

2016 IL App (2d) 151026-U
No. 2-15-1026
Order filed September 14, 2016
Modified upon Denial of Rehearing October 24, 2016

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

LUIS DOWNES,)	Appeal from the Circuit Court
)	of Lake County.
Plaintiff-Appellant,)	
)	
v.)	No. 12-L-0894
)	
CHRISTINE M. DOWNES and EDWARD)	Honorable
FOTH,)	Michael J. Fusz,
)	Margaret J. Mullen,
Defendants-Appellees.)	Judges, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* Summary judgment for defendants affirmed where plaintiff's causes of action for paternity fraud, unjust enrichment and intentional infliction of emotional distress were barred by the applicable statutes of limitations and repose.

¶ 2 Plaintiff, Luis Downes, appeals from the dismissal of his action for paternity fraud against defendant Christine M. Downes, unjust enrichment against defendant Edward Foth, and intentional infliction of emotional distress against both defendants. Plaintiff's complaint was untimely; thus, we affirm the entry of summary judgment for defendants on statute of limitations grounds.

¶ 3

I. BACKGROUND

¶ 4 Luis Downes and Christine Downes were married in August 1968. In 1972 Christine began an extramarital affair with Edward Foth, then a professor at Northern Illinois University. The affair continued, off and on, for approximately four years. During this time period Christine gave birth to three children: Michael Downes, born April 29, 1973; Daniel Downes, born September 18, 1974; and Heather Downes, born August 15, 1976. Luis assumed he was the biological father of these children and raised and provided for them accordingly.

¶ 5 In 1990 or 1991, Luis was told by another paramour of Christine that she had had an affair with Foth. When Luis confronted her with this information, Christine denied it, because, as she testified in her deposition, “he was hurt enough as it was.”

¶ 6 In December, 2009, Foth, his wife and his adult daughter, Carrie Foth, attended a 60th birthday party for Christine. At one point in the evening, Luis noticed an uncanny resemblance between Heather Downes and Carrie Foth and began to suspect that Michael, Daniel and Heather might not be his biological children. Luis testified in his deposition that he began experiencing emotional distress at this time.

¶ 7 Between June and November of 2010, Luis surreptitiously obtained DNA samples from Foth and from Michael, Daniel, and Heather Downes, which he submitted, along with his own DNA sample, to a laboratory for genetic testing. On September 8, 2010, Luis received DNA test results indicating that Foth was the biological father of Michael Downes. On October 13, 2010, Luis received DNA test results indicating that Foth was the biological father of Daniel Downes. On November 15, 2010, Luis received DNA test results indicating that Foth was the biological father of Heather Downes.

¶ 8 According to Luis, he confronted Christine about the test results in September, 2011. Christine said she would have to talk with her therapist before responding. In January, 2012, Christine confirmed that she had engaged in an extramarital affair with Foth. Nine months later, having learned that Luis revealed the DNA results to their children, Christine filed a petition for dissolution of marriage.

¶ 9 Luis filed his initial complaint on November 16, 2012. He then participated in negotiations with Christine in an attempt to settle the issues in the divorce case and, at one point, offered to dismiss the instant lawsuit against Christine and Foth if Christine would walk away from the family business. Christine and Foth filed motions for summary judgment on March 16, 2015, asserting that Luis' actions were time-barred. In their joint statement of material facts, defendants acknowledged that they had an extramarital affair in the first half of the 1970's. In answers to interrogatories, signed in August, 2013, Christine stated that she "has come to the belief" that Foth is the biological father of father of Michael, Daniel and Heather Downes. In her January 2015 deposition testimony, Christine stated her continuing belief that Luis is the three children's biological father and that it is "very distressing" to learn that he might not be their biological father. In his deposition testimony, Foth stated that Christine never told him he was the biological father of Michael, Daniel or Heather. Luis conceded at his deposition that his statement that Foth knew he was the children's father prior to 2009 was speculation on his part.

