FIRST DIVISION
November 13, 2017

No. 1-16-2616



**IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT**

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|---|---|---|
| BAREFOOT ARCHITECT, INC., | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellant, | ) | Cook County. |
| | ) | |
| v. | ) | No. 14 L 10844 |
| | ) | |
| SABO & ZAHN; WERNER SABO; JAMES ZAHN; and SHAWN GOODMAN, | ) | Honorable |
| | ) | Larry Axelrood, |
| Defendants-Appellees. | ) | Judge Presiding. |

JUSTICE HARRIS delivered the judgment of the court
Presiding Justice Pierce and Justice Mikva concurred in the judgment.

## ORDER

¶ 1 *Held*: We affirm the trial court's dismissal of plaintiff's legal malpractice complaint, where plaintiff filed its complaint more than two years after it should have reasonably discovered that defendants may have committed negligence. The trial court's dismissal of plaintiff's claim for breach of fiduciary duty in count II was also proper because plaintiff's alleged damages resulted from prosecution of the bankruptcy, and plaintiff did not refute defendants' proof that plaintiff hired attorneys other than defendants to represent it in those proceedings.

¶ 2 Plaintiff, Barefoot Architect, Inc., appeals the order of the circuit court dismissing its legal malpractice complaint against defendants, Sabo & Zahn, Werner Sabo, James Zahn, and Shawn Goodman, as being barred by the statute of limitations. On appeal, plaintiff contends that

the trial court erred in granting defendants' motion to dismiss where a question of fact exists as to when the statute of limitations began to run. For the following reasons, we affirm.

¶ 3 JURISDICTION

¶ 4 The trial court dismissed plaintiff's complaint on June 28, 2016. Plaintiff filed a motion to reconsider which the trial court denied on August 31, 2016. Plaintiff filed a notice of appeal on September 27, 2016. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 (eff. Feb. 1, 1994) and 303 (eff. May 30, 2008), governing appeals from final judgments entered below.

¶ 5 BACKGROUND

¶ 6 Plaintiff filed an amended two-count complaint for legal malpractice and breach of fiduciary duty against defendants, resulting from defendants' representation of plaintiff in the underlying copyright infringement case of *Barefoot Architect Inc. v. Bunge*, 632 F. 3d 822 (2011). The following facts are relevant to this appeal.

¶ 7 In the late 1990's, Michael Milne formed two architectural firms located in the U.S. Virgin Islands. On May 5, 1997, he and a partner formed Village, where Milne was a share co-owner and served as vice-president. On May 20, 1998, Milne formed Barefoot Architect, Inc. (plaintiff), where he served as owner and president. Both firms were located in the same offices.

¶ 8 In May of 1999, Sarah Bunge and Thomas Friedberg met with Milne to discuss a house they wanted to build in the U.S. Virgin Islands. Bunge and Friedberg paid a deposit to Village in June of 1999, and Milne began preparing sketches and drawings for their project. All of the preliminary drawings and correspondence on the project bore the copyright of Village. Some time in 1999, Village decided to eliminate its architecture practice and began the process of transferring ongoing projects to plaintiff. In its amended complaint, plaintiff alleged that on

October 5, 1999, with the approval of Bunge and Friedberg, Village orally transferred its copyright to the project's design to plaintiff. Plaintiff submitted drawings for permits in April and July of 2000, all of which bore plaintiff's title-block and copyright imprint. In August 2000, Bunge and Friedberg entered into a standard contract with plaintiff for architectural services.

¶ 9 Construction on the project began in January of 2001. Plaintiff found it necessary to issue additional services invoices to Bunge and Friedberg, and although they paid some of them, plaintiff ultimately suspended its services due to a dispute over unpaid bills. At the end of 2001, plaintiff terminated the agreement between the parties and requested that Bunge and Friedberg return all copies of plaintiff's "instruments of service." In early 2002, Bunge and Friedberg hired Springline Architects, LLC, and Tracy Roberts (Springline) to complete their project.

¶ 10 Plaintiff complained that Springline was utilizing plaintiff's work without proper compensation. The dispute between plaintiff and Bunge and Friedberg led to arbitration proceedings that were eventually suspended without resolution. Defendants, whom plaintiff hired to represent it in the arbitration proceedings, then prepared the underlying complaint which was filed on July 27, 2004. The complaint alleged, among other claims, that Bunge, Friedberg, and Springline (Springline defendants) violated plaintiff's copyright. Plaintiff, not Village, was the party named as complainant.

