2019 IL App (1st) 18-0455-U

THIRD DIVISION
June 12, 2019

No. 1-18-0455

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

JEFFREY MANDALIS, n/k/a GEOFFREY HAMMOND,	)	Appeal from the Circuit Court of Cook County, Illinois,
Plaintiff-Appellant,	)	County Department, Law Division.
v.	)	No. 15 L 163081
DAVID WENTZEL and SCOTT BLAKE,	)	The Honorable Patrick J. Sherlock,
Defendants-Appellees.	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Howse and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed the plaintiff's complaint as barred by the two year statute of limitations set forth in section 13-214.3 of the Code of Civil Procedure (735 ILCS 5/13-214.3 (West 2016)).

¶ 2 This cause of action arises from the settlement of a lawsuit entered into between two family factions concerning the ownership and control of assets under an estate plan. After the settlement was affirmed by an arbitrator, the plaintiff, Jeffrey Mandalis, n/k/a/ Geoffrey Hammond, filed the instant two-count legal malpractice and fraud action against the defendants,

his former attorneys, David Wentzel and Scott Blake, who represented him in the settlement negotiations, alleging, *inter alia*, that they negligently and fraudulently misrepresented the terms of that settlement to him and ultimately agreed to terms that were contrary to his express instructions. The trial court dismissed the plaintiff's complaint pursuant to section 2-619(a)(5) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(5) (West 2016)) as time-barred under the two year statute of limitations set forth in section 13-214.3 of the Code (735 ILCS 5/13-214.3 (West 2016)). The plaintiff now appeals contending that the trial court erred when it determined, as a matter of law, that he should have reasonably discovered his malpractice injury and attorneys' fraud prior to, or in the very least, on the date of the arbitrator's award. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The record reveals the following undisputed facts and procedural history. The plaintiff's grandparents, Daniel P. O'Brien Sr. (Dan Sr.) and Mary D. O'Brien (Mary) (collectively, "the grandparents") accumulated substantial assets and wealth during their lifetimes, including numerous business interests, properties, hotels, a golf course, nursing homes, fast food franchises, gas stations, warehouses, and a considerable amount of cash (the family assets). Apart from the nursing home business, which was held in several S-corporations (the Nursing Home Operating Corporations), the majority of the family assets were controlled and operated through limited partnerships. The remainder of the assets was held by the grandparents either in their own names or in their revocable trusts. On March 1, 2013, the value of the family assets was estimated at about $125 million.

¶ 5 The grandparents had six children: (1) Daniel P. O'Brien Jr. (Dan Jr.); (2) Maureen O'Brien

(Maureen); (3) Kathleen O'Brien Stumpf (Kathleen); (4) Margaret O'Brien Schulze (Peggy); (5) the plaintiff's mother, Patricia Mandalis O'Brien (Patricia); and (6) Peter J. O'Brien Sr. (Peter). In addition to the plaintiff, the grandparents had at least 14 other grandchildren.

¶ 6 After the death of their eldest son, Dan Jr., in 1989, the grandparents named their only surviving son, Peter, as their agent and transferred control of the family assets to him. Through a series of transactions in 1994, Peter was given a majority of the stocks in the Nursing Home Operations Corporation, and control of the limited partnerships as a general partner. In addition, he was named as the controlling trustee of the grandparents' revocable trusts.

¶ 7 Through the grandparents' estate planning efforts, during their lifetime, several trust agreements were established for the children/grandchildren, including: (1) the Gift Trust Agreement; (2) the Chicago Trust Agreement; and (3) the NB Trust Agreement.

¶ 8 Non-voting equity stock in the Nursing Home Operating Corporations was irrevocably gifted by the grandparents to trusts set up through the Gift Trust Agreement to each of their five surviving children, and to Daniel P. O'Brien III (Dan III), in place of his deceased father, Dan Jr. (collectively referred to as the Sibling Gift Trusts). In addition, non-voting stock in the Nursing Home Operating Corporations was irrevocably gifted to at least 14 grandchildren, including the plaintiff, and his half-brother, Daniel (Daniel) (collectively referred to as the Grandchildren Gift Trusts). Under the Gift Trust Agreement, Peter, as a trustee, had control over both the Siblings' Gift Trusts' and the Grandchildren Gift Trusts' affairs.

¶ 9 Similarly, the remaining family assets, which were held in various limited partnerships, were irrevocably gifted to the five surviving children and to Dan III, in place of his deceased father, under either the Chicago Trust Agreement or the NB Trust Agreement (collectively referred to as the Siblings' Chicago Trust and NB Trust Agreements). Peter, as a trustee and by way of his

control of the general partnership interest in the limited partnerships exercised control of both trusts' affairs.

¶ 10 Upon Patricia's death in 2004, control of her assets in the various limited partnerships' interests passed equally to her two children, the plaintiff and Daniel.

