2012 IL App (2d) 110476-U
No. 2-11-0476
Order filed March 23, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAXIMILIAN J. WINTERS, CHARLENE WINTERS, and JOSEPH WINTERS, Plaintiffs-Appellants, v. LEE MUNDER, STEVEN A. HOLLAND, MARC LEVENSTEIN, SONNENSCHEIN, NATH & ROSENTHAL, LLP, WAYNE SMITH, and MICHEL FELDMAN, Defendants-Appellees.	)	Appeal from the Circuit Court of Du Page County. No. 10-CH-177 Honorable Bonnie M. Wheaton, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

Held: Where, viewing the pleadings in the light most favorable to plaintiffs, their cause of action was time barred, and the trial court's order granting defendants' motions to dismiss was affirmed.

¶ 1 *Pro se* plaintiffs, Maximilian J. Winters, Charlene Winters, and Joseph Winters, appeal from the trial court's dismissal of their second amended complaint. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 We derive the following relevant facts from the second amended complaint (complaint). In 1985, plaintiff, Maximilian Winters, entered into a business relationship with defendants, Lee Munder, Steven A. Holland, and Wayne Smith, in which Maximilian sought legal and business assistance to market certain software he developed. Plaintiffs Charlene Winters and Joseph Winters are Maximilian's wife and son. Defendant Marc Levenstein, an attorney with defendant law firm Sonnenschein, Nath & Rosenthal, LLP, (Sonnenschein)[1] was counsel for Munder and Holland. The business relationship between the parties terminated in 1993. Defendant Michel Feldman was Maximilian's counsel from 1986 through 1995.

¶ 4 In 1985, a joint venture between Maximilian and Munder, Holland, and Smith culminated in the formation of AID/SNA, Inc. based on a verbal agreement between the parties, which despite defendants' repeated promises, was never formalized into writing. AID was Applied Information Development, Inc., incorporated by Munder and Holland in 1979, and for which Smith served as executive vice president. SNA was Systems Network Analysis, Inc., plaintiffs' closely-held, family-owned corporation. The purpose of AID/SNA was to "develop, market and license enterprise software products created, first designed and developed by" Maximilian for SNA as well as future products, the design of which "would be based in intellectual property trade secrets created by" Maximilian and "otherwise owned by SNA." Plaintiffs alleged that defendants failed to follow "corporate formalities" and concealed all "material corporate filings" from plaintiffs. Defendants also concealed record books and accounting records.

[1]In September 2010, Sonnenschein merged with Denton Wilde Sapte, LLP to form SNR Denton.

¶ 5 AID/SNA was subsequently dissolved when defendants forged Maximilian's signature on articles of dissolution filed with the Illinois Secretary of State in 1986. Its purported successor was the Netserv General Partnership, created "through a void general partnership agreement" in 1987. "The software intellectual property and other assets of AID/SNA were fraudulent[ly] conveyed to AID [the Option Agreement] and then to the Netserv General Partnership after AID/SNA, Inc.'s fraudulent dissolution." The partnership sold the assets to Candle Corporation later in 1987, and Candle sold the assets to IBM years later. Plaintiffs further alleged that Munder and Holland forged Maximilian's signature on the purchase agreement with Candle, and never provided him with a copy. Munder, Holland, and Smith perpetrated all of these frauds against plaintiffs, aided and abetted by Levenstein, Sonnenschein, and Feldman. Maximilian signed an option agreement and an employment agreement, at Feldman's urging, that effectively allowed defendants to "freeze him out" and "squeeze him out." All defendants breached their fiduciary duties to plaintiffs.

¶ 6 During the parties' relationship, defendants excluded Maximilian from discussions and meetings, all the while pressuring him to increase his production by working excessive hours. Munder and Holland intimidated and coerced Maximilian, inflicting great emotional distress. Maximilian suffered terrible depression and anxiety—"a hopeless depression from which he has yet to truly emerge"—and for which he spent much time in psychotherapy sessions. All of the foregoing resulted in Charlene's divorcing Maximilian, and Maximilian and Joseph were homeless for a period of time, during which Joseph had to help Maximilian manage his affairs.

¶ 7 In 2001, while "idly searching" the Illinois Secretary of State's database, Maximilian accidently discovered that his signature had been forged on several documents, including AID/SNA's articles of dissolution, filed in 1986. Maximilian called the Secretary of State's office

and requested all of the forged corporate documents. He also called Feldman and requested documents. Maximilian spoke with the deputy counsel to the Secretary of State and met with an assistant Attorney General for financial crimes. Maximilian consulted with numerous attorneys and began researching the law himself.

