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2012 IL App (3d) 110689-U

Order filed July 20, 2012

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

ELAINE M. BELSHAUSE,)	Appeal from the Circuit Court
)	of the 14th Judicial Circuit,
Plaintiff-Appellant,)	Rock Island County, Illinois
)	
v.)	Appeal No. 3-11-0689
)	Circuit No. 10-CH-338
)	
DANIEL CHURCHILL, individually and as)	
Trustee of the Belshause Family Trust)	
dated May 28, 2003,)	Honorable
)	Mark A. Vandewiele,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justice McDade specially concurred in the judgment.
Presiding Justice Schmidt dissented.

ORDER

¶ 1 *Held:* Plaintiff failed to allege sufficient facts to state a cause of action for legal malpractice as alleged in counts I and II of plaintiff's fourth amended complaint. The appellate court, therefore, affirmed the trial court's grant of defendant's section 2-615 (735 ILCS 5/2-615 (West 2010)) motion to dismiss counts I and II with prejudice.

¶ 2 The husband of plaintiff, Elaine Belshause, passed away having various estate planning documents in place, including two trusts, which were drafted by defendant, Daniel Churchill. After the statutory time for filing claims against the estate expired, plaintiff brought suit against defendant

alleging, among other things, two counts of legal malpractice. The first count alleged a direct attorney-client relationship between plaintiff and defendant. The second count alleged an indirect relationship in that plaintiff was the intended beneficiary of the estate planning documents drafted by defendant for plaintiff's late husband. After dismissing three prior pleadings and allowing plaintiff leave to amend, the trial court granted defendant's section 2-615 motion to dismiss counts I and II of the fourth amended complaint with prejudice and found that there was no just reason to delay enforcement or appeal of its ruling. Plaintiff appeals the dismissal. We affirm the trial court's judgment.

¶ 3

FACTS

¶ 4 Plaintiff was married to Marvin Belshause. In 2003, plaintiff and Marvin hired defendant, a licensed Illinois attorney, to draft their estate planning documents. Plaintiff and Marvin met jointly with defendant about their estate plans. As part of his estate plan, Marvin established two trusts in May 2003, a revocable trust and a family trust. Both trust documents were drafted by defendant. Pursuant to the trust agreement, upon Marvin's death, all of the income from the family trust was to be paid to plaintiff during her lifetime, and upon plaintiff's death, all of the principal was to be distributed equally to the couple's eight children.

¶ 5 Plaintiff and Marvin's Orion home was owned by the revocable trust, and their Milan home was owned by the family trust. In 2003 when the trust agreements were prepared, plaintiff and Marvin apparently lived in the Orion home. Marvin told defendant that he did not want plaintiff to have to pay rent to the trust for her personal residence. As a result, defendant drafted language into the trust agreement for the revocable trust that precluded the trustee from charging plaintiff rent to reside in any home owned by the revocable trust (the Orion home). No such language was drafted

into the trust agreement for the family trust.

¶ 6 In 2008, plaintiff and Marvin moved into the Milan home. According to the fourth amended complaint, which is the subject of this appeal, plaintiff and Marvin met with defendant on one or more occasions during summer 2008 "concerning their mutual goals of their estate planning scheme and the fact that Marvin wanted them to move from the Orion home in his Revocable Trust to the Milan home in the Family Trust and that this would happen in the summer of 2008." After Marvin passed away in August 2008, defendant became the trustee of the family trust, as provided for in the trust agreement. Marvin's will was admitted to probate. Following Marvin's death, defendant, as trustee of the family trust, made representations to members of the Belshause family that the family trust was not charging plaintiff rent for the Milan home. However, at some point after the six-month claim period expired, defendant notified plaintiff that the family trust would be seeking \$2,000 a month from plaintiff in rent. Plaintiff objected to the payment of rent. Defendant, on behalf of the family trust, filed a forcible entry and detainer action against plaintiff regarding the Milan home. During the course of that action, plaintiff brought the instant suit, alleging legal malpractice against defendant (counts I and II) and seeking to have defendant and his son removed as trustee and successor trustee of the family trust and to have one of plaintiff's sons appointed as replacement trustee (counts III and IV).

¶ 7 Plaintiff's fourth amended complaint alleged, in pertinent part, that: plaintiff and defendant had a direct attorney-client relationship (count I), plaintiff was the intended beneficiary of the trust documents (count II), defendant had committed legal malpractice, and plaintiff suffered damages as a result of defendant's malpractice. The main allegation of negligence was that despite being aware of Marvin's 2003 direction that plaintiff not be required to pay rent for her personal residence (the

rent-free provision) and despite having knowledge that plaintiff and Marvin intended to move to the Milan home, defendant failed to notify plaintiff or Marvin in summer 2008 that the Milan home was not covered by a rent-free provision or to suggest that changes needed to be made to the trust agreement for the family trust. The complaint alleged further that defendant fraudulently concealed that: he failed to put a rent-free provision into the family trust, he was possibly liable for malpractice in that regard, and he would eventually seek rent for the Milan home as trustee of the family trust.