¶ 11 For the next decade, various members of the family engaged in disagreements and protracted litigation over the control and disposition of the family assets. In 2009, the grandparents first removed Peter as trustee of their revocable trusts and instead named their daughter, Peggy, as trustee. They also changed their estate executor from Peter to Peggy. Because Peter remained trustee of the Siblings' and Grandchildren's' Gift Trusts, Chicago Trusts and NB Trusts, the grandparents sued Peter and their own estate planning attorney contending that Peter had hoodwinked them into turning control of the vast majority of the family assets to him. The grandfather was represented in this litigation, at least in part, by one of the defendants, Wentzel. The grandparents subsequently filed another law suit against one of the limited partnerships held by the Siblings' and Grandchildren's Trusts, which was controlled by Peter.

¶ 12 In 2009, the plaintiff and his half-brother, Daniel, sued Peter for information about the limited partnerships and to enjoin him from distributing or disposing of partnership assets. They filed six complaints, each of which was ultimately dismissed with prejudice.

¶ 13 In July 2010, two of the surviving children, Peggy and Maureen and one grandson, Dan III (the MMD parties) also filed a complaint against Peter, alleging various breaches of fiduciary duty regarding his control and management of the family assets.

¶ 14 In 2012, the plaintiff aligned himself with the MMD parties and together they filed a new complaint (the underlying action) against Peter and two cousins (Bridget and Charlie Stumpf) (the Peter group) alleging that Peter had breached his fiduciary duties while in control of the

family assets and seeking: (1) appointment of a receiver to manage the various businesses; (2) Peter's removal as an officer/director of the various corporations; (3) dissolution of the corporations and limited partnerships; and (4) damages. The plaintiff and Daniel were both represented in this suit by the defendants. The defendants also represented Peggy, but only in her capacity as the executor of the plaintiff's grandparents' estate. The remaining members of the MMD group, including Peggy, in her individual capacity and other fiduciary capacities, were represented by McDermott Will and Emory (McDermott).

¶ 15 The underlying action was resolved by a combined mediation and arbitration which resulted in the parties' agreement to the basic terms of a settlement agreement, which was memorialized in a "Settlement Term Sheet" (term sheet) on March 1, 2013. The final global settlement was closed on November 27, 2013.

¶ 16 On October 19, 2015, the plaintiff filed the instant cause of action against the defendants, alleging legal malpractice, and contending that contrary to his explicit directions, the defendants "coerced' him into settling the underlying action.

¶ 17 On July 7, 2016, the plaintiff filed his first amended complaint. The defendants filed a combined section 2-615 and 2-619 motion to dismiss (735 ILCS 5/2-615, 619 (West 2016)), arguing, *inter alia*, that the plaintiff's claim was time-barred because he knew or should have known of his alleged injury and that it was wrongfully caused more than two years before he filed his lawsuit (735 ILCS 5/13-214.3 (West 2016)). In their motion to dismiss, the defendants further argued that the plaintiff's verified allegations in the original complaint concerning when the plaintiff learned of his injury were judicial admission, and that his attempt to contradict those allegations by way of amendment was improper as a matter of law.

¶ 18 On October 8, 2016, the trial court dismissed the plaintiff's first amended complaint,

noting, *inter alia*, that it had "serious concerns about the apparent contradictions between plaintiff's two sets of verified allegations." The court also held that the plaintiff had failed to plead the case within a case element of a legal malpractice action and to allege sufficient facts to show how he was "coerced" into settling the underlying case. The court, however, deferred its decision on the potentially dispositive statute of limitations issue and permitted the plaintiff leave to file his second amended complaint.

¶ 19 On April 3, 2017, the plaintiff filed the instant two-count second amended complaint alleging legal malpractice (count I) and, in the alternative, fraud (count II). With respect to count I for legal malpractice, the plaintiff alleged that when in early 2011 he and Daniel considered joining forces with the MMD group against the Peter group, the MMD group's attorney, McDermott, referred them to one of its former partners, the defendant Wentzel.

¶ 20 According to the second amended complaint, around March 28, 2011, the plaintiff and Daniel retained Wentzel (and his employee, and agent, the defendant Blake) to represent them in the forthcoming lawsuit and the settlement negotiations. The plaintiff alleged that at the time of his retention of Wentzel and throughout Wentzel's representation, he "repeatedly informed Wentzel" that his goal in the dispute over the family assets was "to obtain assets equal in value to [his] respective interest in the family assets, free from other family members' control." Wentzel advised the plaintiff to join Peggy, Maureen, Dan III and Dan Sr. in battling the Peter group over the family assets. After Dan Sr.'s death, the defendants undertook to represent Peggy as the executor of the grandparents' estate. According to the second amended complaint, the defendants failed to disclose any conflicts of interest from this joint representation, which, in fact, made it virtually impossible for them to achieve the plaintiff's goal.