¶ 11 On September 9, 2008, plaintiff and Village executed a "Memorandum of Transfer" of the copyright to the Bunge and Friedberg project to plaintiff. The Springline defendants then filed a motion for summary judgment, arguing that plaintiff did not own the copyright. On October 26, 2009, the district court granted summary judgment in favor of the Springline defendants on the copyright and Lanham Act claims. On appeal, plaintiff challenged only the judgment as to its copyright claim.

¶ 12 On January 14, 2011, the third circuit court of appeals affirmed the judgment against plaintiff. In determining whether Village transferred its copyright to the Bunge and Friedberg project to plaintiff, the court noted that the transfer of the copyright interest "is in the nature of an assignment." *Barefoot*, 632 F. 3d at 831. The court found, however, that the Memorandum of Transfer executed on September 9, 2008, did not provide sufficient evidence of assignment because it served both as evidence that an oral transfer occurred and to give "legal effect to that otherwise unenforceable promise." *Id*. at 832. In order to get past summary judgment, plaintiff needed to "present evidence, apart from the Memorandum of Transfer itself, *** that the October 5, 1999, oral assignment actually occurred." *Id*. Since plaintiff did not have such evidence, summary judgment in favor of the Springline defendants was appropriate. *Id*. In a footnote, the court stated that "while [plaintiff] has not so argued, it is likely possible for a copyright transfer to be implied from conduct and then later validated in writing. *** Plaintiff here has not, however, taken this route, and we will not consider whether it would have been availing." *Id*. at 837, footnote 4.

¶ 13 After the district court and appeals court decisions, defendants told plaintiff that the courts erred in making their determinations. After the appeals court decision, defendants informed plaintiff of the content and legal effect of the decision but "omitted any suggestion that the errors were committed by Defendants." Plaintiff had a "few options" after the appeals court decision, including re-filing "state law claims that remained viable" or filing a petition for certiorari with the United States Supreme Court. However, on the advice of defendants, plaintiff filed for bankruptcy on February 1, 2011, because defendants stated "that this would resolve the issues in a matter of weeks and that it was [plaintiff's] only choice." Plaintiff retained attorneys other than defendants to represent it in the bankruptcy proceedings. The underlying case was

stayed until the bankruptcy was dismissed on January 4, 2013. On April 22, 2013, defendants filed a motion to substitute.

¶ 14 Plaintiff filed its complaint for legal malpractice on October 17, 2014. An amended two-count complaint was filed on May 5, 2015. The amended complaint contained a legal malpractice count that alleged defendants failed "to fully research, identify, and address the copyright ownership issue prior to and after filing the complaint," failed "to join Village as a party in the Underlying Matter to circumvent the copyright ownership issue," and failed to argue that certain conduct implied the transfer of the copyright to plaintiff. The complaint also alleged a breach of fiduciary duty by advising plaintiff to file for bankruptcy that "subjected any state law claims [plaintiff] held to the administration of the chapter 7 trustee, and resulted in needless attorneys' fees." In the complaint, plaintiff alleged that it discovered defendants' negligent representation "[i]n January 2013" after the dismissal of its bankruptcy claim.

¶ 15 Defendants filed motions to dismiss under section 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2016)), which the trial court denied. The court noted that a section 2-615 motion to dismiss tests only the legal sufficiency of the complaint and does not raise affirmative factual defenses. The trial court found that "there are sufficient facts on the face of the pleading which entitle the plaintiff to relief." Defendants filed a motion to reconsider which the trial court also denied.

¶ 16 On March 14, 2016, defendants filed a motion to dismiss pursuant to section 2-619 of the Code, arguing that plaintiff's claim was barred by the statute of limitations and statute of repose. In the motion, defendants argued that the statute of limitations began to run either on October 26, 2009, the date of the district court decision, or on January 14, 2011, the date of the adverse appeals court decision, or at the latest on February 1, 2011, when plaintiff retained new counsel

to represent it in bankruptcy proceedings. Since plaintiff's legal malpractice complaint was filed on October 17, 2014, more than two years after all of these events, defendants argued that the complaint was untimely. In response, plaintiff argued that the breach of fiduciary duty count, based on its bankruptcy filing, should not be dismissed because the bankruptcy was terminated less than two years before the complaint was filed. Regarding the legal malpractice claim, plaintiff provided an affidavit from Milne stating that he relied on defendants to explain the court rulings and defendants repeatedly stated that the courts erred. Plaintiff argued that at a minimum, an issue of fact existed as to when it discovered defendants' alleged malpractice.

