably damaged.[2] As a result, plaintiffs hired defendants,[3] *vis a vis* the law firm Riggle & Craven, to represent them in an action against the ocean liner that transported the cargo. Plaintiffs filed the suit on February 6, 2006, in the U.S. District Court of the Southern District of New York (the New York action). The ocean liner

[1] Plaintiffs allege in their appellate brief that Damor has been forced out of business due to events related to the underlying case.

[2] The record does not provide the date of damage.

[3] The record does not provide the date when defendants were hired.

responded by filing an answer and affirmative defenses,[4] including an affirmative defense that plaintiffs' claim was time-barred due to a clause in the bill of lading that required notice be given under the English arbitration act within one year of the loss. Specifically, the bill of lading[5] instructed that "Shipments to and from ports outside the United States of America (U.S.): unless the carrier otherwise agrees in writing, any claim by the merchant shall be referred to the exclusive jurisdiction of the High Court of Justice, England." No such notice had been provided. Instead, plaintiffs settled the New York action on November 6, 2006, for $20,000.[6] The action subsequently was dismissed by agreement on March 15, 2007.

¶ 5 Then, on July 23, 2007, Kent Sinson, plaintiffs' current attorney, filed an action against Zurich International, among others, in the Circuit Court of Cook County, Illinois, on plaintiffs' behalf, seeking to recover $1,386,537 in damages for the losses resulting from the same damaged cargo. Zurich International had been the insurer of the transatlantic cargo. The complaint alleged breach of contract, bad faith, and a violation of the Illinois consumer fraud and deceptive business act against Zurich International. According to Sinson's representation at oral arguments, the Zurich International case remains ongoing.

¶ 6 Later, on April 11, 2014, plaintiffs filed the underlying complaint against defendants, alleging attorney malpractice where defendants failed to comply with the notice provision in the bill of lading and failed to inform plaintiffs that they were entitled to greater than the $20,000 settlement in the New York action, which defendants had stated was the ocean liner's insurance policy limit. Plaintiffs alleged that the actual statutory limit for coverage of their cargo was $1,205,000 based on language[7] stating "the carrier shall in no event be liable for loss or damage

[4] The answer and affirmative defenses do not appear in the record.
[5] The bill of lading does not appear in the record.
[6] The settlement agreement does not appear in the record.
[7] Plaintiffs do not provide the origin of this language.

to or in connection with in an amount exceeding $500 per package." According to plaintiffs' complaint, they did not learn about their cause of action against defendants until Sinson spoke with an attorney specializing in cargo transportation, on December 6, 2013.[8] Plaintiffs alleged that they were prevented from discovering their cause of action prior to that time due to the "trust and confidence" they placed in defendants, as plaintiffs' fiduciary.

¶ 7 In fact, plaintiffs maintained that defendants prevented Sinson from obtaining information related to the New York action. According to plaintiffs' complaint, in August 2008, attorney Sinson attempted to obtain the New York action case file from defendants, but he was told the files "were inadvertently discarded and destroyed by the shredding company" during an office move. Sinson, however, admitted at oral argument that he obtained the court file for the New York action sometime in 2009, which included the affirmative defenses raised by the ocean liner in the New York action. Plaintiffs' complaint also alleges that, on August 26, 2009, in a lawsuit against Riggle & Craven for attorney fees related to the New York action, defendants again repeated to both the opposing counsel and the D.C. Superior Court that plaintiffs' settled for the $20,000 "policy limits." Defendants did not disclose their failure to comply with the notice provision of the bill of lading at that time.

¶ 8 In their complaint, plaintiffs alleged that, if not for defendants' false statement regarding the ocean liner's policy limits or if plaintiffs had knowledge of defendant's failure to provide timely notice to the High Court of Justice in England as required by the bill of lading, plaintiffs would not have settled the New York action. Plaintiffs maintained that the applicable statute of limitations for their malpractice claim was section 13-215 of the Code (735 ILCS 5/13-215 (West 2012)) because defendants fraudulently concealed plaintiffs' cause of action. As a result,

[8] The name of the attorney Sinson spoke to is not included in the complaint, but, at oral argument, Sinson disclosed that the attorney's name was Harold Kingsley.

plaintiffs alleged their complaint was timely filed within the five-year statute of limitations period for fraudulent concealment, which began to run on December 6, 2013-the date when Sinson discovered the malpractice.