¶ 10 The trial court granted defendants' motions for summary judgment on May 22, 2015, agreeing with defendants that the limitations periods contained in the Illinois Parentage Act of 1984 (Parentage Act) (750 ILCS 45/8(a)(1), 8(a)(3); 9(a) (West 2015)) are applicable to this matter and bar plaintiff's causes of action. The court denied Luis' motion for reconsideration, and this appeal ensued.

¶ 11

II. ANALYSIS

¶ 12 Our review of the trial court's ruling on defendants' summary judgment motions is *de novo*. *Seymour v. Collins*, 2015 IL 118432, ¶ 42. A reviewing court must determine whether the record reveals disputed issues of material fact or errors in entering judgment as a matter of law. *Makowski v. City of Naperville*, 249 Ill. App. 3d 110, 115 (1993). In making this determination, we may rely on any grounds called for by the record and are not bound by the trial court's reasoning. *Id.*

¶ 13

A. Application of the Parentage Act

¶ 14 The first issue raised on appeal, and thoroughly addressed by all parties, is whether the statutory limitation provisions of the Illinois Parentage Act of 1984 govern the outcome of this case. The trial court concluded, as a matter of first impression in Illinois, that the Parentage Act limitation provisions apply under these facts. The arguments of the parties and conclusions of the trial court are summarized below. We conclude that, since summary judgment on statute of limitations grounds can be affirmed under the facts presented without invoking the Parentage Act, this case is not the appropriate vehicle for expanding its application beyond the reach of existing precedent.

¶ 15 Section 9(a) of the Parentage Act provides, in pertinent part, that "(i)n any civil action not brought under this Act, the provisions of this Act shall apply if parentage is at issue." 750 ILCS 45(9)(a) (West 2015). Section 8(a)(3) of the Parentage Act provides in pertinent part:

"An action to declare the non-existence of the parent and child relationship brought under section (b) of Section 7 of this Act shall be barred if brought later than 2 years after the petitioner obtains knowledge of relevant facts. The 2-year period for bringing an action to declare the nonexistence of the parent and child relationship shall

not extend beyond the date on which the child reaches the age of 18 years.” 750 ILCS 45/8(a)(3) (West 2015).

Section 7(b) of the Parentage Act provides in pertinent part:

“An action to declare the non-existence of the parent and child relationship may be brought by the child, the natural mother, or a man presumed to be the father under . . . this Act.” 750 ILCS 45/7(b) (West 2015).

The Parentage Act defines the “parent and child relationship” as “the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations.” 750 ILCS 45/2 (West 2015).

¶ 16 Christine and Foth contend that parentage is at issue in this case because recovery on Luis’ claims of paternity fraud, unjust enrichment, and intentional infliction of emotional distress is dependent upon his proving that Foth is the biological father of Michael, Daniel and Heather Downes. It is undisputed that on November 15, 2010, Luis was in possession of DNA test results indicating that Foth, not Luis, was the biological father of Michael, Daniel and Heather Downes; yet Luis did not file suit until November 16, 2012, more than two years after obtaining knowledge of the relevant facts. Because parentage is at issue, defendants argue, the two-year limitation provision and 18-years-of-age repose provision of section 8(a)(3) of the Parentage Act are to be applied and bar Luis’ suit.

¶ 17 According to defendants, where parentage is at issue, the limitations provisions in section 8(a)(3) of the Parentage Act apply regardless of whether a declaration of non-paternity is formally sought. In support of this proposition, defendants cite *Marriage of Ingram*, 176 Ill. App. 3d 413 (1988) (a dissolution of marriage case involving a claim for sole custody of a minor child); *Marriage of Tzoumas*, 187 Ill. App. 3d 723 (1989) (a post-dissolution of marriage case in

which the husband sought to terminate his obligation to pay child support for the parties' minor children); and *Marriage of Ostrander*, 2015 IL App (3d) 130755 (a dissolution of marriage case in which the husband sought a finding of non-paternity in order to terminate his obligation to pay child support for the parties' eight-year-old minor child).