¶ 8 In 2010, plaintiffs commenced the action at issue by filing, *pro se*, a "Verified Motion Nunc Pro Tunc" in which they sought a declaration that the articles of dissolution for AID/SNA were void *ab initio*. On its own motion, the trial court dismissed the motion and granted plaintiffs leave to file a complaint that comported with the Code of Civil Procedure (Code) (735 ILCS 5/1-101 *et seq*. (West 2010)). Plaintiffs ultimately filed their second amended complaint at issue in this appeal. In the complaint, plaintiffs purported to assert a "single equitable cause of action." Specifically, plaintiffs alleged that Munder, Holland and Smith committed "fraud in the factum in the formation of a business relationship" with Maximilian, breached their fiduciary duties to Maximilian, and committed forgery, perjury, fraudulent concealment, and fraudulent conversion. Plaintiffs sought an equitable accounting, or, in the alternative, disgorgement of unjust enrichment, or establishment of a constructive trust, or quasi-contractual restitution. Plaintiffs also alleged that Munder and Holland intentionally inflicted emotional distress on Maximilian, and sought damages for pain, suffering, loss of consortium, and inability to earn a living. Against defendants Levenstein and Sonnenschein, plaintiffs alleged breach of fiduciary duty, conspiracy to breach fiduciary duty, and "fraudulent conflict of interest" for which they sought damages "in an amount to serve justice and equity." With respect to defendant Feldman, plaintiffs alleged conspiracy to breach fiduciary duty, breach of fiduciary duty, and aiding and abetting a conspiracy to defraud, seeking damages "to serve justice and equity."

¶ 9 Defendant Feldman filed a motion to dismiss pursuant to section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2010)), based on the statutes of limitation and repose for legal malpractice claims in section 13-214.3 of the Code (735 ILCS 5/13-214.3 (West 2010)). The remaining defendants, collectively, filed a section 2-619(a)(5) motion to dismiss, asserting that the claims against them were time barred under section 13-205 of the Code (735 ILCS 5/13-205 (West 2010)), section 13-215 of the Code (735 ILCS 5/13-215 (West 2010)), section 13-202 of the Code (735 ILCS 5/13-202 (West 2010)), and section 13-214.3 of the Code. Plaintiffs responded that the various statutes of limitation and repose were statutorily or equitably tolled.

¶ 10 Plaintiffs also filed a motion for writ of *mandamus*, seeking an order compelling defendants to allow them to examine the records of AID/SNA, Inc., and the Netserv general partnership. It appears from the record that the trial court operated under the assumption that there must be a valid complaint on file before it could rule on the motion for a writ.

¶ 11 After hearing argument, the trial court granted the motions to dismiss, concluding that the statutes of limitation and repose had long since run when plaintiffs filed their action and that plaintiffs failed to show that Maximilian was under a legal disability. The court dismissed the complaint with prejudice. Plaintiffs filed a motion to reconsider, but abandoned their motion for a writ of *mandamus*. The trial court denied the motion to reconsider, and plaintiffs timely appeal.

¶ 12 ANALYSIS

¶ 13 Plaintiffs argue that the trial court erred in granting defendants' motions to dismiss. A motion to dismiss under section 2-619 of the Code admits the legal sufficiency of the complaint, but asserts affirmative matters that avoid or defeat the complaint's allegations. *Corcoran-Hakala v. Dowd*, 362 Ill. App. 3d 523, 525 (2005). A section 2-619 movant concedes the truth of all well-

pleaded allegations in the complaint. *Nettleton v. Stogsdill*, 387 Ill. App. 3d 743, 759 (2008). The reviewing court must first determine if a genuine issue of material fact exists, thereby precluding dismissal of the case. *Nettleton*, 387 Ill. App. 3d at 759. Absent a genuine issue of material fact, the court must determine whether dismissal was proper as a matter of law. *Nettleton*, 387 Ill. App. 3d at 759. We review *de novo* the trial court's dismissal of a complaint pursuant to section 2-619(a)(5). *Caywood v. Gossett*, 382 Ill. App. 3d 124, 129 (2008).

¶ 14 Section 2-619(a)(5) allows a cause of action to be dismissed if it was not commenced within the time limited by law. *Compton v. Ubilluz*, 351 Ill. App. 3d 223, 227-28 (2004). Article XIII of the Code provides time limitations for filing civil actions. See 735 ILCS 5/13-101 *et seq.* (West 2010); *Jain v. Johnson*, 398 Ill. App. 3d 135, 138 (2010). Under the discovery rule, a statute of limitations begins to run when the plaintiff discovers, or reasonably should have discovered, his injury. *Jain*, 398 Ill. App. 3d at 138. Once the plaintiff knows, or reasonably should know, that he was injured and that the injury was wrongfully caused, the statute of limitations begins to run, putting a burden on the plaintiff to inquire further to determine whether an actionable wrong was committed. *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 415-16 (1981). Although the commencement of the limitations period usually presents a question of fact, it may be decided as a matter of law when the answer is clear from the pleadings. *Clay v. Kuhl*, 189 Ill. 2d 603, 609-10 (2000).