¶ 21 The plaintiff alleged that contrary to his best interests, with their loyalty to Peggy and her

best interests, on or about March 1, 2013, the defendants without authority and without informing either the plaintiff or Daniel, engaged in mediation (the March mediation) with the intent to settle all of their claims to the family assets. The mediation was held before former district court Judge Wayne Anderson. The defendants never executed any agreement to mediation on behalf of the plaintiff or Daniel prior to the March mediation and never disclosed their intent to mediate to the plaintiff. In addition, only the defendant, Blake, attended the mediation. According to the second amended complaint, Blake, who was a licensed attorney for only 15 months at this time, was insufficiently experienced, as well as unfamiliar with the complex facts and legal issues involved.

¶ 22 The plaintiff alleged that without either his or Daniel's authority, on March 2, 2013, on behalf of the plaintiff, Daniel and Peggy, as the executor of the grandparents' estate, the defendant Blake initialed a one-and-a-half-page settlement term sheet documenting a global settlement of all then existing disputes, including any pending litigation, between the family members to the family assets (the mediation settlement). These included all of the plaintiff's then existing rights and claims to the family assets, free from other family members' control. The term sheet broadly allocated the family assets to the two family factions: (1) the MMD group with the plaintiff and Daniel (collectively referred to as the MMMD group); and (2) the Peter group. The term sheet also "locked the plaintiff into non-controlling interest in the MMMD group's assets," under the control of other MMMD group members. According to the second amended complaint, the term sheet did not address the plaintiff's goal of obtaining assets equal in value to his respective interest in the family assets, free from other family members' control. However, the term sheet did provide that it was "subject to due diligence review by the parties and their advisors," and

that "all disputes arising between now and closing shall be brought to Judge Wayne Anderson for resolution."

¶ 23 The plaintiff alleged that he did not find out about the March mediation or settlement until after it had occurred. When he initially confronted the defendants with their alleged unauthorized settlement, the defendants misrepresented and led him to believe that the other members of the MMMD group (namely Maureen, Dan III, and Peggy, both individually and as executor of the grandparents' estate) had decided that in exchange for agreeing to the mediation settlement and giving up their rights and claims, the plaintiff and Daniel would receive at the closing of the mediation settlement, MMMD assets equal in value to their respective interests in the family assets, free from other family members' control, including Peggy's. The defendants further misrepresented and led the plaintiff to understand that they would negotiate the details of which MMMD assets would be transferred to him free and clear of the other MMMD group members. This transfer was refereed to at various times by the parties to the mediation, their attorneys, and in prior pleadings and instant briefs as "divestiture." We will therefore refer to it in the same manner here.

¶ 24 According to the second amended complaint, a second mediation before former district Judge Wayne Anderson, occurred on September 25, 2013 (September mediation). This mediation addressed disputes between the two family factions (the Peter group and the MMMD group) over how to effectuate the mediation settlement as documented in the term sheet. The plaintiff alleged that represented by the defendants, he participated in this mediation only because the defendants continued to misrepresent to him that divestiture would be attainable at a later date.

¶ 25 The plaintiff alleged that because the September mediation did not resolve the disputes

between the MMMD group and the Peter group, the defendants asked the plaintiff to agree to a binding mediation-arbitration through JAMS (the Judicial Arbitration and Mediation Services). According to the second amended complaint the defendants continued to make the same misrepresentations about the MMMD members' agreement to later divestiture and the defendants' intent to negotiate such a divestiture. In reliance on these misrepresentations, the plaintiff executed a written agreement on October 8, 2014 agreeing to participate in the binding mediation-arbitration proceedings.

¶ 26 Those proceedings were held on October 13, 2014, again before former district Judge Wayne Anderson as the arbitrator. On that date, a "First Interim Award" (the arbitration award) was issued, addressing the then-existing disputes between the two main family factions on how to effectuate the mediation settlement as documented in the term sheet. That arbitration award provided in pertinent part that the arbitrator was authorized to "resolve all the disputes" between the parties "regarding the scope, terms and implementation of a final resolution contemplated by the March 1, 2013, settlement term sheet." The document further stated that the arbitrator was without authority to "recast" the March 1, settlement sheet, and that instead his duty was to "interpret it and resolve disputes regarding its terms and implementation." The arbitration award provided that based on that term sheet, certain family assets would be transferred to the exclusive control of the Peter group and the remaining assets to the exclusive control of the MMMD group "to be divided among them as they choose." The arbitration award further stated:

> "On March 1, when the [s]ettlement [t]erm [s]heet was signed, each party was very aware of the difficulty of valuing any of the assets.
>
> * * *

> The decision by the parties to enter into the [s]ettlement was made with the full knowledge of all involved that it would be impossible to ensure that any specific percentage division of assets could be effected."