¶ 18 Luis contends that parentage, as contemplated under the Parentage Act, is not at issue in this case because his civil action does not seek to alter his legal relationship with Michael, Daniel or Heather Downes. Luis relies on the plain language of section 8(a)(3), which specifically bars actions “to declare the non-existence of the parent and child relationship,” and section 45(2), which defines the “parent and child relationship” to mean “the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations.” Read together, Luis maintains, the limitations provisions of section 8(a)(3) are intended to apply only to actions affecting the legal relationship between a parent and child. Luis contends that he is not seeking any monies relating to conferred or imposed “rights, privileges, duties and obligations” but, rather, is “seeking compensation for Defendants’ fraud and the emotional impact it has had upon him,” and that a “measure of those damages would be the monies he has provided for the benefit of Michael, Daniel, and Heather.”

¶ 19 If he were to prevail on his claims against defendants, Luis asserts, the children would still be considered his legal children. Conversely, if Foth’s paternity as biological father were to be established, “the legal rights flowing from the parent and child relationship [would not be] automatically conferred.” *J.S.A. v M.H.*, 224 Ill. 2d 182, 211 (2007). Luis distinguishes defendants’ cases in which the Parentage Act limitations provisions were applied regardless of the plaintiffs’ pleadings on the ground that these cases all involved determinations of rights or obligations affecting custody, visitation or support with respect to minor children; the instant

case, in contrast, does not implicate the legal relationship between Luis and his adult children. In support, Luis cites to *Kapp v. Alexander*, 218 Ill. App. 3d 412, 416 (1991), for the proposition that the Parentage Act was enacted to provide “not only for the establishment of a father and child relationship but also for custody, child support, and visitation privileges.”

¶ 20 Finally, Luis urges that even if the Parentage Act did apply here, the fraudulent concealment statute (750 ILCS 5/13-215 (West 2015)), which permits filing within five years of discovery, and the doctrine of “equitable tolling” should prevent the application of the repose provision of section 8(a)(3), citing *DeLuna v. Burciaga*, 223 Ill. 2d 49 (2006) (extending the statute of repose for legal malpractice).

¶ 21 Christine contends that Luis has forfeited this argument by raising it for the first time in his motion to reconsider. Defendants further argue that the fraudulent concealment statute is inapplicable because a reasonable period of time for filing remained under the Parentage Act’s two-year statute of limitations, given that Luis discovered the relevant facts more than two years before bringing his action. Defendants also assert that the principle of equitable estoppel is inapplicable for the same reason.

The trial court concluded that parentage is at issue in this case because proof of Luis’ non-paternity and Foth’s paternity are essential to establishing Luis’ causes of action and his right to recovery on them. Accordingly, the court granted defendants’ summary judgment motions on the ground that both the 18-years-of-age “repose” provision of section 8(a)(3) for an action to establish the non-existence of a parent-child relationship and the 20-year limitations period of section 8(a)(1) for an action to establish the existence of a parent-child relationship had passed before Luis filed suit. See 750 ILCS 8(a)(1) (“an action brought by a party alleging that he or she is the child’s natural parent . . . shall be barred if brought later than 2 years after the

child reaches the age of maturity”).¹

Upon reconsideration, the court determined that it had the discretion to hear Luis’ fraudulent concealment and equitable estoppel arguments. Although it is not altogether clear in the hearing transcript, the court apparently found that, pursuant to *DeLuna*, the Parentage Act’s statute of repose was not at issue, but, because “parentage was at issue,” the two-year statute of limitations had to be applied to all three of Luis’ causes of action. Those actions were barred because Luis had a reasonable amount of time—the entire two-year statutory period—to file his claims after discovering them.

¶ 22 In entering summary judgment, the trial court indicated that the issue of whether the Parentage Act provisions should apply to the facts of this case is one of first impression in Illinois because this case, unlike other civil actions not brought under the Parentage Act, involves the determination of paternity or nonpaternity, and the enforcement or termination of rights or obligations, with respect to adult children, as opposed to minor children. In deciding to proceed without clear precedent, the court noted that section 9(a) does not limit its application to cases involving minor children.

