

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2014 IL App (3d) 130509-U

Order filed September 24, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

MICHAEL W. MIGLIO, Executor of the Estate)	Appeal from the Circuit Court
of Jennie Miglio, deceased,)	of the 10th Judicial Circuit,
)	Putnam County, Illinois.
Plaintiff-Appellant,)	
)	
v.)	Appeal No. 3-13-0509
)	Circuit No. 11-L-6
BOYLE AND BOLIN LAW FIRM, a)	
Partnership, and ROGER BOLIN, as principal)	
in the law firm, as surviving partner,)	The Honorable
)	Michael E. Brandt and
Defendants-Appellees.)	Stuart P. Borden,
)	Judges, presiding.

JUSTICE CARTER delivered the judgment of the court.
Justice Holdridge concurred in the judgment.
Justice Schmidt specially concurred.

ORDER

¶ 1 *Held:* In a case involving a legal malpractice action in which the representation in question ended in 2000, the appellate court affirmed the dismissal with prejudice of the plaintiff's second amended complaint, holding that the six-year statute of repose barred the plaintiff's legal malpractice count and that the plaintiff's associated fraudulent concealment and fraudulent misrepresentation counts were also properly dismissed with prejudice.

¶ 2 The plaintiff, Michael W. Miglio, as executor of the estate of Jennie Miglio, filed a legal malpractice action in 2011 against the defendants, the Boyle and Bolin Law Firm and Roger Bolin. The complaint alleged that the defendants failed to file for a credit or refund of federal taxes paid on behalf of the estates of Jennie's sisters, Antoinette and Frances, who died in 1998 and 2000, respectively, and that such failure devalued the assets left for Jennie upon her sisters' deaths. The plaintiff's second amended complaint contained three counts: (1) legal malpractice; (2) fraudulent concealment; and (3) fraudulent misrepresentation. After the defendants filed a motion to dismiss, the circuit court held a hearing and granted the motion, thereby dismissing the complaint with prejudice. On appeal, the plaintiff argues that the circuit court erred when it dismissed the complaint with prejudice. We affirm.

¶ 3 **FACTS**

¶ 4 The decedent, Jennie Miglio, died in 2007. The plaintiff, Michael W. Miglio was appointed executor of Jennie's estate and counsel was retained. Jennie was the last of the Miglio daughters to pass away. Jennie's sisters, Antoinette and Frances, died in 1998 and 2000, respectively. A since-deceased partner of the defendant law firm prepared the tax returns for the estates of Antoinette and Frances.¹ In 1998, Antoinette's estate paid a federal tax of \$154,284. In 2000, Frances' estate paid a federal tax of \$135,455. There is nothing in the record to indicate that any further act of representation by the defendants took place after the taxes were paid in 2000.

¶ 5 On August 21, 2009, counsel for the plaintiff sent a letter to the Internal Revenue Service (IRS) that requested a review of whether Jennie's estate was due credits for the federal taxes paid by the estates of Antoinette and Frances. Counsel for the plaintiff sent another letter to the IRS

¹ The complaints state that Jennie was the executor of the estates of Antoinette and Frances.

on November 23, 2009, this time with an IRS form required for the consideration of the tax credit. In the letter, counsel for the plaintiff indicated that he was told by an IRS employee that "no credit could be obtained under any circumstances" but that he was re-submitting the request nonetheless. In May 2010, the IRS denied the plaintiff's request for the credits.

¶ 6 In July 2010, the plaintiff filed a federal lawsuit against the IRS. The plaintiff claimed that because the Miglio estates' funds were channeled to Jennie, the last surviving daughter, Jennie's estate should have received tax credits for the amounts paid by the estates of Antoinette and Frances. In August 2011, the federal court dismissed that action, ruling, *inter alia*, that the plaintiff failed to file for the credit within the statutory three-year limitation period contained in 26 U.S.C. § 6511.

¶ 7 On December 6, 2011, the plaintiff filed a civil complaint for legal malpractice against the defendants, which alleged that the defendants were liable for damages because they failed to timely file for the aforementioned tax credits. The defendants filed a motion to dismiss, claiming that the action was barred by the statutes of limitation and repose. Among other things, the plaintiff's response to the motion to dismiss intimated that the defendants fraudulently concealed facts from the plaintiff such that the statutes of limitation and repose should have been tolled. After a hearing, the circuit court granted the defendants' motion to dismiss. The court also granted the plaintiff leave to file an amended complaint alleging fraudulent concealment.