¶ 27 The plaintiff alleged that on October 24, 2013, the defendant Wentzel informed him for the first time that the defendants would not be able to represent him or Daniel in negotiating any divestiture from the MMMD group. According to the second amended complaint, Wentzel referred the plaintiff to another attorney explaining that he had to remain "neutral" in any negotiations between him and Daniel versus Peggy. Wentzel also told the plaintiff that he was telling Peggy and her attorneys to meet with the plaintiff to finalize which MMMD assets would be given to the plaintiff at closing. The plaintiff believed, based on Wentzel's representations that he and Daniel would receive 25% of the assets allocated to the MMMD group. According to the second amended complaint, at this time the defendants did not disclose to him that they did not intend to continue the remainder of their representation. The plaintiff therefore understood that they would continue to represent him in the mediation settlement in dividing the family assets between the two main family factions.

¶ 28 On October 26, 2013, the plaintiff and his half-brother retained attorney Robert Heist (Heist) to represent them solely with respect to negotiating the details of which MMMD assets would be transferred to them free and clear of the other MMMD group members' control at the as-yet unscheduled closing on the mediation settlement. At this time, the defendants continued to misrepresent to the plaintiff that the other members of the MMMD group had agreed that the plaintiff and Daniel would receive MMMD assets equal in value to their respective interests in the family assts, free from other family's members control, including Peggy's.

¶ 29 The plaintiff alleged that the defendants continued with these same misrepresentations until

about November 19, 2013, when they notified the plaintiff by email of their intention to withdraw from any further representation of him and Daniel. This email was sent to the plaintiff eight days before the scheduled mediation settlement closing on November 27, 2013.

¶ 30 According to the second amended complaint, on November 22, 2013, Heist filed a request for mediation-arbitration regarding the dispute among the MMMD group members on the details of which MMMD assets would be transferred to the plaintiff and Daniel free and clear of the other MMMD group members' control, but that request was denied by the arbitrator on November 23, 2013.

¶ 31 The second amended complaint alleged that on November 27, 2013, the plaintiff and Daniel were left without representation for the meditation settlement closing. The plaintiff admitted that he attended that closing and alleged that he signed the closing documents because he was concerned that if the closing did not occur, the value of the MMMD assets ultimately received at any later closing date would be reduced by a substantial amount and the other MMMD members would blame and ultimately sue him for this amount. The plaintiff decided that his best option was to let the closing occur and to then continue to try and get his percentage interest in the MMMD assets from the other MMMD members free and clear of their control.

¶ 32 According to the second amended complaint, after the closing, the plaintiff was unable to reach any agreement with the other MMMD members on this issue. The plaintiff therefore sued the other MMMD members and all of the various entities holding MMMD assets. The plaintiff ultimately settled this suit in 2016. After deducting for attorney fees, the plaintiff received approximately $8 million less than the value of his percentage interest in the MMMD assets.

¶ 33 Based on the aforementioned alleged facts, in count I, the plaintiff asserted that the

defendants, *inter alia*: (1) failed to adequately disclose their conflict of interest arising from their simultaneous representation of the plaintiff and Peggy as the executor of the grandparents' estate, and from their referral relationship with Wentzel's former law firm, McDermott, which continued to represent the remaining members of the MMMD group, including Peggy individually, throughout the settlement proceedings; (2) undertook the plaintiff's representation despite these conflicts of interest; (3) told the plaintiff to stop negotiating directly with the Peter group; (4) without authority and without informing the plaintiff, engaged in the March mediation; (5) had the defendant Blake, who was inexperienced, represent the plaintiff at that March mediation; (6) advised the plaintiff to go along with the term sheet signed at the March mediation, the September mediation, and the October arbitration award, when they knew such advise was inconsistent with the plaintiff's goals; (7) ceased representation of the plaintiff on November 19, 2013, when finalization of the mediation closing document was not yet completed and the closing was imminent, thereby prejudicing the plaintiff's ability to protect his interests; (8) repeatedly misrepresented and permitted the plaintiff to understand that the other members of the MMMD group had agreed to the divestiture of assets; and (9) inadequately reviewed and failed to advise the plaintiff that the closing documents would not achieve this goal and would in fact make it very difficult for him to achieve it in the future.

¶ 34 The plaintiff alleged that as a proximate cause of the defendants' aforementioned actions, he was injured when the settlement of his claims to the family assets closed without divestiture.

¶ 35 In count II of his second amended complaint, which was alleged in the alternative to count I, the plaintiff alleged that the defendants intentionally, knowingly, repeatedly and falsely represented to the plaintiff that divestiture would be part of the settlement closing on November 27, 2013. The plaintiff further alleged that the defendants intended that he rely on their false

representations, and that he did rely on them because of the attorney-client relationship and the non-disclosure of the defendants' conflicts of interests.

¶ 36 On May 8, 2017, the defendants filed a combined section 2-619 and 2-615 motion to dismiss the second amended complaint, alleging, *inter alia* that the second amended complaint was time-barred by the two-year statute of limitations set forth in section 5/13-214.3(b) of the Code (735 ILCS 5/13-214.3(b) (West 2016)), and that the plaintiff had failed to allege sufficient facts to support either of his causes of action.

