2016 IL App (1st) 151175-U

FOURTH DIVISION
June 9, 2016

No. 1-15-1175

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

QUINTON DOBBINS and PONDA A. DOBBINS,	)	Appeal from the
	)	Circuit Court
Plaintiffs-Appellants,	)	Cook County.
	)	
v.	)	
	)	No. 14 L 3521
PEARL ZAGER and VEDDER PRICE P.C.,	)	
	)	Honorable
Defendants-Appellees.	)	Eileen O'Neill Burke,
	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: Plaintiffs' legal malpractice claim is barred under the statute of repose because neither equitable estoppel nor fraudulent concealment is applicable when plaintiffs failed to allege any misrepresentations or actions by defendants that prevented them from pursuing their claim.

¶ 2 In July 2014, plaintiffs Quinton Dobbins and Ponda A. Dobbins filed a complaint for legal malpractice against defendants Pearl Zager and Vedder Price P.C. (Vedder) for alleged malpractice arising out of a commercial real estate transaction from February 2003. Plaintiffs also alleged fraudulent concealment and equitable estoppel in their complaint. Defendants filed

a motion to dismiss pursuant to section 2-619.1 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619.1 (West 2012)) in the trial court, arguing that the statute of repose barred plaintiffs' legal malpractice count and that fraudulent concealment and equitable estoppel should dismissed for failure to state a cause of action. The trial court granted defendants' motion to dismiss. The trial court later denied plaintiffs' motion to reconsider its ruling.

¶ 3 Plaintiffs appeal, arguing that the trial court erred in granting defendants' motion to dismiss because (1) the doctrine of equitable estoppel bars the applicability of the statute of repose, (2) the statute of repose was tolled by defendants' concealment of material facts, (3) discovery is a material fact that precluded the dismissal under section 2-619 of the Code.

¶ 4 In March 2014, plaintiffs filed a complaint for legal malpractice against defendants. Defendants filed a motion to dismiss the complaint. In July 2014, plaintiffs filed an amended complaint alleging counts of legal malpractice, fraudulent concealment, and equitable estoppel. Plaintiffs' complaint and the record set forth the following facts.

¶ 5 In October 2002, Morgan Stanley Dean Witter Mortgage Capital, Inc. made a loan to Arlington Associates LP for $5,700,000, secured by the commercial real estate building located at 2101 S. Arlington Heights Road, Arlington Heights, Illinois (the property). In late 2002 or early 2003, plaintiffs were approached by James Proctor, a college friend of Quinton, and asked them to enter into a real estate transaction to purchase the property from Arlington Associates LP, which plaintiffs agreed to do.

¶ 6 In early 2003, plaintiffs retained defendants for legal representation of plaintiffs and Proctor for the purchase of the property, with Zager acting as their attorney. Prior to the purchase of the property, Proctor substituted his son Joshua Proctor in the transaction with plaintiffs' agreement. Plaintiffs organized into three limited liability corporations: Arlington

Green I LLC with Quinton as managing member; Arlington Green II LLC with Ponda as managing member; and Arlington Green III LLC with Joshua as managing member (Arlington Entities).

¶ 7 On February 21, 2003, the Arlington Entities assumed the loan and entered into an Amended and Restated Promissory Note (Note) and an Amended and Restated Mortgage Security Agreement (Mortgage). Also on that date, plaintiffs executed a Guaranty of Recourse of Obligations of the Borrower (plaintiffs' guaranty), and Joshua executed a separate Limited Guaranty of Recourse of Obligations of the Borrower (Proctor's guaranty). Defendants prepared all documents.

¶ 8 Section 4 of plaintiffs' guaranty stated:

> "4. The term 'Guaranteed Recourse Obligations of Borrower' as used in this Guaranty shall mean all obligations and liabilities of Borrower for which Borrower shall be personally liable pursuant to Article 11 of the Note."

¶ 9 Section 4 of Proctor's guaranty stated:

> "4. The term 'Guaranteed Recourse Obligations of Borrower' as used in this Guaranty shall mean all obligations and liabilities of Borrower for which Borrower shall be personally liable pursuant to Article 11 of the Note, but only if such obligations and liabilities as caused by or arise out of the actions or inactions of Guarantor and/or the Borrower controlled by such Guarantor."

¶ 10 Plaintiffs alleged in their complaint that defendants did not advise them that Joshua Proctor executed a more limited guaranty than they did, and that their guaranty assumed a greater

risk. They asserted that if they had known Proctor's guaranty would be limited or less than theirs, then they would not have entered into an agreement to purchase the property, would not have executed the guaranty, and would not have entered into the transaction.