¶ 15 Here, based on plaintiffs' allegations in the complaint, they were aware of their injuries prior to 2001. A few examples of the many allegations follow. Plaintiffs alleged that in the 1980s, defendants never provided them with a copy of the articles of incorporation, a written agreement for the joint venture, or the purchase agreement with Candle. Plaintiffs asserted that "virtually every

substantive legal document," starting with the option agreement, "demonstrate[d] clear breach of fiduciary duty." For example, upon reading the option agreement in the mid-1980s, Maximilian "realized" that the consideration for the option was taken out of his monthly paycheck, "so that there was no actual consideration paid by AID." Because Maximilian was a "purported" director and shareholder, he was aware that shareholders' or directors' meetings were never held. Maximilian also complained to defendants in the 1980s about not receiving his negotiated pay. Plaintiffs alleged that in August 1985, Maximilian told his psychoanalyst that he believed that defendants "were going to screw him." In January 1986, Maximilian asked his psychoanalyst for a referral for a lawyer. Upon reviewing a draft of a new employment agreement in November 1986, Maximilian "immediately told his analyst he needed a lawyer." Indeed, Maximilian retained defendant Feldman then. Thus, plaintiffs were at least on inquiry notice of their alleged injuries well before 2001.

¶ 16 Plaintiffs further alleged that, in 2001, Maximilian discovered that his signature had been forged on AID/SNA documents filed with the Secretary of State. Forgery is an obvious wrong; therefore, Maximilian's discovery of the forgery put him on inquiry notice that plaintiffs' injuries were wrongfully caused. Indeed, plaintiffs alleged that Maximilian did, in fact, begin inquiring into potential actionable wrongs committed by defendants. Maximilian consulted with the Secretary of State, the Attorney General, and various attorneys, and conducted his own legal research. Accordingly, any applicable statutes of limitation began to run in 2001. See *Celotex Corp.*, 88 Ill. 2d at 415-16 (stating that statutes of limitation begin to run when the plaintiff knows he has sustained an injury and that it was wrongfully caused).

¶ 17 We now consider whether any applicable limitations period had expired when plaintiffs commenced their civil action in 2010. Although plaintiffs' complaint purported to assert a "single

equitable cause of action," plaintiffs' claims sounded in fraud, breach of fiduciary duty, intentional infliction of emotional distress, and legal malpractice. Section 13-205 of the Code is a catch-all provision setting a five-year limitation on actions sounding in, *inter alia*, fraud and breach of fiduciary duty. 735 ILCS 5/13-205 (West 2010) ("[A]ll civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued."); *DeSantis v. Brauvin Realty Partners, Inc.*, 248 Ill. App. 3d 930, 933-34 (1993) (applying section 13-205 to actions in fraud and breach of fiduciary duty). Section 13-202 of the Code provides a two-year limitation for personal injury actions, including intentional infliction of emotional distress. 735 ILCS 5/13-202 (West 2010); *Dahl v. Federal Land Bank Ass'n of Western Illinois*, 213 Ill. App. 3d 867, 872 (1991). Limitations for legal malpractice actions are contained in section 13-214.3 of the Code, which includes a two-year statute of limitations and a six-year statute of repose. 735 ILCS 5/13-214.3(b), (c) (West 2010). Under even the longest period provided—the six-year statute of repose, plaintiffs' suit had to have been filed in 2007, six years after plaintiffs discovered their injury. See *DeLuna v. Burciaga*, 223 Ill. 2d 49, 61, 65 (2006) (Although a statute of repose cuts off the right to bring a claim regardless of when it was discovered, section 13-214.3(e) (735 ILCS 5/13-214.3(e) (West 2010)) operates to toll the statute of repose in section 13-214.3(c) during a plaintiff's legal disability). Therefore, all of the statutory time limitations had long since expired when plaintiffs filed suit in 2010. Accordingly, the trial court properly dismissed the complaint as time barred.

¶ 18 Nonetheless, plaintiffs assert that the limitations periods were tolled because Maximilian is operating under a "continuing mental disability." They maintain that the trial court erred in dismissing their complaint without allowing discovery on the degree of Maximilian's disability. We agree with the trial court that plaintiffs misapprehend the nature of a legal disability.