¶ 37 On October 30, 2017, the trial court dismissed the plaintiff's second amended complaint pursuant to section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2016)) based on the two year statute of limitations (735 ILCS 5/13–214.3(a) (West 2016)). In doing so, the court found that the plaintiff's causes of action accrued in March 2013 after he became aware of the results of the first unauthorized mediation. Alternatively, the trial court found that, in the very least, the plaintiff should have been aware of his injury on October 13, 2013, when the trial court entered the arbitration award, which contained no mention of his goal of divestiture. The court also found the plaintiff's allegations of the defendants' fraudulent concealment as a tolling mechanism for the statute of limitations unavailing.

¶ 38 The plaintiff filed his motion to reconsider on November 20, 2017, arguing, *inter alia*, that the term sheet and the arbitration award were preliminary documents subject to modification and therefore the plaintiff could not have known of his injury at the time they were entered. In this vein, for the first time, the plaintiff asserted that the term sheet was ambiguous. The plaintiff further sought leave to amend his complaint. The trial court denied both the motion to reconsider and the request for leave to amend on February 21, 2018. The plaintiff now appeals.

¶ 39 II. ANALYSIS

¶ 40 On appeal, the plaintiff first contends that the trial court erred when it dismissed his suit as time-barred under the two-year statute of limitations for legal malpractice actions. For the reasons that follow, we disagree.

¶ 41 A motion to dismiss pursuant to section 2-619 (735 ILCS 5/2-619 (West 2016)) admits the legal sufficiency of the complaint (*i.e.*, all facts well pleaded), but asserts certain defects, defenses or other affirmative matters that appear on the face of the complaint or are established by external submissions that act to defeat the claim. See *Brummel v. Grossman*, 2018 IL App (1st) 162540, ¶ 22; *Wallace v. Smyth*, 203 Ill. 2d 441, 447 (2002). Subsection (a)(5) of section 2-619, pursuant to which the circuit court granted the defendants' motion to dismiss, specifically allows dismissal when "the action was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2016). In ruling on a section 2-619 motion, all pleadings and supporting documents must be construed in the light most favorable to the nonmoving party, and the motion should be granted only where no material facts are in dispute and the defendant is entitled to dismissal as a matter of law. *Brummel*, 2018 IL App (1st) 162540, ¶ 24; see also *Mayfield v. ACME Barrel Company*, 258 Ill. App. 3d 32, 34 (1994). The relevant inquiry 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 dismissal [wa]s proper as a matter of law." *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993). Our review of the circuit court's grant of a motion to dismiss pursuant to section 2-619 is *de novo*. *FirstMerit Bank, N.A. v. Soltys*, 2015 IL App (1st) 14100, ¶ 13.

¶ 42 The parties here agree that the applicable statute of limitations for both the legal malpractice and fraud claims is found in section 13-214.3(a) of the Code. 735 ILCS 5/13–214.3(a) (West 2016)). That section requires that "[a]n action for damages based on tort, contract, or otherwise

*** against an attorney arising out of an act or omission in the performance of professional services" must be commenced 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(a) (West 2016). Our courts have repeatedly held that the statute of limitations set forth in this section incorporates the "discovery rule," " 'which serves to toll the limitations period to the time when a person knows or reasonably should know of his or her injury.' " *Blue Water Partners, Inc., v. Edwin D. Mason, Foley & Lardner*, 2012 IL App (1st) 102165, ¶ 48 (quoting *Hester v. Diaz*, 346 Ill. App.3d 550, 553 (2004)); see also *Romano v. Morrisroe*, 326 Ill. App. 3d 26, 28 (2001) ("[u]nder the 'discovery rule,' the two-year period does not necessarily begin the day the plaintiff suffers his injury; rather, the period starts when the plaintiff knows or should know facts that would cause him to believe that his injury was wrongfully caused."); see also *Brummel*, 2018 IL App (1st) 162540, ¶ 26.

¶ 43 Significantly, the statute of limitations does not require that the injured party have actual knowledge of the alleged malpractice. *Brummel*, 2018 IL (1st) 162540, ¶ 26; see also *Carlson v. Fish*, 2015 IL App (1st) 140526, ¶ 23 ("[A]ctual knowledge of the alleged malpractice is not a necessary condition to trigger the running of the statute of limitations."); see also *SK partners I, L.P. v. Metro Consultants, Inc.*, 408 Ill. App. 3d 127, 130 (2011) ("under the discovery rule, a statute of limitations may run despite the *lack* of actual knowledge of negligent conduct" (emphasis in original)). Instead, the statute of limitations begins to run when the purportedly injured party, " ' has a reasonable belief that the injury was caused by wrongful conduct, thereby creating an obligation to inquire further on that issue. ' " *Carlson*, 2015 IL App (1st) 140526, ¶ 23 (quoting *Dancor International, Ltd. v. Friedman, Goldberg & Mintz*, 288 Ill. App. 3d 666, 672 (1997)). Knowledge that an injury has been wrongfully caused does not mean knowledge of

a specific defendant's negligent conduct or knowledge of the existence of a cause of action. *Carlson*, 2015 IL App (1st) 140526, ¶ 23. Rather, "[a] person knows or reasonably should know an injury is 'wrongfully caused' when he or she possesses sufficient information concerning an injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved." *Id*. Once a person knows, or reasonably should know, both of his injury and that the injury was wrongfully caused, "the burden is upon the injured person to inquire further as to the existence of a cause of action." (Internal quotation marks omitted.) *Id*., ¶ 23 (quoting *Castello v. Kalis*, 352 Ill. App. 3d 736, 745 (2004)).

