2011 IL App (2d) 100202-U
No. 2—10—0202
Order filed September 8, 2011



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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| SHEILA A. MANNIX,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>SANDRA G. NYE, JONATHAN D. NYE, LAW OFFICES OF NYE AND ASSOCIATES, LTD., and each partner or shareholder therein,<br><br>Defendants-Appellees. | ) | Appeal from the Circuit Court of Lake County.<br><br>No. 09—L—316<br><br>Honorable Raymond J. McKoski, Judge, Presiding. |

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JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

**ORDER**

*Held*: (1) Because it presented, at best, evidence, rather than fact, the trial court did not abuse its discretion in refusing to judicially notice an opinion involving plaintiff as a witness and otherwise not involving the parties or issues on appeal.
(2) The trial court did not err in determining that plaintiff had not met the requirements necessary to send her motion to substitute judge to another judge.
(3) Plaintiff's action was untimely where she filed an affidavit setting forth averments that were converted into allegations in the amended complaint at issue in this appeal; the time between the filing of the affidavit and the complaint was greater than the limitations period.

¶ 1 *Pro se* plaintiff, Sheila A. Mannix, appeals from the judgment of the circuit court of Lake County, dismissing her amended legal malpractice complaint against defendants, Sandra G. Nye, Jonathan D. Nye, and the Law Offices of Nye & Associates, Ltd., on the grounds that the original complaint was filed after the lapse of the five-year fraudulent concealment statute of limitations. On appeal, plaintiff contends that the trial court (1) erred in refusing to take judicial notice of *D'Agostino v. Lynch*, 382 Ill. App. 3d 960 (2008); (2) erred in refusing to recuse himself from the case; and (3) erred in finding the cause time-barred by the five-year fraudulent concealment statute of limitations. We affirm.

¶ 2 In the course of enforcement proceedings to obtain past-due child support in the dissolution action between plaintiff and her ex-husband, Daniel Sheetz, plaintiff retained the Law Offices of Nye and Associates, Ltd., to represent her. Sandra Nye appears to have personally represented plaintiff in the proceedings. Plaintiff alleges that, as a result of the child support hearing, Sheetz retaliated by petitioning to change the custody of the parties' children from plaintiff to him. Plaintiff alleges that, during the course of these proceedings, defendants "fabricated a custody battle" out of what should have been a straightforward child support enforcement case. According to plaintiff, defendants filed a motion for custody evaluation and the appointment of a children's representative without her knowledge or consent, and this led to the appointment of David Wessel. Plaintiff characterizes this as the first round of the pattern of racketeering activity in which defendants participated.

¶ 3 Plaintiff alleges that, at a hearing in 2002, Sheetz's attorney questioned whether he should withdraw his petition to modify custody. According to plaintiff, her attorney, Sandra Nye, told Sheetz's attorney, "No." Plaintiff alleges that Sandra Nye's response was not in her best interest,

constituted legal malpractice, and further set up the manufactured custody battle that initiated the RICO activity

¶ 4 After Wessel was appointed, Dr. Henry Lahmeyer, a psychiatrist, was appointed to conduct the evaluations. According to plaintiff, Lahmeyer was ordered evaluate the parties, but he would not release the report until after plaintiff had paid him $33,000. Plaintiff alleges that, when the report was released, it was false and defamatory, stating that plaintiff was severely mentally ill, delusional, and in need of medication. According to plaintiff the report was created in furtherance of the RICO scheme in order to coerce her into an unjust settlement that was not in the best interest of her or her family. After the settlement offer, plaintiff fired defendants and retained another attorney.

¶ 5 As is pertinent here, in September 2003, plaintiff executed an affidavit in the underlying postdissolution proceedings in which she averred: the custody battle was "false litigation;" Sandra Nye had not acted in her best interest when she advised Sheetz's counsel not to withdraw his petition to modify custody; Nye "misrepresented" plaintiff when plaintiff was ordered to pay for the services of the children's representative and Lahmeyer's evaluation; Nye collaborated in preparing the settlement agreements (which plaintiff claimed to be harmful to her children, unethical, and blatantly financially unfair to plaintiff); and the psychological evaluation was false and defamatory and intentionally created to coerce plaintiff into an unjust settlement. In October 2005, the trial court awarded Sheetz custody of the parties' children.

¶ 6 In October 2006, plaintiff testified in *D'Agostino*. The appellate court summarized plaintiff's participation: "Although [plaintiff] did not provide Lynch with any information regarding Judge White, she produced direct evidence regarding several other judges' involvement in the bribery scheme." *D'Agostino*, 382 Ill. App. 3d at 966.