¶ 23 As noted above, we do not need to resolve the issue of whether the Parentage Act applies in order to affirm the ruling of the trial court because even without invoking the Parentage Act, Luis’ causes of action were barred by their applicable limitations periods.

¶ 24 B. Paternity Fraud, Fraudulent Concealment and Equitable Estoppel

¶ 25 Under the counts of his first amended complaint entitled “Paternity Fraud,” Luis alleges that Christine deliberately concealed the biological paternity of Michael, Daniel and Heather

¹ No party argues on appeal that the 20-year limitations period of section 8(a)(1) applies in this case.

Downes. Under the fraudulent concealment doctrine, the running of the statute of limitations will be tolled if the plaintiff pleads and proves that fraud prevented discovery of a cause of action. *Clay v. Kuhl*, 189 Ill. 2d 603, 613 (2000). If the fraudulent concealment doctrine applies, a plaintiff can commence his suit at any time within five years after he discovers he has a cause of action. 735 ILCS 5/13–215 (West 2015).

¶ 26 Generally, where one alleges that the concealment of a cause of action tolls the statute of limitations, it is necessary to show affirmative acts by the defendant that were designed to prevent, and in fact did prevent, the discovery of the action. *S.I. Securities v. Powless*, 403 Ill. App. 3d 426, 441 (2015) (citing *Skrodzki v. Sherman State Bank*, 348 Ill. 403, 407 (1932)). In other words, a claimant must show “affirmative acts or representations [by a defendant] that are calculated to lull or induce a claimant into delaying filing his claim or to prevent a claimant from discovering his claim.” *Barratt v. Goldberg*, 296 Ill.App.3d 252, 257 (1998). Although a person occupying a position of fiduciary or confidence is under a duty to reveal the facts to the plaintiff (see *Hagney v. Lopeman*, 147 Ill. 2d 458, 463 (1992)), marriage alone does not establish such a position. See *Nessler v. Nessler*, 387 Ill. App. 3d 1103, 1111 (2008) (“While a marital relationship alone may not establish a fiduciary relationship, a fiduciary relationship may arise in a marital relationship as the result of special circumstances of the couple’s relationship, where one spouse places trust in the other so that the latter gains superiority and influence over the former.”). In this case, whether Luis placed the requisite trust in Christine is a moot point: the paragraphs in Luis’ first amended complaint alleging a legal duty on Christine’s part to disclose to Luis that Foth was the biological parent of Michael, Daniel, and Heather were dismissed by agreed order in the trial court.

¶ 27 Luis testified that Christine’s only acts of concealment were saying to him “we’re pregnant” and referring to him as the three children’s “father” throughout their marriage. He further stated his belief that she concealed the true paternity of the children not to harm him but to prevent him from divorcing her. It is clear from Luis’ own admissions that he has not shown a design on Christine’s part to prevent him from discovering his present action. Indeed, Luis has not shown that Christine had knowledge of the facts giving rise to a cause of action for fraud before September, 2011, when Luis confronted her with the DNA results indicating that Foth was the biological father of Michael, Daniel and Heather. Although Christine admitted in 2012 to having had an affair with Foth in the 1970’s, she testified in 2015 to her continuing belief that Luis was the children’s biological father. As counter evidence Luis presents Christine’s interrogatory answer in which she stated in 2013 that she “ha[d] come to the belief” that Foth is the children’s biological father. This answer, however, does not implicate Christine’s knowledge of the relevant facts prior to Luis’ own discovery of them. We conclude that the paternity fraud counts against Christine were appropriately dismissed on statute of limitations grounds.²

² For the same reasons that Luis has not shown fraudulent concealment, he is unable to establish the “knowing concealment or omission necessary to assert claims for common-law fraud,” which are subject to the limitations provisions of section 13-205 of the Code of Civil Procedure (735 ILCS 5/13-205 (West 2015)). *Addison v. Distinctive Homes, Ltd.*, 359 Ill. App. 3d 997, 1003 (2005). Indeed, we note that Luis has offered no argument on appeal as to why his action was timely filed irrespective of the Parentage Act’s provisions, with the possible exception of equitable estoppel, which he asserts should have precluded defendants from asserting “any limitations period.”