¶ 44 To be considered injured, a legal client must suffer a loss for which he or she may seek monetary damages. *Nelson v. Padgitt*, 2016 IL App (1st) 160571, ¶ 13; see also *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd*., 216 Ill. 2d 294, 306 (2005). Generally, that loss will not occur until the plaintiff has suffered an adverse judgment, settlement or dismissal of the underlying action caused by the attorney's negligence. *Lucey v. Law Offices of Pretzel & Stouffer, Chartered*, 301 Ill. App. 3d 349, 356 (1998). If the damages are yet "speculative" then the cause of action has not yet accrued, and the malpractice suit is premature. *Id*. at 353.

¶ 45 In this context, however, "speculative" means " 'only if [the damages'] existence itself is uncertain, not if the amount is uncertain or yet to be fully determined. ' " *Nelson*, 2016 IL App (1st) 160571, ¶ 14 (quoting *Northern Illinois Emergency Physicians*, 216 Ill. 2d at 307); see also *Lucey*, 301 Ill. App. 3d at 355 ("When uncertainty exists as to the very fact of damages, as opposed to the amount of damages, damages are speculative [citation] and no cause of action for malpractice can be said to exist"). Moreover, it is well-settled that a malpractice claim can accrue before an adverse judgment of the underlying action if it is "plainly obvious" that the

client has been injured "as the result of professional negligence." *Nelson*, 2016 IL App (1st) 160571, ¶ 14; see also *Lucey*, 301 Ill. App. 3d at 358 (acknowledging that an action can accrue prior to an adverse judgment "where it is plainly obvious, prior to any adverse ruling against the plaintiff, that he has been injured as the result of professional negligence.").

¶ 46 Although ordinarily, the question of when a party becomes charged with the requisite knowledge to maintain a cause of action for legal malpractice is a question of fact, the trial court may decide the issue as a matter of law where the facts are undisputed and only one conclusion may be drawn from them. *Brummel*, 2018 IL App (1st) 162540, ¶ 26; *Blue Water Partners, Inc.*, 2012 IL App (1st) 102165, ¶ 48 (citing *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill. 2d 240, 250 (1994)).

¶ 47 In the present case, taking as we must the pleadings in the light most favorable to the plaintiff, there can be no doubt that the plaintiff actually knew of his injury in March 2013, such that the filing of his complaint against the defendants in December 2015, was barred by the two-year statute of limitations. In his verified second amended complaint, the plaintiff alleged that from the outset he informed the defendants that his ultimate goal was to obtain divestiture. According to that verified pleading, however, in March 2013, the defendants participated in a settlement mediation without any authorization from the plaintiff, and signed a term sheet on his behalf, without his prior consent, which contained no mention whatsoever of divestiture, and instead "locked" him "into non-controlling interests in the MMMD [a]ssets under the control of the other MMMD group members." The plaintiff further alleged in his pleadings that upon hearing about the terms of this settlement, he "disagreed vehemently with the mediated results and immediately informed [the defendants] that he would not agree to the terms set forth in [the] [t]erm [s]heet." As such, taking the plaintiff's own verified pleadings at their word, we are

compelled to conclude that the plaintiff was not only in possession of sufficient information about his injury to be placed on inquiry to determine whether actionable conduct was involved, but in fact had actual knowledge of both the injury and the cause of that injury in March 2013, so as to trigger the running of the statute of limitations . See *e.g*., *Carlson*, 2015 IL App (1st) 140526, ¶ 23 (holding that a former client's cause of action for legal malpractice against the defendant law firm in connection with its representation of the client in a mediation settlement involving his former business partners accrued from the date the client had knowledge of a wrongful cause of his injury, which occurred no later than the date that the client sent his attorney an email message expressing his dissatisfaction with the settlement amount and his belief that his former partners had engaged in fraud and had tricked him into taking less money than he was entitled to).