¶ 8 On July 26, 2012, the plaintiff filed his first amended complaint. The plaintiff set out the fraudulent concealment claim as a separate count and alleged that the defendants owed a duty to Jennie to inform her of the right to claim the tax credit or to file a claim for a refund of the taxes paid, and that the defendants failed to inform Jennie of their failure to apply for the credit or of her right to claim the credit. Further, the complaint stated that:

"Defendants misled the Plaintiff's decedent Jennie Miglio, and the Plaintiff Executor Michael W. Miglio, by their silence, by failing to perform the function of satisfaction of the estate tax payment in the manner related herein, by claiming the available credit, all of which conduct of the Defendants was calculated to conceal the failure to correctly handle the alternative payment options to obtain the credit."

The plaintiff also filed a motion for reconsideration that requested, *inter alia*, that the circuit court reinstate the dismissed legal malpractice claim.

¶ 9 On October 17, 2012, the circuit court issued an order in which it stated it was reconsidering the dismissal of the legal malpractice claim, which was done based on the statute of limitations, but that the claim was still subject to dismissal because it was barred by the statute of repose.

¶ 10 The defendants had filed a motion to dismiss the plaintiff's first amended complaint and, after the circuit court ordered the plaintiff to respond to that motion, the plaintiff instead attempted to file a second amended complaint—apparently without leave of court—that included a third count based on fraudulent misrepresentation. The plaintiff's second amended complaint expounded on the fraudulent concealment count, including allegations that the defendants "concealed and misled" Jennie and Michael by remaining silent regarding the tax credit or refund. The fraudulent misrepresentation count essentially mirrored the allegations contained in the fraudulent concealment count, but also alleged that the "[d]efendants misrepresented facts to Plaintiff's decedent of the availability of the credit, the failure to claim the credit, or inform the Plaintiff's decedent of the right to claim a refund of the overpaid tax in the Estate of Frances Miglio." Further, the new count also alleged, *inter alia*, that the defendants misrepresented the "actual tax due" in Frances' estate.

¶ 11 The defendants thereafter filed a motion to dismiss the plaintiff's second amended complaint, claiming that the complaint was subject to dismissal under both sections 2-615 and 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 619 (West 2010)).

¶ 12 On November 29, 2012, the circuit court held a hearing on the motion to dismiss. In its written order, the court stated that "for reasons stated in open court, Defendants' motion to dismiss shall be and is hereby granted." Further, the court allowed the plaintiff to add the previously dismissed legal malpractice count to the second amended complaint, and the court then dismissed all three counts with prejudice. No transcript from this proceeding appears in the record on appeal.

¶ 13 The plaintiff filed a motion for reconsideration of the circuit court's order, and the case was transferred to another judge during that motion's pendency. On May 9, 2013, Judge Michael E. Brandt held a hearing on the motion for reconsideration. Judge Brandt issued his written decision on June 18, 2013, ruling that the complaint was correctly dismissed with prejudice because the 6-year statute of repose contained in section 13-214.3(c) of the Code (735 ILCS 5/13-214.3(c) (West 2010)) barred the plaintiff's action. The plaintiff appealed.

¶ 14 ANALYSIS

¶ 15 On appeal, the plaintiff argues that the circuit court erred when it dismissed the action with prejudice. Specifically, the plaintiff contends, *inter alia*, that the statute of repose's six-year limitation should have been tolled because Michael did not learn of what had been done in the prior estates until after his appointment as the executor of Jennie's estate in 2007.

¶ 16 In relevant part, section 2-619.1 of the Code permits a party to combine motions to dismiss made under section 2-615 and 2-619. 735 ILCS 5/2-619.1 (West 2010). A motion to dismiss made under section 2-615 challenges the legal sufficiency of a complaint. *Bjork v.*

O'Meara, 2013 IL 114044, ¶ 21. A motion to dismiss made under section 2-619 admits the legal sufficiency of the complaint but claims that an outside defense defeats the complaint. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. In this case, the defendants' motion to dismiss contained both section 2-615 and section 2-619 motions to dismiss. Our review is *de novo* under either section 2-615 or section 2-619. *Id.* ¶ 31. We also note that we can affirm the circuit court's ruling on any basis supported by the record. *Cwik v. Giannoulis*, 237 Ill. 2d 409, 424 (2010).