¶ 28 Finally, Luis' invocation of the doctrine of equitable estoppel is unavailing. See *DeLuna v. Burciaga*, 223 Ill. 2d 49, 69 (citing *Witherell v. Weimer*, 85 Ill. 2d 146, 159 (1981)) ("all that is necessary for invocation of the doctrine of equitable estoppel is that the plaintiff reasonably rely on the defendant's conduct or representations in forbearing suit." (Internal quotation marks and citation omitted.)) Luis argues that the "factual basis for a finding of equitable estoppel is the same as that required for fraudulent concealment." Having found no factual basis for Luis' fraudulent concealment claim, we also reject his equitable estoppel claim.

¶ 29 C. Unjust Enrichment

¶ 30 Luis' unjust enrichment claim was brought only against Foth. Luis contends that, by fraudulently concealing the true paternity of the three children, Foth was able to avoid the moral, financial, and legal obligations associated with raising them. However, Luis has not shown that Foth actively concealed an unjust enrichment cause of action. See *Diotallevi v. Diotallevi*, 2013 IL App (2d) 111297, ¶ 37 (dismissing the plaintiff's unjust enrichment claim where the "plaintiff seeking to apply section 13-215 to toll the statute of limitations [failed to] show that the defendant engaged in affirmative acts or representations designed to prevent discovery of the cause of action or to induce the plaintiff to delay filing his claim.").

¶ 31 Luis has not shown that Foth engaged in affirmative acts or representations designed to prevent him from discovering his action for unjust enrichment. Moreover, Luis conceded at his deposition that his statement that Foth knew he was the father of Michael, Daniel and Heather prior to 2009 was speculation. Finding no basis for a fraudulent concealment claim against Foth, we also reject the invocation of equitable estoppel to bar Foth from asserting the statute of limitations as a defense to the unjust enrichment claim. Accordingly, dismissal of the unjust enrichment count on statutory limitations grounds was properly entered.

¶ 32 D. Intentional Infliction of Emotional Distress

¶ 33 Luis' intentional infliction of emotional distress claim is brought against both Christine and Foth. The statute of limitations for the intentional infliction of emotional distress is two years "because the tort is a form of personal injury." *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 278 (2003); 735 ILCS 5/13-202 (West 2015). Luis claims that he began suffering emotional distress in December, 2009, when he noticed the resemblance between Heather Downes and Carrie Foth and first suspected that Michael, Daniel and Heather might not be his biological children. At the latest, his distress began on November 15, 2010, when he was convinced by the DNA test results that Foth was the father. Because he delayed filing his complaint until November 16, 2012, his cause of action for the intentional infliction of emotional distress was time-barred.

¶ 34 Luis alleges that his injuries are continuous. Under the "continuing tort" rule, if a tort involves a continuing or repeated injury, the "limitations period does not begin to run until the date of the last injury or the date the tortuous acts cease." *Feltmeier*, 207 Ill. 2d at 278. A continuing tort, however, "is occasioned by continuing unlawful acts and conduct, not by continual ill effects from an initial violation." *Id.*; *Blair v. Nevada Landing P'ship*, 369 Ill. App. 3d 318, 324 (2006). Although Luis may have continued to suffer ill effects after December 2009 or November 15, 2010, he has not shown any continuing unlawful acts or conduct on Christine's or Foth's parts following those dates that would justify tolling the statute of limitations.

¶ 35 Again, Luis' claims of fraudulent concealment and equitable estoppel with respect to his action for the intentional infliction of emotional distress have no merit.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we affirm the entry of summary judgment in favor of defendants.

¶ 38 Affirmed as modified.