¶ 9 In response, defendants filed a section 2-619(5) motion to dismiss plaintiffs' complaint for failure to comply with the two-year statute of limitations and six-year statute of repose applicable to malpractice actions pursuant to sections 13-214.3(b) and (c) of the Code (735 ILCS 5/13-214.3(b), (c) (West 2012)).

¶ 10 Plaintiffs then filed an Illinois Supreme Court Rule 191(b) motion requesting discovery in order to respond to defendant's motion to dismiss. Plaintiffs' Rule 191(b) motion was denied by the circuit court on August 29, 2014. The circuit court stated that defendants' section 2-619 dismissal motion admitted the allegations of plaintiffs' complaint and would be denied by the court if there were any facts in dispute.

¶ 11 Ultimately, on November 12, 2014, the circuit court granted defendants' section 2-619(5) motion to dismiss, finding that plaintiffs should have discovered their cause of action in or around 2007 when the New York action was settled and dismissed. This appeal followed.

¶ 12 ANALYSIS

¶ 13 I. Section 2-619(5) Motion to Dismiss

¶ 14 The issue on appeal is whether the circuit court erred when it dismissed plaintiffs' legal malpractice claim as time barred by section 13-214.3 of the Code.

¶ 15 A section 2-619 motion to dismiss admits the legal sufficiency of the complaint, but asserts an affirmative matter to otherwise defeat the claim. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. In considering a section 2-619 motion to dismiss, a court reviews all pleadings and supporting documents in a light most favorable to the nonmoving

party. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367-68 (2003). However, conclusions of fact or law unsupported by allegations of specific facts are not taken as true and are not considered by the court in ruling on the motion. *Mayfield v. ACME Barrel Co.*, 258 Ill. App. 3d 32, 34 (1994). The court must determine whether the existence of a genuine issue of material fact precludes dismissal or, absent such an issue of fact, whether the asserted affirmative matter makes dismissal proper as a matter of law. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993). We review the dismissal of a complaint pursuant to section 2-619 *de novo*. *Id*. at 116.

¶ 16 Section 13-214.3 of the Code provides, in relevant part:

> "(b) 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 *** 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.
>
> (c) Except as provided in subsection (d) [when the injury caused by the act or omission does not occur until the death of the person for whom the professional services were rendered], an action described in subsection (b) 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(b), (c) (West 2012).

¶ 17 Section 13-215 of the Code, however, provides:

> "If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, 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).

Carlson v. Fish, 2015 IL App (1st) 140526, ¶ 44 ("[u]nder the fraudulent concealment doctrine, the statute of limitations will be tolled if the plaintiff pleads and proves that fraud prevented discovery of a cause of action").

¶ 18 Generally, a plaintiff alleging fraudulent concealment must show affirmative acts by the defendant that were designed to prevent the discovery of the action. *Clay v. Kuhl*, 189 Ill. 2d 603, 613 (2000). However, in *DeLuna v. Burciaga*, 223 Ill. 2d 49 (2006), the Illinois Supreme Court expressed an exception to the general rule where the existence of a fiduciary relationship is clearly established. *Id*. at 76. "[A] fiduciary who is silent, and thus fails to fulfill his duty to disclose material facts concerning the existence of a cause of action, has fraudulently concealed that action, even without affirmative acts or representations." (Emphasis omitted.) *Id*. at 77. It is widely accepted that an attorney client relationship constitutes a fiduciary relationship. *Id*. That said, "this court has rejected the notion that a lawyer has an affirmative obligation to advise a client of the grounds to sue him for legal malpractice." *Lamet v. Levin*, 2015 IL App (1st) 143105, ¶ 7 (citing *Carlson*, 2015 IL App (1st) 140526, ¶ 45).