¶ 11 Plaintiffs also alleged that at the time of the transaction, they were residing in Florida and Zager communicated with them via telephone and fax. When executing the transaction for the property, Zager sent plaintiffs by fax only the signature pages. Plaintiffs were not shown the actual documents for the transaction until the acquisition of the property was completed.

¶ 12 The Note executed by the Arlington Entities provided that the debt is fully recoverable in the event that "any borrower defaults under Article 8 of the Security Instrument." Section 8.1 of Article 8 of the Mortgage provided, in relevant part, that the borrowers shall not "without prior written consent of Lender *** transfer the Property or any part thereof or any interest therein." Section 10.1 of Article 10 of the Mortgage sets forth what occurrences constitute an "event of default," which included if a borrower violated or did not comply with any provisions of Article 8.

¶ 13 On or about February 21, 2003, Quinton and Joshua transferred a 10% interest in the property to Benjamin Nummy or his nominee. The transfer was memorialized in February 2005 in a written Acknowledgment of Transfer of Tenants In Common Interests (Acknowledgment), which was recorded with the Cook Country Recorder of Deeds on or about February 2005.

¶ 14 Plaintiffs alleged in their complaint that they were not advised that a transfer without consent of the lender would be an event of default under the Note, subjecting them to personal liability under their guaranty. Plaintiffs stated that they would not have consented to the transfer if defendants had advised them of the default provision in the Note.

¶ 15 In June 2003, defendants sent plaintiffs a binder with a table of contents to all documents from the closing of the property acquisition, including both Plaintiffs' guaranty and Proctor's guaranty. Plaintiffs did not review the documents in the binder until at the earliest 2012. After the February 2003 closing, defendants continued to represent plaintiffs in connection with other matters related to the property.

¶ 16 On June 6, 2012, U.S. Bank National Association (U.S. Bank), as the successor in interest to the lender, notified plaintiffs that the unauthorized transfer to Nummy was an event of default under Section 8.1 of Article 8 of the Mortgage. U.S. Bank demanded that plaintiffs and Joshua pay all amounts due under the Note pursuant to the terms of their respective guarantees.

¶ 17 In July 2012, U.S. Bank filed a judicial foreclosure action on the property under case number 12 CH 27693, alleging failure to make periodic debt service payments. After learning of the foreclosure suit, plaintiffs contacted Zager by phone. Plaintiffs alleged that Zager admitted that she made a mistake in failing to obtain written consent of the lender before executing the transfer to Nummy. On May 7, 2013, the trial court entered a judgment of foreclosure in the amount of $5,181,415.08, and ordered a Sheriff's sale of the property. The property sold in June 2013 for $2,900,000. In August 2013, an *in rem* deficiency judgment was entered in the amount of $2,281,415.08.

¶ 18 In February 2014, U.S. Bank filed a complaint against plaintiffs and Joshua seeking the deficiency judgment under case number 14 L 1126, which remains pending.

¶ 19 On March 26, 2013, Vedder entered into a tolling agreement with plaintiffs. Zager was not a party to the agreement. The tolling agreement provided that the period between the execution date until termination date, March 30, 2014, shall not be included in determining the applicability of any statute of limitations or any defense based on the lapse of time in any action

brought by plaintiffs against Vedder. The agreement also stated that "[n]othing in this Agreement shall affect any defense available to any party as of the date of this Agreement, and the Agreement shall not be deemed to revive any of the Claims that are or were barred on that date."

¶ 20 In March 2014, plaintiffs filed their initial complaint for legal malpractice against defendants. An amended complaint was filed in July 2014, alleging one count of legal malpractice, one count of fraudulent concealment, and one count of equitable estoppel. All three counts were premised on the documents and actions relating to the February 2003 real estate transaction.

¶ 21 In August 2014, defendants filed a motion to dismiss pursuant to section 619.1 of the Code. The motion contended that the legal malpractice claim was barred under the statute of repose and should be dismissed under section 2-619 of the Code (735 ILCS 5/2-619 (West 2012)). According to defendants, section 13-214.3 of the Code (735 ILCS 5/13-214.3 (West 2012)) barred plaintiffs' complaint because under the statute of repose, the acts and events occurred more than six years prior to the filing date of the complaint. Defendants also argued that the claims of fraudulent concealment and equitable estoppel should be dismissed for failure to state a cause of action pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)). In November 2014, following briefing from the parties, the trial court dismissed plaintiffs' complaint in a written decision. The court found that the statute of repose barred plaintiffs' legal malpractice claim since it was filed in 2014. The court also concluded that plaintiffs were put on notice of the documents when they received the binder with all closing documents included.