¶ 17 A statute of repose extinguishes an action after a fixed period of time, irrespective of when the action accrued. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 61 (2006). Section 13-214.3(c) of the Code provides, in relevant part, that an action for legal malpractice "may not be commenced in any event more than 6 years after the date on which the act or omission [allegedly constituting legal malpractice] occurred." 735 ILCS 5/13-214.3(c) (West 2010). Recently, our supreme court emphasized that "[a] statute of repose is not tolled by the discovery rule." *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 16 (citing *Mega v. Holy Cross Hospital*, 111 Ill. 2d 416, 422-23 (1986)). In this case, despite the plaintiff's protestations, it is irrelevant when the plaintiff may have known, or reasonably should have known, of the injury and its cause. There is no question that the plaintiff's 2011 complaint in this case was filed well beyond the lapsing of the six-year statute of repose in 2006. See *Koczor v. Melnyk*, 407 Ill. App. 3d 994, 998-99 (2011) (holding that the repose period begins to run with the last act of representation that forms the basis for the alleged malpractice). Our analysis does not end there, however.

¶ 18 Section 13-215 of the Code provides:

"If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be

commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such cause of action, and not afterwards." 735 ILCS 5/13-215 (West 2010).

Our supreme court has held that section 13-215, when applicable, is an exception to the six-year statute of repose for legal malpractice actions. *DeLuna*, 223 Ill. 2d at 74. The complainant must plead sufficient facts to be eligible for the section 13-215 exception. See *DeLuna*, 223 Ill. 2d at 75-76.

¶ 19 Fraudulent concealment under section 13-215 is not a stand-alone cause of action; rather, section 13-215's purpose is to extend the limitations period within which an underlying action must be brought. *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 110. In this case, the plaintiff pled fraudulent concealment as a separate cause of action under section 13-215, rather than amending the pleading to allege that the statute of repose was tolled by fraudulent concealment. Accordingly, the dismissal of the plaintiff's fraudulent concealment count with prejudice was proper. See generally *Cummings v. City of Waterloo*, 289 Ill. App. 3d 474, 479 (1997) (holding that under section 2-615 of the Code, "[i]f a complaint fails to set forth a legally recognized claim upon which the plaintiff can recover, the complaint is infirm because of legal insufficiency").

¶ 20 Alternatively, even if we construed the plaintiff's fraudulent concealment count as an attempt at claiming the section 13-215 exception tolled the statute of repose in this case, we would hold that the plaintiff failed to plead facts sufficient to qualify for the exception. "To toll the statute of repose, the plaintiff must show 'affirmative acts or representations designed to prevent discovery of the cause of action or to lull or induce a claimant into delaying the filing of his claim.'" *Racjan v. Donald Garvey and Associates, Inc.*, 347 Ill. App. 3d 403, 407 (2004)

(quoting *Dancor International, Ltd. v. Friedman, Goldberg & Mintz*, 288 Ill. App. 3d 666, 675 (1997)). Our supreme court has also held that "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.) *DeLuna*, 223 Ill. 2d at 77. Here, the complaint did not plead facts to indicate that the defendants concealed the existence of a cause of action from the plaintiff, that they had any knowledge whatsoever that the credit or refund was a possibility, or that they intended to deceive the plaintiff.

¶ 21 Similarly, the plaintiff failed to properly plead a cause of action for fraudulent misrepresentation. Given that the fraudulent misrepresentation count was premised on legal malpractice, it was also subject to the six-year statute of repose in section 13-215. See 735 ILCS 5/13-214.3(b), (c) (West 2012); see also *Evanston Insurance Co.*, 2014 IL 114271, ¶ 23 (emphasizing that the statutory scheme "broadly applies" to all types of actions for damages premised on legal malpractice). Moreover, the plaintiff's fraudulent misrepresentation claim—which did not even set forth the elements of fraudulent misrepresentation—pled nothing to indicate that the defendants actually misrepresented any facts. See *Schrager v. Bailey*, 2012 IL App (1st) 111943, ¶ 19 (setting forth the five elements of the common law tort of fraudulent misrepresentation); see also *Miner v. Fashion Enterprises, Inc.*, 342 Ill. App. 3d 405, 420 (2003) (holding that a complaint failed to state a cause of action for fraudulent misrepresentation when it did not contain allegations related to the elements of the tort). Accordingly, the dismissal of the plaintiff's fraudulent misrepresentation count with prejudice was also proper.

¶ 22 In sum, the six-year statute of repose for legal malpractice actions contained in section 13-215 of the Code bars the plaintiff's legal malpractice claim against the defendants. Further,

the plaintiff's fraudulent concealment and fraudulent misrepresentation counts were also properly dismissed with prejudice. Accordingly, we hold that the circuit court did not err when it dismissed the plaintiff's second amended complaint with prejudice.

¶ 23

CONCLUSION

¶ 24

The judgment of the circuit court of Putnam County is affirmed.

¶ 25

Affirmed.

¶ 26

JUSTICE SCHMIDT, specially concurring.

¶ 27

I concur in the judgment.