¶ 19 A legal disability exists when a person completely lacks understanding or capacity to make decisions or to communicate his decisions *and* has a total inability to manage his estate or financial affairs. *Basham v. Hunt*, 332 Ill. App. 3d 980, 989 (2002); *Selvy v. Beigel*, 309 Ill. App. 3d 768, 776 (1999) (emphasizing the word "and"). Putting aside that plaintiffs make no argument that all three of them were under a legal disability, their allegations that, in 2001, Maximilian consulted with government officials and various attorneys, and conducted his own legal research are fatal to their claim because these acts demonstrated Maximilian's understanding and capacity to make decisions and manage his affairs. Plaintiffs' vague assertions, that Maximilian was severely depressed and that his son had to manage his affairs, do not compel a different conclusion. Not only did plaintiffs fail to allege any specific facts as to how or why Maximilian was unable to manage his affairs, but their allegations demonstrate the opposite—that he did manage his affairs. See *Bloom v. Braun*, 317 Ill. App. 3d 720, 731-32 (2000) (holding that the record belied the plaintiff's claims of legal disability where she sought psychiatric treatment, held various jobs, and contributed to living expenses with roommates, despite her being declared psychiatrically disabled by the Social Security Administration); *In re Doe*, 301 Ill. App. 3d 123, 127 (1998) (holding that the statute of limitations was not tolled where the plaintiff had earned a bachelors degree and applied for a masters degree during the time of his alleged legal disability); *Sille v. McCann Construction Specialties Co.*, 265 Ill. App. 3d 1051, 1055 (1994) (holding that the plaintiff's alcoholism was not a legal disability sufficient to toll the limitations period when the plaintiff regularly operated construction machinery for his business). Consequently, based on plaintiffs' allegations in the complaint, at least as of 2001, plaintiff was not under a legal disability.

¶ 20 Given that any legal disability suffered by Maximilian was removed in 2001, any tolling of the limitations periods terminated then as well. Sections 13-211 (735 ILCS 5/13-211 (West 2010)) and 13-214.3(e) of the Code provide for tolling when the plaintiff is under a legal disability. Under section 13-211, certain specified actions, including fraud and breach of fiduciary duty, may be brought within two years of the removal of the plaintiff's legal disability. 735 ILCS 5/13-211 (West 2010). Under section 13-214.3(e), the legal malpractice statutes of limitation (section 13-214.3(b)) and repose (section 13-214.3(c)) do not begin to run until the plaintiff's legal disability is removed. 735 ILCS 5/13-214.3(e) (West 2010); *DeLuna*, 223 Ill. 2d at 65. Plaintiffs' complaint was time barred under either provision because it must have been filed in 2003—two years from the removal of the disability under section 13-211, or in 2007—six years after removal of the disability under sections 13-214.3(c) and 13-214.3(e).

¶ 21 Plaintiffs also contend that the limitations periods were tolled because of defendants' fraudulent concealment. Section 13-215 of the Code provides that if the defendant fraudulently concealed the cause of action from the plaintiff, the plaintiff may bring the action within five years of discovering the cause of action. 735 ILCS 5/13-215 (West 2010). As we discussed above, plaintiffs discovered the alleged fraud by 2001; thus, under section 13-215, they had until 2006 to file suit. Thus, assuming without deciding that defendants concealed the cause of action from plaintiffs, the complaint filed in 2010 was still too late. See *Muskat v. Sternberg*, 211 Ill. App. 3d 1052, 1061 (1991) (stating that "once a party discovers the fraud, it is no longer concealed").

¶ 22 Plaintiffs additionally maintain that, because this is a case in equity, statutes of limitation do not operate as a time bar. They urge that the doctrine of equitable tolling applies because, despite their attempts at diligence, they were delayed in filing their complaint due to circumstances beyond

their control, namely Maximilian's disability and defendants' fraudulent concealment. As discussed, in 2001, plaintiffs discovered their injury and any disability suffered by Maximilian was removed by then when he began investigating potential claims. Plaintiffs contend that Maximilian was not aware of all of the elements of his cause(s) of action in 2001. However, a plaintiff need only be on inquiry notice of an injury wrongfully caused (*Jain*, 398 Ill. App. 3d at 138) and need not be aware of the technical legal definition of his claim or know that all of the elements of a potential cause of action are satisfied. *Mitsias v. I-Flow Corp*., 2011 IL App (1st) 101126, ¶ 24. Accordingly, plaintiffs' nine-year delay in filing simply does not reflect diligence.

¶ 23 Finally, in the conclusion of their brief, plaintiffs maintain that their motions *nunc pro tunc* and for writ of *mandamus* must be acted upon. Plaintiffs forfeited these contentions by failing to provide a reasoned legal argument and by not citing any relevant authority in support of their propositions. *Roiser v. Cascade Mountain, Inc.*, 367 Ill. App. 3d 559, 568 (2006). Although plaintiffs also assert in the issues section of their brief that this court should order a remand with a change of venue and assert in their conclusion that defendants' counsel must be disqualified, they concede in their reply brief that these requests are improper.

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

¶ 25 Affirmed.