¶ 17 The trial court granted the motion to dismiss, finding plaintiff's complaint barred by the statute of limitations. Plaintiff filed a motion to reconsider which the trial court denied. The court found that plaintiff should have known of its injury when the appeals court affirmed the judgment of the district court in January 2011, and two weeks later plaintiff retained new counsel to file for bankruptcy relief. Since plaintiff's complaint was filed more than three years later, it was "barred by the two-year statute of limitations for legal malpractice." Plaintiff filed this timely appeal.

¶ 18 ANALYSIS

¶ 19 The trial court granted defendants' motion to dismiss plaintiff's malpractice complaint pursuant to section 2-619(a)(5) of the Code. In a section 2-619 motion to dismiss, all well-pled facts and reasonably drawn inferences in plaintiff's complaint are accepted as true for purposes of the motion. *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 85 (1995). Dismissal is proper as a matter of law where no genuine issues of material fact exist. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993). A motion to dismiss under section 2-619(a)(5) alleges "[t]hat the action was not commenced within the time limited

by law." 735 ILCS 5/2-619(a)(5) (West 2016). When a defendant raises the statute of limitations issue in a motion to dismiss, plaintiff "must provide sufficient facts to avoid application of the statute of limitations." *Hermitage Corp.*, 166 Ill. 2d at 84.

¶ 20 "An 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 2 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(b) (West 2016). This statute of limitations "starts to run when a person knows or reasonably should know of his injury and also knows or reasonably should know that it was wrongfully caused." *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 415 (1981). Knowledge that an injury was wrongfully caused, however, is not the same as knowledge of defendants' negligent conduct. *Id*. Rather, "[a]t some point the injured person becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved." *Id*. at 416. " 'At that point, the burden is upon the injured person to inquire further as to the existence of a cause of action.' " *Id*. quoting *Witherell v. Weimer*, 85 Ill. 2d 146, 156 (1981).

¶ 21 Illinois courts have found that a cause of action for legal malpractice accrues, and thus the limitations period begins to run, when a court enters an adverse judgment against plaintiff. See *Hermitage Corp.*, 166 Ill. 2d at 84-87 (finding that the statute of limitations began to run when the trial court first entered an order reducing the amount of the mechanics lien). Although courts have recognized that an adverse judgment in the trial court alone does not always indicate possible malpractice, they have found that an adverse judgment in a court of appeals should put plaintiff on notice that an actionable wrong may have been committed. See *Jackson Jordan, Inc.*

*v. Leydig, Voit & Mayer*, 158 Ill. 2d 240, 251 (1994) (implying that the latest event in which a malpractice injury would have been known was the date the federal appeals court entered its adverse ruling); *Butler v. Mayer, Brown and Platt*, 301 Ill. App. 3d 919, 925 (1998) (noting that the jury could find that the statute of limitations did not commence until the appellate court affirmed the trial court's adverse ruling).

¶ 22 In its amended complaint, plaintiff alleged that defendants' negligence caused plaintiff to lose its copyright infringement claim in the underlying matter and resulted in a number of judgments against plaintiff. In determining when plaintiff knew or reasonably should have known of its wrongfully caused injury, it is undisputed that both the district and appeals court entered adverse judgments in plaintiff's underlying case. In its judgment entered on January 14, 2011, the appeals court made clear that it was affirming the judgment against plaintiff because the Memorandum of Transfer alone was not sufficient evidence that the copyright was transferred from Village to plaintiff. In a footnote, the court found that a copyright transfer could be implied from conduct and later validated in writing. *Barefoot Architect*, 632 F. 3d at 837. However, since plaintiff did not raise this argument, the court did "not consider whether it would have been availing." *Id*. It is undisputed that, as plaintiff alleged in its complaint, defendants informed plaintiff of the content and legal effect of this decision. Plaintiff should have reasonably known at this point that it lost its copyright infringement claim, and that defendants may have committed negligence. Plaintiff at least had the burden to inquire further as to whether a cause of action existed. *Knox College*, 88 Ill. 2d at 416. Since plaintiff's legal malpractice complaint was filed on October 17, 2014, more than two years after the appeals court decision, it is barred by the statute of limitations.