¶ 19 Plaintiffs contend that the statutes of limitations and repose are tolled because defendants fraudulently concealed their legal malpractice. Plaintiffs maintain that they only discovered their cause of action on December 6, 2013, and subsequently filed their legal malpractice action within the requisite 5-year period. Defendants respond that plaintiffs' claim was untimely. According to defendants, plaintiffs had all of the necessary information to put them on notice of a claim against defendants in 2007 when they settled the New York action. Specifically, according to defendants, plaintiffs had access to the bill of lading, which provided the one-year notice provision, and they were aware of the statutory remedy providing them with $1,205,000 for their losses. In fact, plaintiffs expressly requested over $1.3 million in damages from Zurich

in the lawsuit pursued against the insurer in 2007. As a result, defendants argue that plaintiffs' attorney Sinson's "chance discussion with a mystery attorney" in 2013 was not the relevant date for establishing plaintiffs' knowledge of the malpractice claim.

¶ 20 We find the supreme court's analysis in *DeLuna* to be instructive. In *DeLuna*, the plaintiffs sufficiently pled facts demonstrating fraudulent concealment of their legal malpractice claim where they alleged that their attorney actively misled them over the course of a 10-year period by telling them their underlying medical malpractice lawsuit was "going well" when the suit already had been dismissed. *DeLuna*, 223 Ill. 2d at 80-81. As a result of the attorney's deceptive assurances, the plaintiffs did not investigate their case and failed to discover their malpractice claim within the limitations of the statute of repose. *Id*. In fact, the plaintiffs only discovered that their case had been dismissed and that they might have an action against the defendant when one of their other attorneys in the underlying case sent them a letter informing them of such 13 years after the case had been dismissed by the trial court and 8 years after the dismissal had been affirmed by the supreme court. *Id*. at 80.

¶ 21 *DeLuna*, however, is distinguishable from the case before us. In *DeLuna*, the plaintiffs did not speak English, and maybe could not read English; thus, all of their communications regarding the case were limited to their Spanish speaking attorney, who committed the malpractice, and not the other attorneys assisting with the case. The *DeLuna* plaintiffs alleged that they relied "in good faith" on the assurances and reassurances regarding the status of their case made by the defendant over the course of multiple meetings throughout the years. The supreme court found that, under the circumstances, the plaintiffs had no duty to conduct their own courthouse investigation and had no reason to believe such an investigation was necessary. *Id*. at 81-82.

¶ 22 In contrast, plaintiffs here were put on notice that defendants failed to abide by the terms of the bill of lading, which admittedly was within their possession, in 2006 when the ocean liner raised the contract language as a defense in the New York action. Additionally, plaintiffs knew they suffered an injury in 2007 when they settled the New York action for two cents on the dollar, *i.e.*, where they accepted a $20,000 settlement on a $1.3 million loss. "[W]here a plaintiff has been put on inquiry as to a defendant's fraudulent concealment within a reasonable time before the ending of the statute of repose, such that he should have discovered the fraud through ordinary diligence, he cannot later use fraudulent concealment as a shield in the event that he does not file suit within the statutory time period." *Mauer v. Rubin*, 401 Ill. App. 3d 630, 649 (2010) (courts will not apply the doctrine of fraudulent concealment to toll the statute of repose if the plaintiff had knowledge, or should have had knowledge, of his cause of action within the statutory period). Furthermore, defendants ceased representing plaintiffs after the action was dismissed by agreement on March 15, 2007, following the November 6, 2006, settlement agreement. Therefore, unlike the defendant attorney in *DeLuna*, defendants here did not repeatedly and continuously mislead plaintiffs regarding the status of their case. Instead, defendants suggested plaintiffs enter into the settlement agreement, albeit for a small fraction of the damages alleged. Accordingly, to the extent defendants engaged in fraudulent concealment, the fraudulent concealment ceased when the New York action was dismissed in March 2007. The concealment could not have been maintained in the face of ordinary diligence once the settlement agreement was entered for two cents on the dollar of plaintiffs' damages, and the cause of action dismissed.

¶ 23 We are not persuaded by plaintiffs' allegation that defendants continued the fraudulent concealment beyond the settlement date where they repeated that plaintiffs settled for the policy

limits. The challenged concealment referenced by plaintiffs occurred in 2009 during the lawsuit defendants brought against the law firm of Riggle & Craven for attorney fees related to the New York action. Any concealment by defendants during that lawsuit was directed at Riggle & Craven, not plaintiffs. Plaintiffs, therefore, cannot base their own legal malpractice cause of action upon the alleged concealment in 2009.