¶ 7 In January 2009, plaintiff filed a complaint in federal court against defendants and others, alleging that defendants engaged in a "pattern of racketeering activity," conspiring with the state court judges, attorneys, and other court-appointed agents in plaintiff's postdissolution proceedings. On January 24, 2009, the federal trial court denied plaintiff's petition for leave to proceed *in forma pauperis*, holding that plaintiff had not asserted a viable claim. The federal trial court denied plaintiff's motion to reconsider, and the federal appellate court dismissed plaintiff's appeal for failure to prosecute.

¶ 8 On April 2, 2009, plaintiff filed this action in the circuit court of lake county, alleging that defendants were engaged in a "pattern of racketeering activity," "in conspiracy with the judiciary and the court-appointed individuals," turning a "straightforward domestic violence and child support enforcement case" into a "fabricated custody battle." On September 9, 2009, the trial court dismissed the complaint without prejudice, holding that, if the two-year statute of limitations applied, it had expired, and also holding that plaintiff had not sufficiently pleaded facts to demonstrate the applicability of the five-year fraudulent concealment statute of limitations. Plaintiff filed an amended complaint, reiterating her original allegations, that defendants created a custody battle, conspired with the court to appoint Wessel as children's representative, and conspired with Wessel to appoint Lahmeyer to evaluate the parties. Plaintiff further alleged that the foregoing scheme was concealed from her when defendants "consistently stated" that what they, the court, Wessel, and Lahmeyer were doing was standard practice within the courts when, according to plaintiff, they were "concealing the initiation of the racketeering activity" in her postdissolution case. Plaintiff also alleged that February 27, 2008, was the date on which she discovered the malpractice and racketeering scheme, which, she claims, is also the publication date of the *D'Agostino* case.

¶ 9 On December 17, 2009, the trial court granted defendants' motion to dismiss. This time the court held that, assuming that the five-year fraudulent concealment statute of limitations applied, the trigger-date was the date on which plaintiff executed her September 2003 affidavit. The trial court concluded that plaintiff's complaint, filed on April 2, 2009, was seven months late. Plaintiff filed a timely motion to reconsider, which, on January 29, 2010, was denied. Thereafter, plaintiff filed a timely notice of appeal.

¶ 10 Following the filing of her notice of appeal, plaintiff additionally filed a petition to vacate the trial court's orders of December 2009 and January 2010 pursuant to section 2—1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2—1401 (West 2010)). Plaintiff does not raise any issues in this appeal pertaining to the 2—1401 petition to vacate or any of the motions related to the proceedings on that petition.

¶ 11 On appeal, plaintiff argues that the trial court erred when it failed to take notice of her testimony as set forth in the *D'Agostino* opinion. Plaintiff also contends that the trial court was biased and should have recused itself from presiding over this matter. Last, plaintiff argues that the trial court erred by granting defendants' motion to dismiss. We address each contention in turn.

¶ 12 Plaintiff initially contends that the trial court should have taken judicial notice of the appellate court's statement in *D'Agostino*, "Dr. Sheila Mannix of the IFCAA assisted Lynch in bringing charges and filing complaints against the corrupt judges. Although Mannix did not provide Lynch with any information regarding Judge White, she produced direct evidence regarding several other judges' involvement in the bribery scheme." *D'Agostino*, 382 Ill. App. 3d at 966. Plaintiff argues that the appellate court's statement established incontrovertible proof of the existence of the racketeering scheme she was postulating before the court in this matter. Plaintiff concludes that the

trial court in this matter could have taken notice of the opinion in *D'Agostino* thereby establishing the existence of the racketeering scheme here. We disagree.

¶ 13 The *D'Agostino* court was presenting a summary of the evidence before it. Its statement about plaintiff was nothing more than a description of the evidence she gave in that proceeding. It is well established that a court will not take notice of the proceedings of another court unless the parties are the same and the outcome of the other case is determinative of an issue in the current case. *Hastings v. Gulledge*, 272 Ill. App. 3d 861, 866 (1995). Neither plaintiff nor defendants were parties in the *D'Agostino* case, and there is nothing in *D'Agostino* that impinges on any of the issues (judicial notice, recusal, or statute of limitations) in this case. At best, *D'Agostino*'s mention of plaintiff provided evidence for the finder of fact to consider if the information contained in that presentation identified a person or persons who had some relationship to this particular case. Without identification of these persons in *D'Agostino*, whatever was contained in the opinion is not relevant or material until a proper foundation is laid to make the connection. However, the reference to plaintiff and her testimony in *D'Agostino* is secondary hearsay. The opinion stated that plaintiff presented direct evidence and testified about others, but did not comment on the merits of the evidence. It did nothing more than establish that the claims about the unidentified judges were made without determining the merits of the evidence or the claims. As plaintiff's request to take judicial notice of *D'Agostino* involved evidence, it is reviewed under the standard applying to a trial court's decision about evidence, namely, whether the trial court abused its discretion in rendering its decision. *Timothy Whelan Law Associates, Ltd. v. Kruppe*, 409 Ill. App. 3d 359, 365 (2011). Based on our review of the record, we conclude that the trial court did not abuse its discretion.