¶ 8 Defendant filed a section 2-615 motion to dismiss counts I and II of the fourth amended complaint with prejudice. A hearing was held on the motion. Prior to the hearing, written arguments were filed by the parties in support of their respective positions. The parties were also given an opportunity to make oral arguments to the trial court. During the oral arguments, plaintiff's attorney essentially conceded in response to the trial court's inquiry that he had made all of the additions that he could make to the pleadings and that there was nothing more that he could allege. At the conclusion of the arguments, the trial court granted defendant's section 2-615 motion to dismiss counts I and II of the amended complaint with prejudice and found that there was no just reason to delay enforcement or appeal of its decision. Plaintiff appealed to challenge the trial court's ruling.

¶ 9 ANALYSIS

¶ 10 On appeal, plaintiff argues that the trial court erred in granting defendant's section 2-615 motion to dismiss counts I and II of the fourth amended complaint. Plaintiff asserts that the facts pled and the reasonable inferences to be drawn from those facts were sufficient to state causes of action for legal malpractice. Defendant argues that the trial court's ruling was proper and should be affirmed.

¶ 11 A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based upon

defects that are apparent on the face of the complaint. *Board of Directors of Bloomfield Club Recreation Ass'n v. Hoffman Group, Inc.*, 186 Ill. 2d 419, 423 (1999). In determining whether a complaint is legally sufficient, a court must accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). "The critical inquiry in deciding upon a section 2-615 motion to dismiss is whether the allegations of the complaint, when considered in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted." *Board of Directors of Bloomfield Club Recreation Ass'n*, 186 Ill. 2d at 424. A cause of action should not be dismissed pursuant to section 2-615 unless it is clearly apparent that the plaintiff cannot prove any set of facts that will entitle the plaintiff to relief. *Board of Directors of Bloomfield Club Recreation Ass'n*, 186 Ill. 2d at 424. In reviewing a trial court's ruling on a section 2-615 motion to dismiss, the appellate court applies a *de novo* standard of review. *Board of Directors of Bloomfield Club Recreation Ass'n*, 186 Ill. 2d at 424.

¶ 12 To state a cause of action for legal malpractice, a plaintiff must allege sufficient facts to establish that: (1) the defendant attorney owed the plaintiff client a duty of due care arising from the attorney-client relationship; (2) the defendant breached that duty; and (3) the plaintiff suffered injury as a proximate result of the breach. *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 306 (2005). In addition to clients, an attorney's duty of due care has also been extended to non-clients in a limited number of circumstances when the non-client was the intended beneficiary of the attorney-client relationship. See, e.g., *Pelham v. Griesheimer*, 92 Ill. 2d 13, 21 (1982); *McLane v. Russell*, 131 Ill. 2d 509, 515 (1989).

¶ 13 In the present case, even if we were to assume that plaintiff alleged sufficient facts to establish that defendant owed her a duty of due care as to Marvin's estate plan, either through a direct

attorney-client relationship or under an intended-beneficiary theory, we would still have to conclude that plaintiff failed to allege any facts that would establish that defendant had an obligation to advise plaintiff or Marvin regarding the need to amend the family trust to add a rent-free provision. Most notably in that regard, plaintiff did not allege that defendant incorrectly prepared the trust agreement for the family trust in 2003, or that defendant was instructed to amend the trust agreement for the family trust and failed to do so, or that plaintiff or Marvin specifically inquired of defendant the effect that a move to the Milan home would have on plaintiff's obligation to pay rent to the family trust if Marvin died. Rather, plaintiff's assertion of an obligation relies upon unfounded assumptions as to what Marvin or plaintiff would have discussed with, or expected from, defendant as a result of their meeting in Summer 2008. Furthermore, to the extent that plaintiff alleged fraudulent concealment (to avoid the statute of limitations), those allegations pertained only to defendant's actions as trustee of the family trust and did not pertain to defendant's actions as attorney for Marvin or plaintiff. Therefore, the allegations contained in the fourth amended complaint were insufficient to state a cause of action for legal malpractice, and the trial court properly granted defendant's motion to dismiss counts I and II of the fourth amended complaint with prejudice. See *Board of Directors of Bloomfield Club Recreation Ass'n*, 186 Ill. 2d at 424.

¶ 14 For the foregoing reasons, we affirm the judgment of the circuit court of Rock Island County.

¶ 15 Affirmed.