¶ 23 Plaintiff disagrees. In alleging that its complaint was timely filed, plaintiff 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." *Hester v. Diaz*, 346 Ill. App. 3d 550, 553 (2004). "The time at which a party has or should have the requisite knowledge under the discovery rule to maintain a cause of action is ordinarily a question of fact." *Jackson Jordan*, 158 Ill. 2d at 250. However, a court may determine the issue as a matter of law where the only conclusion, based on undisputed facts, is that the statute of limitations period had run from the time plaintiff knew or should have known of its injury and the date plaintiff filed its complaint. *Id*.

¶ 24 Plaintiff argues that the discovery rule applies because it relied on the legal expertise of defendants during the underlying proceedings, and defendants assured plaintiff that the court judgments were erroneous. As a result, plaintiff continued to follow their advice and subsequently filed for bankruptcy. Therefore, plaintiff did not discover defendants' malpractice until January 2013, when its bankruptcy claim was dismissed and plaintiff's obligations to Bunge and Friedberg were not discharged. As support for its argument that defendants' assurances tolled the statute of limitations, plaintiff primarily relies on *Jackson Jordan* and *Butler*.

¶ 25 These cases are distinguishable. In both *Jackson Jordan* and *Butler*, information available prior to the appellate court's adverse ruling could have put the plaintiffs on notice that misconduct had occurred. The plaintiffs alleged that they did not previously know of any misconduct because their attorneys continued to assure them and expressed confidence that they would prevail on appeal. *Jackson Jordan*, 158 Ill. 2d at 246; *Butler*, 301 Ill. App. 3d at 921. If the statute of limitations began to run on the date of the adverse appellate court ruling, plaintiffs' malpractice complaints would have been timely filed. However, if the limitations period began to

run based on prior information, they would have been untimely. *Jackson Jordan*, 158 Ill. 2d at 250-51; *Butler*, 301 Ill. App. 3d at 925. The court in each case determined that since the facts supported more than one conclusion, a question of fact existed as to when the plaintiffs reasonably knew of the misconduct and the cause was remanded for further proceedings. *Id*.

¶ 26 In *Jackson Jordan* and *Butler*, a fact finder could determine that the complaints were timely filed because the attorneys' assurances tolled the running of the statute of limitations until the date of the adverse appellate court rulings. Here, however, plaintiff's malpractice complaint would not have been timely even if the statute of limitations began to run on the date of the adverse appeals court decision. *Jackson Jordan* and *Butler* do not alter our finding that plaintiff should have reasonably known of defendants' possible negligence when the appeals court rendered its adverse decision. In fact, the implication in both cases was that despite the assurances of their attorneys, the plaintiffs should have reasonably known of their injuries on the date the appellate court entered the adverse rulings.

¶ 27 Furthermore, although plaintiff's complaint alleged it relied on defendants' information and explanations that the courts erred, these allegations are conclusory and unsupported by allegations of evidentiary facts from which those conclusions may be drawn. Although a section 2-619 motion to dismiss admits all well-pleaded facts, it does not admit conclusory factual allegations unsupported by specific facts. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. Similarly, the conclusory statements in Milne's affidavit are insufficient to raise a genuine issue of material fact. *Steinmetz v. Board of Trustees of Community College District No. 529*, 68 Ill. App. 3d 83, 88 (1978).

¶ 28 Plaintiff next contends that the doctrines of fraudulent concealment and equitable estoppel preclude application of the statute of limitations here. To establish a cause of action for

fraudulent concealment, plaintiff must allege that defendants " 'knowingly misrepresented a material fact for the purpose of inducing [plaintiff] to act, that [plaintiff] reasonably believed the misrepresentation to be true, and [plaintiff] detrimentally relied upon it. [Citations.]' " *Greene v. First National Bank of Chicago*, 162 Ill. App. 3d 914, 922 (1987). To raise a claim of estoppel, plaintiff must allege that it relied on defendants' representations and "had no knowledge or convenient means of discovering the true facts." *West v. Northeastern Illinois R.R. Corp.*, 180 Ill. App. 3d 307, 313 (1989).