¶ 48 If the plaintiff did not actually know of his injury after the March mediation settlement, in the very least, he certainly should have known of it after the entry of the October 13, 2013, binding arbitration award enforcing that settlement. The language of that binding arbitration award could not have been clearer. It explicitly provided that the arbitrator would not "recast" the Mach mediation settlement, and would instead "resolve all the disputes" between the parties "regarding the scope and terms" of the settlement as set forth in the term sheet. In addition, the arbitration award provided that the parties decision to enter into the terms of the settlement were made "with full knowledge of all involved that it would be impossible to ensure that any specific percentage division of assets could be effected," and that the respective family assets awarded to the MMMD group would be "divided among them as they choose." Since the plaintiff repeatedly asserted in his pleadings that he had informed his attorneys from the outset that such a division was contrary to his ultimate goal of divestiture and his and Daniel's desired ownership of 25% of

the family assets, at this point in time, the plaintiff was in possession of sufficient information to be placed on notice of both the injury and the cause of that injury (*i.e.*, his attorneys misconduct). See *Carlson*, 2015 IL App (1st) 140526, ¶ 23. Since the plaintiff filed his complaint over two years after that October 2013 arbitration award, we find no error in the trial court's dismissal of the plaintiff's second amended complaint. *Id*; see also *Nelson*, 2016 IL App (1st) 160571, ¶¶ 15-24.

¶ 49 In this respect, we reject the plaintiffs' assertion that he could not have suffered any cognizable injury until after the final disposition of the underlying action on November 27, 2013, because until that closing date, any potential damages he suffered were merely speculative. In this respect, the plaintiff contends that if he had not signed the closing document, his existing rights in the family assets would not have changed, and he would have retained his leverage over the Peter group to obtain divestiture. The plaintiff's argument, however, is contradicted by his own pleadings, wherein he admitted that he signed the closing document because he believed that the value of the MMMD assets ultimately received at any later closing date would be substantially reduced and that the other MMMD members would blame and ultimately sue him for this amount. The plaintiff cannot escape the bar of the statute of limitations by arguing that his injury was speculative because until that point he did not know exactly how much he had been injured. As already explained above, the plaintiff's injury accrued, at the very latest, upon the entry of the binding arbitration award that determined the enforceability of the March mediation settlement that he "vehemently" disagreed with. The fact that the amount of the plaintiff's monetary damages was not yet fixed or known at that point does not mean that the damages themselves were speculative. When, as here, it is "plainly obvious" that the plaintiff was injured as the result of his attorney's professional negligence (*i.e.*, their binding him to a

mediation settlement, in direct contravention of his goals, and without prior authorization), the existence of the damages was not speculative, but rather known to the plaintiff long before the settlement closed on November 27, 2013. See *Nelson*, 2016 IL App (1st) 160571, ¶¶ 15-24 (holding that former client's legal malpractice action against an attorney who negotiated his employment contract accrued at the latest on the date that the client filed a lawsuit against his former employer for breach of contract based on the client's termination; the client knew he suffered economic loss well before his action against the employer ended because at the time he filed his claim against the employer he knew that the text of the contract negotiated by the former attorney was partly responsible for his inability to protect himself from the employer's alleged wrongdoing.).

¶ 50 In this respect, we further disagree with the plaintiff that there remains an issue of fact as to whether he understood the term sheet and the arbitration award to be non-binding. The crux of the plaintiff's argument is that the term sheet and the arbitration award were preliminary documents presumably subject to modification and that therefore until the November 27, 2013, closing he did not have an actionable claim. In support of this argument, the plaintiff contends that both the term sheet and the arbitration award were ambiguous. The plaintiff points out that the term sheet provided for a term of "due diligence" permitting the parties to bring any disputes arising until closing to "Judge Wayne Anderson for resolution." In addition, he asserts that the arbitration award which was titled "interim award," did not remotely address whether the plaintiff would receive his share of assets free and clear from the control of other family members.

¶ 51 Contrary to the plaintiff's assertions, we find no ambiguity in either the term sheet or the

arbitration award. The term sheet clearly stated the parties' intentions with respect to the division of the family assets, dividing those assets among the Peter and MMMD groups. As already noted above, the plaintiff attested that "immediately" upon reading the term sheet he "vehemently" objected to its terms. Consequently, the plaintiff's position that those terms were ambiguous is contradicted by his own admission that the terms were clear enough for him to understand that they did not include his desired goal of divestiture, and to cause him to "immediately" and fervently object.

¶ 52 Moreover, even if we were to accept the plaintiff's contention that there was ambiguity in the term sheet, any such ambiguity was certainly settled by the binding arbitration award. In this respect, we find unavailing the plaintiff's suggestion that the arbitration award's silence as to him having his share of the family assets free and clear of any family interference is evidence of ambiguity. If silence amounted to ambiguity, every arbitration award would be subject to challenge with provisions that may or may not have been contemplated. More importantly, contrary to the plaintiff's position, the arbitration award is not silent on this issue, but rather clearly states that all of the parties were "very aware of the difficulty of valuing any of the assets" and entered into the binding settlement "with the full knowledge" of the impossibility of ensuring any specific percentage division of those assets. The arbitration award provided that the MMMD group would divide their share of those assets among themselves as "they chose." The plaintiff expressly agreed to these terms and cannot now complain for having sat back silently without raising his objections at that time.