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¶ 16 JUSTICE McDADE, specially concurs:

¶ 17 I concur in the decision to affirm the judgment of the circuit court of Rock Island County

dismissing Elaine Belshause's fourth amended complaint with prejudice. I write separately to discuss more fully two of the allegations in her complaint from which we are asked to infer the existence of a legal duty, the breach of which constitutes the claimed legal malpractice. Plaintiff asserts in her fourth amended complaint alleging defendant's legal malpractice that she moved out of the Orion home and into the Milan house prior to Marvin's death. The complaint states in ¶19 of Count I and ¶47 of Count II that:

"Prior to Mr. Belshause's death, Mr. and Mrs. Belshause moved out of the residence that was owned by the Revocable Trust into a home that was owned by the Family Trust. Marvin and Elaine started moving items into the home owned by the Family Trust several months before Marvin died."

¶ 18 In our *de novo* review of the trial court's dismissal, we are required to take all well-pled allegations as true. This is, however, the second time these parties have been before this court on issues related to plaintiff's claim that she is entitled to live in the Milan house rent free. The earlier appeal was from a decision in a forcible entry and detainer action that was positive for Mrs. Belshause in the trial court but was reversed on appeal in an unpublished order authored by Justice O'Brien. In ¶8 of that order the majority recounted Mrs. Belshause's sworn testimony during the trial on the forcible entry action, as follows:

"Elaine Belshause also testified. She stated that the summer before he died, she and Marvin were planning to move to the Milan property. They had discussed the move with Churchill. The day Marvin died there were no furnishings or appliances in the Orion home. Elaine

was not sure how long after Marvin's death she moved to the Milan property. Elaine acknowledged the Milan property was owned by the Belshause Family Trust."

¶ 19 Plaintiff now deviates from her earlier sworn testimony to contend that they had already moved into the Milan house and that that "fact" coupled with the "estate planning" discussions she and Mr. Belshause had with the defendant in 2008 provided defendant with enough information to create a duty for him to advise Marvin of the need to amend the Family Trust to ensure Elaine could live in the Milan house rent free.

¶ 20 Elaine's prior sworn testimony in the forcible entry and detainer action¹ would seem to negate both a conclusion that this allegation is well pled and our resulting obligation to take it as true.

¶ 21 With regard to the "estate planning" discussions, the following exchange between the court and plaintiff's attorney occurred during the hearing on the motion to dismiss the fourth amended complaint:

"THE COURT: And I also heard you say this is the best you're going to do; is that correct?

MR. PEPPING: I don't think – I haven't talked to my client as to exactly what was said at what times and how many occasions did Marvin state that he wasn't going to want rent charged, *but I don't believe that he said again in 2008 I don't want rent charged. So I*

¹A court may take judicial notice of its own records, including its own prior judgment." See *McKinney v. East St. Louis*, 39 Ill. App. 2d 137 (1963); see also *McMillen v. Rydbon*, 56 Ill. App. 2d 14 (1965)(court noted instances where other courts properly took judicial notice of their own exhibits, the testimony of a litigant in a prior case, its own prior judgment, and its own records).

don't think I can allege that. I don't think he specifically said that."

There is, therefore, no allegation in the complaint that Marvin, who had created two separate trusts in May 2003 and had maintained them separately while he lived and had never before made provision for Elaine to live rent-free (or at all) in the Milan house after his death, had ever advised the defendant that he wanted her to have that right.

¶ 22 Thus, two major components of plaintiff's legal malpractice claims – as alleged in the fourth amended complaint – appear to have little or no weight.

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¶ 23 PRESIDING JUSTICE SCHMIDT, dissenting:

¶ 24 The majority finds that the allegations contained within the fourth amended complaint were insufficient to state a cause of action for legal malpractice. *Supra* ¶ 13. As such, it concludes the trial court properly granted defendant's 2-615 motion to dismiss. I disagree.

¶ 25 The majority correctly notes that we accept all well pled facts and the reasonable inferences which flow from them as true (*Marshall*, 222 Ill. 2d at 429) and identifies the necessary elements which must be pled to state a cause of action for legal malpractice. *Supra* ¶ 11. Those elements are the existence of a duty arising from an attorney-client relationship, a breach of that duty, and injury suffered as a result of that breach. *Northern Illinois Emergency Physicians*, 216 Ill. 2d at 306.

¶ 26 The complaint alleges that defendant "was hired by Elaine M. Belshause as an attorney prior to May 2003 to advise her in her estate planning matters ***." It continues noting that Marvin Belshause also hired defendant to be his attorney and that defendant drafted the two trusts at issue in this matter. Undoubtedly, the complaint alleges sufficient facts, which we must construe as true,

to show that Marvin and Elaine Belshause were clients of the defendant. As such, there can be no doubt that defendant owed a duty of reasonable representation to both.