¶ 22 In December 2015, plaintiffs filed a motion to reconsider the dismissal order. In March 2015, following briefing by the parties, the trial court denied plaintiffs' motion to reconsider in a written order.

¶ 23 This appeal followed.

¶ 24 On appeal, plaintiffs argue that the trial court erred in dismissing their legal malpractice action because defendants should be estopped from raising a limitations defense under the doctrine of equitable estoppel or fraudulent concealment. Plaintiffs have not raised any issues challenging the dismissal of the counts alleging fraudulent concealment and equitable estoppel.

¶ 25 Section 2-619.1 is a combined motion that incorporates sections 2-615 and 2-619 of the Code. 735 ILCS 5/2-619.1, 2-615, 2-619 (West 2010). We review a trial court's dismissal of a complaint under section 2-619.1 of the Code *de novo*. *Morris v. Harvey Cycle and Camper, Inc.*, 392 Ill. App. 3d 399, 402 (2009). A motion to dismiss pursuant to section 2-615 of the Code attacks the legal sufficiency of the complaint by alleging defects on its face. *Gatreaux v. DKW Enterprises, LLC*, 2011 IL App (1st) 103482, ¶ 10. In contrast, a motion to dismiss pursuant to section 2-619 admits the legal sufficiency of the complaint, but raises an affirmative defense or another basis to defeat the claims alleged. *Id.* An involuntary dismissal is allowed under the Code when the action "was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2012).

¶ 26 Section 13-214.3 provides that an action in tort or contract against an attorney arising out of an act or omission in the performance of professional services 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 2002). "[A] statute of repose begins running when a specific event occurs, regardless of whether an action has accrued or whether any injury has resulted." *Ferguson v.*

McKenzie, 202 Ill. 2d 304, 311 (2001). The purpose of the statute of repose is "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." *Id.* Once the statute of repose has expired, the potential plaintiff no longer has a recognized right of action to redress any harm that has been done. *Trogi v. Diabri & Vicari, P.C.*, 362 Ill. App. 3d 93, 96 (2005). "Illinois courts have interpreted section 13-214.3(c) to provide that the repose period begins to run with the 'last act of representation upon which the malpractice is founded.' " *Id.* (quoting *O'Brien v. Scovil*, 332 Ill. App. 3d 1088, 1089 (2002)). "The period of repose in a legal malpractice case begins to run on the last date on which the attorney performs the work involved in the alleged negligence." *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 18.

¶ 27 Here, defendants argue that the last date in which Zager performed work involved in the alleged negligence was when the closing documents were prepared in February 2003, which under section 13-214.3(c), allowed for the filing of a legal malpractice complaint until February 2009. Alternatively, defendants submit an outer date of February 2005, when the deed for the transfer was recorded, but the action was still barred when filed after February 2011. Under either operative date, it is undisputed that plaintiffs' complaint was barred under the statute of repose when filed in March 2014.

¶ 28 Plaintiffs contend that the filing limitations under the statute of repose do not apply under the doctrines of equitable estoppel or fraudulent concealment.

> "A party claiming estoppel must demonstrate that: (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, 82-83 (2006).

¶ 29 "The common-law doctrine of equitable estoppel, as applied in the context of the statute of repose, parallels the fraudulent concealment statute." *Mauer v. Rubin*, 401 Ill. App. 3d 630, 648 (2010). Under section 13-215 of the Code, fraudulent concealment is defined as:

> "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 2002).

¶ 30 Plaintiffs base their equitable estoppel and fraudulent concealment claims on Zager's actions and advice at the time of the transaction. According to plaintiffs, based on defendants' "statements and conduct," they were "clueless" until 2012 that Zager's representations were incorrect. Namely, that contrary to what Zager told them, the executed guarantees were not

identical and the transfer was a default event absent the lender's approval. Plaintiffs repeatedly refer to their lack of knowledge regarding the legal significance of the transaction and its attendant documents. Rather, they "wholly relied" on Zager's advice in the transaction, and all matters related to the purchase until 2012. Plaintiffs assert that they would not have entered into the transaction had they been aware of different risk burdens in the guarantees and the ramifications of the transfer to Nummy.