¶ 29 Plaintiff alleged that defendants misled plaintiff by saying the courts erred in their decisions, and having trust and confidence in defendants, plaintiff continued to follow their advice and therefore was prevented from discovering defendants' negligence. Importantly, plaintiff did not allege that defendants concealed the adverse court decisions from plaintiff, or the content of those decisions. In fact, plaintiff alleged the opposite in its complaint- that defendants "informed [plaintiff] of the content and legal effect" of the [appeals court's] decision but "continued to assert that the Appellate Court erred and incorrectly decided the matter." Plaintiff did not allege any material facts misrepresented by defendants. Since plaintiff has not properly established its claims of fraudulent concealment and estoppel, we need not consider the argument that those doctrines preclude application of the statute of limitations to plaintiff's malpractice complaint. See *DeLuna v. Burciaga*, 223 Ill. 2d 49, 77 (2006) (finding that "in order to state a claim of fraudulent concealment, 'a plaintiff must allege that the defendant concealed a material fact when he was under a duty to disclose that fact to plaintiff' [Citations.]").

¶ 30 Plaintiff's final contention is that the trial court erred in dismissing count II (breach of fiduciary duty), since that count is based on the filing of the bankruptcy petition which was dismissed on January 4, 2013, less than two years prior to the filing of the complaint. Although

the trial court did not specify its reasons in dismissing count II, the court dismissed the entire complaint and a reviewing court may affirm a section 2-619 dismissal on any basis supported by the record. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 261-62 (2004). We may affirm the dismissal even if the trial court based its decision on improper grounds. *In re Marriage of Gary*, 384 Ill. App. 3d 979, 987 (2008). Section 2-619 provides for dismissal where the claim asserted is barred by other affirmative matter avoiding the legal effect of or defeating the claim. 735 ILCS 5/2-619(a)(9) (West 2016). "'[A]ffirmative matter' includes a defense that completely negates the asserted cause of action." *Webb v. Damish*, 362 Ill. App. 3d 1032, 1037 (2005). Dismissal is proper "where the affirmative matter refutes crucial conclusions of law or material fact that are unsupported by allegations of specific facts." *Id*.

¶ 31 To state a claim for breach of fiduciary duty, plaintiff must allege (1) the existence of a fiduciary relationship between the parties; (2) specific duties owed to plaintiff; (3) a breach of those duties; and (4) damages resulting from the breach. *Neade v. Portes*, 193 Ill. 2d 433, 444 (2000). In count II, plaintiff alleged that defendants gave "legally unsound" advice to file for bankruptcy, and plaintiff suffered damages because it had a "few options" after the appeals court decision, including re-filing "state law claims that remained viable" or filing a petition for certiorari with the United States Supreme Court, but instead it filed for bankruptcy. Plaintiff also alleged that it "was required to expend attorney fees in the prosecution of the bankruptcy." These damages, however, stem from the actual filing of the bankruptcy petition and plaintiff did not allege that defendants actually filed the petition on plaintiff's behalf.

¶ 32 In its motion to dismiss, defendants established that two weeks after the appeals court entered its judgment against plaintiff, "plaintiff had already retained other counsel and filed for bankruptcy relief after suffering" losses in the district and appeals court. Defendants noted that

court filings establish that plaintiff was represented by Benjamin A. Currence in the bankruptcy case of "*Barefoot Architect, Inc., Debtor,* Court No. 3:11 BK 30002, in the U.S. District Court of the Virgin Islands (since February 1, 2011)." A court may take judicial notice of facts when determining a section 2-619 motion to dismiss. *Village of Riverwoods v. BG Ltd. Partnership*, 276 Ill. App. 3d 720, 724 (1995). "[P]ublic documents which are included in the records of other courts and administrative tribunals" can be the subject of judicial notice, because such documents "fall within the category of readily verifiable facts which are capable of 'instant and unquestionable demonstration.'" *May Department Stores Co. v. Teamsters Union Local No. 743*, 64 Ill. 2d 153, 158-59 (1976). We take judicial notice of these court filings to establish that plaintiff was represented by other counsel in the bankruptcy proceedings since February 1, 2011.

¶ 33 Furthermore, plaintiff did not refute this affirmative matter. In response to defendants' motion to dismiss, plaintiff attached the affidavit of Milne in which he acknowledged that he hired other firms and attorneys "to assist in the bankruptcy," and that other attorneys represented plaintiff in the bankruptcy proceedings. Since plaintiff's alleged damages arose only from the filing of the bankruptcy petition and the subsequent proceedings, the actions of successor counsel eliminated the connection between defendant's alleged misconduct and plaintiff's alleged damages. *Webb*, 362 Ill. App. 3d at 1039. Therefore, dismissal of this claim pursuant to section 2-619 was proper. *Id*.

¶ 34 Due to our disposition of the appeal, we need not address defendants' argument that plaintiff's complaint is also barred by the statute of repose.

¶ 35 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 36 Affirmed.