¶ 14 Moreover, judicial notice is limited to facts that are so easily verified that they are beyond reasonable controversy. *Cook County Board of Review v. Property Tax Appeal Board*, 339 Ill. App. 3d 529, 541 (2002). A court will not take judicial notice of critical evidence not presented in that court or the court below or of evidence that may be important to determining the issues between the parties. *Cook County Board of Review*, 339 Ill. App. 3d at 542. Plaintiff's request that the court take notice of the passage in *D'Agostino* was a request about the heart of the matter plaintiff brought before the trial court. As such, the court could not take notice of that matter as if it were a proven fact because the parties controverted the issue. *Cook County Board of Review*, 339 Ill. App. 3d at 542. Accordingly, we reject plaintiff's contention.

¶ 15 Similarly, plaintiff complains that the trial court did not take notice of her complaint in *Mannix v. Madigan*, No. 09—C—103 (N.D. Ill.), and her affidavit which she recorded in the Lake County Recorder's office as Lake County Recorder's Office Document No. 6324306, memorializing "testimony to alleged illegal acts by Lake County judges." Neither the complaint nor the recorded document are capable of being judicially noticed, other than the fact of the existence of each document. The substance of the documents, which is presumably what plaintiff wished the trial court to take notice of, are allegations or testimony, not facts so easily verified as to be beyond reasonable controversy. *Cook County Board of Review*, 339 Ill. App. 3d at 541. The trial court did not abuse its discretion in refusing to take judicial notice of these documents.

¶ 16 Next, plaintiff argues that the trial court erred in refusing to recuse itself. Plaintiff argues that the trial court was biased against her (primarily as shown by its refusal to take judicial notice of *D'Agostino*, her federal court complaint, and her recorded affidavit). Because we determined that there was no error in the trial court's refusal to take judicial notice of these documents, there can be

no prejudice accruing to its action. In the absence of prejudice, the trial court was not required to recuse itself. See *In re Marriage of O'Brien*, 393 Ill. App. 3d 364, 373 (2009) (party seeking recusal of the trial court must prove actual prejudice).

¶ 17 Although plaintiff does not identify this as error, we note that the trial court ruled on plaintiff's motion for substitution of judge without first transferring it to another court. This is potentially problematic. However, a party's right to have a petition for substitution of judge heard by another judge is not automatic. In order to have the petition heard by another judge, the moving party must first demonstrate that it meets the threshold requirements, including setting forth the specific cause for the substitution. *In re Estate of Wilson*, 238 Ill. 2d 519, 553 (2010). Where, as here, bias or prejudice is invoked as the ground for seeking substitution, such bias must normally stem from an extrajudicial source, not simply be based on what the judge learned from his or her participation in the case. *Estate of Wilson*, 238 Ill. 2d at 554. Additionally, a judge's rulings during the case almost never constitute a proper basis for a claim of prejudice. *Estate of Wilson*, 238 Ill. 2d at 554. Here, plaintiff does not identify any extrajudicial source as the basis for the trial court's alleged bias against her. Likewise, plaintiff has not shown that the trial court's decision on the timeliness of her complaint resulted from anything other than the trial court's participation in the case. Because plaintiff has provided no basis with which to demonstrate the trial court's bias, she did not trigger the necessity of having another judge consider the motion for substitution. Thus, the trial court's action was not erroneous.

¶ 18 Plaintiff also argues that the trial court should have recused itself under the Judicial Code, namely Illinois Supreme Court Rule 63(C)(1) (eff. April 16, 2007), which provides that a judge should recuse from a case where his or her impartiality might reasonably be questioned. Plaintiff

does not identify grounds to question the trial court's impartiality, such that an "objective, reasonable person would conclude that the judge's impartiality might reasonably be questioned." *Marriage of O'Brien*, 393 Ill. App. 3d at 374. Accordingly, we reject plaintiff's argument.

¶ 19 Next, plaintiff contends that the trial court erred in dismissing her amended complaint on statute-of-limitations grounds. Section 2–619(a)(5) of the Code authorizes the involuntary dismissal of an action if it "was not commenced within the time limited by law." 735 ILCS 5/2—619(a)(5) (West 2008); *Johnson v. Augustinians*, 396 Ill. App. 3d 437, 439 (2009). We review *de novo* the trial court's ruling on the motion. *Johnson*, 396 Ill. App. 3d at 439.