¶ 31 However, as this court has already held, "there is a well-established rule that the basis of the legal malpractice action also cannot constitute the grounds for equitable estoppel. This statement means that there must be some misrepresentation by defendant that plaintiffs relied on to their detriment to prevent filing their legal malpractice action." *Koczor v. Melnyk*, 407 Ill. App. 3d 994, 1000 (2011) (citing *Barratt v. Goldberg*, 296 Ill. App. 3d 252, 258 (1998)).

¶ 32 In *Koczor*, the plaintiffs filed a legal malpractice action against a former attorney after the attorney failed to record a property deed. The purchase took place in 1997, but the plaintiffs did not discover that the deed had not been filed until 2007, and filed their complaint in 2009. *Id*. at 995. The plaintiffs argued on appeal that their cause of action was not untimely because the doctrine of equitable estoppel tolled the statute of repose. *Id.* at 999. According to the plaintiffs, they relied on the attorney's representations that he would properly record the deed to parcel of land, but this reliance was to their detriment, but did not disclose any misrepresentations that they relied on to forbear filing suit between 1997 and 2007. *Id*. This court rejected the plaintiffs' argument, finding that the record failed to disclose any misrepresentation by the attorney that the plaintiffs relied on to prevent filing their action or discovering the cause of the malpractice claim. *Id*. at 1000.

¶ 33 As do plaintiffs in the instant case, the plaintiffs in *Koczor* relied on *DeLuna*, 223 Ill. 2d at 82-83 (2006), and *Hester v. Diaz*, 346 Ill. App. 3d 550 (2004), for support. We found both cases distinguishable.

> "In each of those cases, the defendant attorneys made continuing misrepresentations to their clients about the status of their cases. In *DeLuna*, the defendant, without the permission of his clients, deliberately filed the plaintiffs' medical malpractice case without a required affidavit, the case was dismissed and the dismissal was affirmed on appeal. Despite this dismissal, the defendant repeatedly told plaintiffs that the case was ' "going very well" ' and they did not need to contact him more frequently. *DeLuna*, 223 Ill. 2d at 58. They did not learn about the dismissal until another attorney on the case sent them an explanatory letter and then they filed the action for legal malpractice. *DeLuna*, 223 Ill. 2d at 55-58.
>
> Similarly, in *Hester*, the defendant failed to appear at a hearing in a worker's compensation case and the case was dismissed. The defendant failed to inform the plaintiff of the dismissal at that time and the plaintiff continued to contact him about the case. Seven years after the case was dismissed, the defendant finally notified the plaintiff about the dismissal. *Hester*, 346 Ill. App. 3d at 551-52." *Koczor*, 407 Ill. App. 3d at 1001-02.

¶ 34 We observed that the attorneys in *DeLuna* and *Hester* continued to make "misrepresentations or concealed material facts that they knew were untrue upon which their clients relied to their detriment." *Id*. at 1002. In contrast, the attorney in *Koczor* had no further contact with the plaintiffs, nor did the plaintiffs assert any misrepresentations made after the attorney was notified of the mistake. "Since plaintiffs failed to establish that defendant made a misrepresentation that they relied on in forbearing suit, equitable estoppel is inapplicable to toll the statute of repose." *Id.*

¶ 35 In the present case, plaintiffs attempt to distinguish *Koczor* and urge this court to follow the holdings of *DeLuna* and *Hester*. Plaintiffs assert two reasons why this case is distinguishable. First, according to plaintiffs, the facts show that Zager knew the misrepresentations to plaintiffs regarding the guarantees and transfer were untrue at the time they were made and were to made to induce them to purchase the property. Second, defendants continued to represent plaintiffs regarding other matters related to the property until 2012. During the continued representation, defendants did not disclose the different guarantees or that the transfer constituted a default event. Plaintiffs maintain that they had no reason to doubt Zager's previous actions and they continued to trust and rely on her in all matters related to the transaction.

¶ 36 We find *Koczor* dispositive of the instant case. Plaintiffs did not allege any facts in their complaint that defendants made any misrepresentations that they relied on to delay filing their action. Rather, plaintiffs rely on the same conduct that is the basis of the legal malpractice claim to assert the application of equitable estoppel, *i.e.*, that Zager failed to tell them of the different guarantees and that the transfer triggered a default event without lender approval. Plaintiffs have not offered any further conduct by defendants. Further, the continued attorney-client relationship

without allegations of misrepresentations to delay suit does not alone give rise to the doctrine of equitable estoppel to toll the statute of repose. "Illinois courts have rejected the continuous course of representation doctrine with regard to legal malpractice, finding that the statute of repose is not tolled merely by the continuance of the attorney-client relationship." *Mauer*, 401 Ill. App. 3d at 640. "Moreover, the period of repose is not tolled by the attorney's ongoing duty to correct past mistakes." *Lamet v. Levin*, 2015 IL App (1st) 143105, ¶ 20.