¶ 27 The complaint further alleges that "Marvin Belshause, in his employment of Churchill, gave specific direction to Churchill that he did not want his spouse, the plaintiff, to pay any rent for her personal residence at any time following Marvin's death." The complaint notes a meeting took place during the summer of 2008 between Mr. Belshause, Mrs. Belshause and the defendant "concerning their mutual goals of their estate planning scheme and the fact that Marvin wanted them to move from the Orion home *** to the Milan home ***." Nevertheless, it is alleged that defendant never informed plaintiff that she would need to pay rent if she moved to the Milan home or that she may be evicted for failure to do so. It is further alleged that, despite knowing Elaine and Marvin's wishes that Elaine live rent free, defendant failed to amend the family trust to include language similar to that of the Marvin Belshause Trust Agreement. These failures, plaintiff alleges, "constitute[d] a lack of ordinary care and diligence required of an attorney in estate planning matters." The complaint concludes that based upon the failure to inform her of the fact that she could not live in the Milan home rent free, plaintiff suffered damages in the amounts of rent charged and the costs associated with being evicted from that residence.

¶ 28 "An attorney must exercise a reasonable degree of care and skill in the representation of his clients." (Internal quotation marks omitted.) *First National Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181, 196 (2007). The plaintiff must generally present expert testimony to establish the standard of care against which the attorney's conduct is to be measured. *Id.* "Illinois follows the generally accepted rule from other jurisdictions that expert evidence is required in a legal malpractice case to establish the attorney's breach of his duty of care except in cases where the breach or lack

thereof is so obvious that it may be determined by the court as a matter of law, or is within the ordinary knowledge and experience of laymen." *Barth v. Reagan*, 190 Ill. App. 3d 516, 522 (1989).

¶ 29 Again, we must accept as true Mrs. Belshause's allegation that defendant was not just her husband's attorney but her estate planning attorney as well. Whether defendant breached his duty to Mrs. Belshause by failing to inform her that she could live rent free in the Milan house is a question for the trier of fact. Expert testimony will be needed to establish the standard of care an estate planning attorney owes his client and whether or not the attorney breaches that standard of care when acting as defendant did in this matter.

¶ 30 As plaintiff has properly alleged the existence of a duty arising from an attorney-client relationship, a breach of that duty and that she suffered damages as a result of that breach, I find that dismissal pursuant to 2-615 is improper. Furthermore, I find the complaint contains sufficient allegations of fraudulent concealment to avoid application of the six-month statute of limitations provided by 735 ILCS 5/13-214.3(d)(West 2010).

"As a general matter, one alleging fraudulent concealment must show affirmative acts by the fiduciary designed to prevent the discovery of the action. [Citation.] However, there is a widely recognized exception to this rule in cases where the existence of a fiduciary relationship is clearly established. [Citation.] A fiduciary who is silent, and thus fails to fulfill his duty to disclose material facts concerning the existence of a cause of action, has fraudulently concealed that action, even without affirmative acts or

representations. (Emphasis omitted.) [Citation.] Our supreme court has also recognized that an attorney-client relationship constitutes a fiduciary relationship. (Internal quotation marks omitted.)" *Kheirkhavash v. Baniassadi*, 407 Ill. App. 3d 171, 180 (2011) (quoting *Clay v. Kuhl*, 189 Ill. 2d 603,633 (2000)).

¶ 31 Although it is not necessary to show affirmative acts where a fiduciary relationship has been established, our supreme court has insisted on strict pleading requirements for a plaintiff alleging fraudulent concealment. *Hagney v. Lopeman*, 147 Ill. 2d 458, 463-64 (1992). To excuse diligence in discovering the fraud, the plaintiff must attribute the failure to discover to the trust and confidence placed in the fiduciary. *Id.* at 464. "In order to state a claim for 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." *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 500 (1996).

¶ 32 Plaintiff alleged that defendant, "acting as plaintiff's attorney had a duty to advise her that there may be a potential malpractice action against him as an aggressive trustee might be able to charge rent to her based on the trust language as he drafted it." The complaint alleges that defendant, as the author of the trust document and trustee, "knew or should have known that [he] as trustee intended to charge rent." Plaintiff alleges that defendant's "silence and failure to speak amounted to a fraudulent concealment of the facts of this situation." Plaintiff continues that not only did defendant fail to act when under a duty to disclose certain facts, but that he also "made representations to members of the Belshause family subsequent to the death of Marvin, which representations were known to [Elaine] that he was not charging rent to her as income beneficiary and thereby concealed any action that she might have against him." Given these allegations, I find

plaintiff's fourth amended complaint sufficiently alleges fraudulent concealment to preclude application of the statute of limitations.

¶ 33 I would reverse and remand for further proceedings.