¶ 24 Moreover, unlike the plaintiff in *DeLuna*, who was completely reliant on the Spanish-speaking attorney engaged in the concealment for all of the information related to his lawsuit, plaintiffs here were represented by a number of attorneys in various actions during the relevant time period. Riggle & Craven represented plaintiffs and their Italian partner at the time the shipment was damaged. Riggle & Craven then hired defendants to represent plaintiffs in the New York action. As emails attached to defendants' motion to dismiss reveal, Riggle & Craven also participated in the New York action and communicated with plaintiffs. In fact, Riggle & Craven told plaintiffs of their intent to speak with plaintiffs' current attorney on January 15, 2007, to discuss suing Zurich. Plaintiffs' current attorney, Sinson, that "discovered" the underlying malpractice action represented plaintiffs in the Zurich action in 2007. Sinson maintained that he was unaware of defendants' malpractice because he was not an expert in cargo transportation law; however, Sinson conceded at oral argument that he was aware as early as 2007 (when he was hired to file the lawsuit against Zurich International) and as late as 2009 (when he obtained the court file for the New York action) that the statute of limitations was raised as an affirmative defense in the underlying case. Accordingly, the instant plaintiffs were not in the same vulnerable position experienced by the *DeLuna* plaintiffs. See *DeLuna*, 223 Ill. 2d at 82.

¶ 25 Contrary to plaintiffs' position, there is no case law that requires an attorney to affirmatively advise his client of his negligence and the statute of limitations for bringing a malpractice lawsuit. *Fitch v. McDermott, Will & Emery, LLP*, 401 Ill. App. 3d 1006, 1025 (2010). *DeLuna* requires that an attorney disclose material *facts* concerning the cause of action. *DeLuna*, 223 Ill. 2d at 77. As stated, the record reveals plaintiffs were aware, or should have been aware, of the material facts insofar as defendants failed to abide by the one-year bill of lading limitation period and that they settled the New York action for a fraction of the damages they sustained.

¶ 26 Based on the foregoing, we conclude that the fraudulent concealment statute (735 ILCS 5/13-215 (West 2012)) did not apply to plaintiffs' malpractice claim and, therefore, that it did not toll the time for filing the claim. Instead, plaintiffs had, at most, six years from the dismissal date in the New York action, *i.e.*, March 15, 2007, to file their claim under the statute of repose (735 ILCS 5/13-214.3(c) (West 2012)). *Lamet*, 2015 IL App (1st) 143105, ¶ 20 (the statute of repose begins to run as soon as an event giving rise to legal malpractice occurs, regardless of whether the plaintiff's injury has yet been realized). Plaintiffs failed to do so where their underlying complaint was filed on April 11, 2014. The legal malpractice claim was, therefore, time-barred.

¶ 27 For the reasons stated above, we additionally conclude that any equitable estoppel claim raised in plaintiffs' complaint was also time-barred. See *Kozcor v. Melnyk*, 407 Ill. App. 3d 994, 999-1000 (2011) (citing *DeLuna*, 223 Ill. 2d at 83). Simply stated, defendants did not make any representations after March 15, 2007, that plaintiffs relied on to refrain from filing a legal malpractice claim.

¶ 28 In sum, we find that, after reviewing all pleadings and supporting documents in a light most favorable to plaintiffs, the trial court properly dismissed plaintiffs' legal malpractice complaint against defendants as untimely. See *Van Meter*, 207 Ill. 2d at 367-68.

¶ 29 II. Rule 191(b) Motion for Discovery

¶ 30 In light of our decision affirming the dismissal of plaintiffs' complaint, we find plaintiffs' claim that the trial court erred in denying their request for discovery is moot. *Hill v. Murphy*, 14 Ill. App. 3d 668, 670 (1973) ("[a] question is said to be moot when it presents or involves no actual controversy, interests or rights, or where the issues involved have ceased to exist").

¶ 31 CONCLUSION

¶ 32 We affirm the dismissal of plaintiffs' complaint pursuant to section 2-619(5) of the Code.

¶ 33 Affirmed.