¶ 53 The plaintiff nonetheless argues that even if we find that he was injured, at the very latest, on October 13, 2013, he should have been permitted to proceed with his cause of action pursuant to section 13-215 of the Code (735 ILCS 5/13-215 (West 2016)), which tolls the statute of

limitations to five years, where the defendants fraudulently conceal their misconduct. For the reasons that follow, we disagree.

¶ 54 Under the fraudulent concealment doctrine, the statute of limitations will be tolled if the plaintiff pleads and proves that fraud prevented discovery of his cause of action. *Carlson*, 2015 IL App (1st) 140526, ¶ 44 (citing *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 2016). As a general matter, one alleging fraudulent concealment must "show affirmative acts by the defendant that are designed to prevent the discovery of the action." *Lamet v. Levin*, 2015 IL App (1st) 142105, ¶ 32; see also *Carlson*, 2015 IL App (1st) 140526, ¶ 44. 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).

¶ 55 In the present case, the plaintiff asserts that instead of disclosing their legal malpractice to him by informing him that the settlement term sheet was in direct contravention of his express directives, the defendants instead reassured him that his goals of divestiture and a specific percentage of the family assets continued to be viable up until closing. The plaintiff further asserts that the defendants failed to advise him of the conflict of interest arising from their representation of both him and Peggy, as the executor of the grandparents' estate, and their prior relationship with Peggy's individual attorney, McDermott. In support of this argument, the plaintiff cites to *DeLuna v. Burciaga*, 223 Ill. 2d 49 (2006), for the proposition that as a fiduciary, an attorney has a "duty to disclose material *facts* concerning the existence of a cause of action." (Emphasis added.)

¶ 56 Contrary to the plaintiff's position, however, he nowhere alleged that the defendants failed to disclose any material *facts* to him. In fact, the plaintiff's own verified pleadings establish that the defendants never concealed the terms of the March mediation settlement term sheet from him. Instead, according to the second amended complaint, immediately upon learning those terms the plaintiff "vehemently" objected, and informed the defendants that he would not agree to a settlement without divestiture. In addition, the plaintiff admitted that he subsequently participated in the binding arbitration knowing full well that the arbitration award would enforce the terms of that term sheet, including that the MMMD group would distribute assets among themselves in any way that they chose. Similarly, the plaintiff's pleadings nowhere allege that the defendants failed to disclose to him their prior relationship with McDermott, or their simultaneous representation of him and Peggy as the executor of the grandparents' estate. On the contrary, the pleadings reveal that the plaintiff was aware of these facts from the very beginning of the defendant's representation. As such, they should have been on notice from the very beginning that in any subsequent dispute among the MMMD group, regarding divestiture of the MMMD assets, the defendants could not simultaneously represent both him and Peggy, as the executor of the grandparents' estate, if their interests did not align. As such, whether the defendants' conduct was negligent, is not a fact, but rather an opinion or a legal conclusion that might or might not be drawn from the facts. See *Lamet*, 2015 IL App (1st) 142105, ¶ 32. Our courts have "repeatedly rejected the notion that a lawyer has an affirmative obligation to advise his client of the grounds to sue him for legal malpractice." See *Lamet*, 2015 IL App (1st) 142105, ¶ 32; Carlson, 2015 IL App (1st) 140526, ¶ 45; see also *Fitch v. McDermott, Will & Emery, L.L.P.*, 401 Ill. App. 3d 1006, 1025 (2010) ("We similarly find no case that would require an attorney to affirmatively advise his client of his negligence and the statute of limitations for

suing him."). Accordingly, we find that the plaintiff was well aware of the actions or inactions on the part of the defendants that he now contends were the cause of his injury, and therefore failed to sufficiently plead fraudulent concealment to toll the statue of limitations.

¶ 57 In his final attempt to avoid the untimeliness of his complaint, the plaintiff asserts, for the first time on appeal, that we should apply judicial estoppel to prevent the application of the statute of limitations. In this vein, the plaintiff reiterates the same facts on which he relied with respect to his fraudulent concealment claim, namely that to his detriment the defendants' repeatedly reassured him, and he relied on those assurances, that his goal of divestiture would be achieved prior to the settlement closing. We, however, refuse to consider this argument, since the plaintiff never raised judicial estoppel before the trial court. In the past, we have consistently held that issues not brought before the circuit court are forfeited and cannot be raised for the first time on appeal. *Carlson*, 2015 IL App (1st) 140526, ¶ 34; see also *Herbert v. Cunningham*, 2018 IL App (1st) 172135, ¶37 (" '[Arguments] not raised before the circuit court are forfeited and cannot be raised for the first time on appeal. [Citation.]' ") (quoting *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 15); see also *Carlson*, 2015 IL App (1st) 140526, ¶ 34. We continue to adhere to this principle and find that the plaintiff has forfeited this issue on appeal.

¶ 58 III. CONCLUSION

¶ 59 For all of the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 60 Affirmed.