> " 'A continuing violation or tort is occasioned by continuing unlawful acts and conduct, not by continual ill effects from an initial violation. [Citations.] Thus, 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.' " *Mauer*, 401 Ill. App. 3d at 642 (quoting *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 278-79 (2003)).

¶ 37 Since the misrepresentations alleged formed the basis of legal malpractice action, plaintiffs have failed to offer any further misrepresentations by defendants that caused plaintiffs to forbear filing suit. Accordingly, the doctrine of equitable estoppel is inapplicable, and the statute of repose was not tolled.

¶ 38 Likewise, plaintiffs have failed to show any actions that amounted to fraudulent concealment by defendants. "A plaintiff alleging fraudulent concealment must generally show affirmative acts by the defendant that are designed to prevent the discovery of the action." *Lamet*, 2015 IL App (1st) 143105, ¶ 32. "However, courts have declined to apply fraudulent concealment and equitable estoppel 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*, 401 Ill. App. 3d at 649 (quoting *Smith v. Cook County Hospital*, 164 Ill. App. 3d 857, 862 (1987)). "Thus, where 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 period." *Id.*

¶ 39 Here, plaintiffs acknowledge that they received a binder in June 2003 which contained all closing documents related to the real estate transaction, including both guarantees and the Mortgage with the language requiring lender approval for any transfer of a share in the property. Plaintiffs also admit they did not review these documents, but simply relied on Zager's representations. Defendants attached the table of contents to the binder to its motion to dismiss. The table of contents described the guarantees as follows: "Guaranty of Recourse Obligations of Borrower (Dobbins)," and "Limited Guaranty of Recourse Obligations of Borrower (Proctor)." It was plainly observable from this without reading the guarantees that Joshua's guaranty was different from plaintiffs' guaranty. The table of contents also indicated that the Mortgage and Note were included in the binder. Defendants also point out that an opinion letter written by defendants to the lender was included in the binder. The opening paragraph of the letter described plaintiffs as the "New Guarantor," and Joshua as the "Limited Guarantor." Thus, without even reading the complete legal documents, plaintiffs would have been on notice that Joshua had a limited guaranty. Plaintiffs had more than ample time to file a legal malpractice time after receiving this binder in June 2003, and the expiration of the statute of repose.

¶ 40 We are not persuaded by plaintiffs' arguments to excuse their lack of diligence in discovering the basis for the cause of action. Plaintiffs contend that their failure to review the documents at all was within "ordinary diligence," and, thus, is not fatal to their malpractice claim. Illinois law has consistently held that "a competent adult is charged with knowledge of and assent to a document the adult signs and that ignorance of its contents does not avoid its effect." *Steele v. Provena Hospitals*, 2013 IL App (3d) 110374, ¶ 36.

¶ 41 Moreover, as we have observed, fraudulent concealment requires allegations of affirmative acts by the defendant that are designed to prevent the discovery of the action. See *Lamet*, 2015 IL App (1st) 143105, ¶ 32. Plaintiff has made no such allegation. In fact, defendants did the opposite, it disclosed the documents to plaintiffs that would have given rise to their claims, but plaintiffs did not discover it. Nothing in plaintiffs' complaint offers any allegation of an action by defendants to prevent plaintiffs from discovering both the difference in the guarantees and the default event of a transfer without lender approval. Accordingly, fraudulent concealment is not applicable to toll the statute of repose in this case. Plaintiffs' legal malpractice action is barred under the statute of repose, and the trial court properly granted defendants' motion to dismiss on this basis.

¶ 42 Finally, plaintiffs argue that the trial court erred in denying their motion to reconsider the dismissal. Plaintiffs' argument on this issue consists of a single paragraph citing one case explaining the basis for granting a motion to reconsider. Plaintiffs offer no further argument applying this citation to their argument as to how the trial court erred. We find that plaintiffs have forfeited this point by failing to present a sufficient argument, as required by Supreme Court Rule 341(h)(7). Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016). Forfeiture aside, based on our

conclusion that the trial court did not err in dismissing plaintiffs' complaint, we also affirm the denial of plaintiffs' motion to reconsider.

¶ 43 Based on the foregoing reasons, the decision of the circuit court of Cook County is affirmed.

¶ 44 Affirmed.