¶ 20 Plaintiff argues that the trial court did not consider the fact that defendants fraudulently concealed her cause of action. We disagree. The court was well aware of plaintiff's allegations of fraudulent concealment. We note further that the court initially granted defendants' motion to dismiss without prejudice, instructing plaintiff to further plead to establish that defendants fraudulently concealed the cause of action from plaintiff. There is no merit to this argument.

¶ 21 Plaintiff argues that, in the circuit court of Cook County, the court denied a section 2—619(a)(5) motion to dismiss that was very similar to the one at issue here. Plaintiff reasons that the trial court here was constrained by the circuit court of Cook county's decision and should also have denied the motion to dismiss. This reasoning is in error. Decisions made in the trial court do not set precedent. *People v. Mann*, 397 Ill. App. 3d 767, 769 (2010). Further, courts are not bound to follow the decisions of equal or lower courts (*People v. Canulli*, 341 Ill. App. 3d 361, 370 (2003)), so the circuit court of Cook County's decision is not binding on the trial court or this court. While the Cook County court's decision may have carried some measure of persuasiveness in the trial court, it did not bind the trial court to make the same ruling. Plaintiff's contention is without merit.

¶ 22 In any event, we have carefully reviewed the record and conclude that plaintiff's complaint was time-barred. For the purpose of analysis, we assume that the five-year fraudulent concealment limitation applies, and we conclude that plaintiff filed her action outside of the limitations period. The record shows that, on September 10, 2003, plaintiff filed an affidavit in which she averred that she was aware of the practice of instigated custody petitions driving mothers into poverty. She stated that her postdissolution action was a similar "false litigation" begun because the lawyers believed that she and her family were wealthy. In the affidavit she averred that Sandra Nye did not act in her best interest when her ex-husband's attorney questioned whether he should withdraw the petition to modify custody and Nye responded, "no." Plaintiff further averred that it was as a result of Nye's misrepresentation and actions against her interest that the trial court ordered her to pay Wessel's retainer. Plaintiff described Lahmeyer's "extortive behaviors" in conducting his evaluation and described his report as "false and defamatory" and "intentionally created to coerce [her] into an unfeasible and unjust settlement not in the best interest of [her] children and family." These averments establish that, by the date of September 10, 2003, plaintiff knew or reasonably should have known that she had been injured by defendants' alleged malpractice. The five-year statute of limitations began to run on that date and plaintiff had five years from that date in which to file this actions. See *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 81-82 (1995) (statute of limitations will begin to run when the plaintiff knows or reasonably should have known of the injury and its wrongful cause). Thus, because on September 10, 2003, the statute of limitations began running, plaintiff had five years, or until September 10, 2008, in which to file this action. On April 2, 2009, after the limitations period had elapsed, plaintiff actually filed this action. This action,

therefore, is untimely. Accordingly, we hold that the trial court did not err in granting defendant's motion to dismiss pursuant to section 2–619(a)(5) of the Code.

¶ 23 Plaintiff also claims that the statute of limitations should be equitably tolled because defendants attempted to conceal the existence of the malpractice action from her. Equitable tolling allows a party to avoid the statute-of-limitations bar where it would be unjust to allow the opponent to disavow express and implied statements upon which the party relied and which caused the party to forego timely filing the action. *Cramsey v. Knoblock*, 191 Ill. App. 3d 756, 765 (1989). However, in order to properly invoke equitable tolling, the plaintiff cannot demonstrate only misconduct, but must demonstrate that the other party did or said something that lulled or induced the plaintiff to delay filing the claim until after the limitations period had run. *Cramsey*, 191 Ill. App. 3d at 765. Here, upon reviewing the record, it is clear that plaintiff did not demonstrate any facts showing that defendants made any representations to her between January 2002 and April 2009 that she relied upon to refrain from filing her legal malpractice claim. The one thing to which plaintiff can point is her allegation that defendants consistently represented that what they were doing (along with the trial court, Wessel, and Lahmeyer) was "standard practice." However, this allegation also forms a basis of plaintiff's malpractice claim, and it is well settled that the allegations forming the basis of the legal malpractice action may not also constitute the grounds for employing the doctrine of equitable tolling. *Barratt v. Goldberg*, 296 Ill. App. 3d 252, 257-58 (1998). Accordingly, plaintiff may not resort to equitable tolling to avoid the bar of the limitations period.

¶ 24 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 25 Affirmed.