2017 IL App (1st) 160577-U
No. 1-16-0577

THIRD DIVISION
February 8, 2017



---

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

---

| | | |
|---|---|---|
| DAVID W. HILL, JR, M.D.,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>A. CORTEZ SIMMONS, individually and as officer and representative of DAC, and DAC INTERNATIONAL, LTD., an Illinois corporation, individually and by and through its agent, A. Cortez Simmons, JOHN D. MALARKEY, an individual, ELIZABETH COLSANT O'BRIEN, an individual,<br><br>Defendants-Appellees. | ) | Appeal from the Circuit Court of Cook County.<br><br>No. 13 L 011080<br><br>The Honorable Margaret A. Brennan, Judge Presiding. |

---

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

**ORDER**

¶ 1 *Held:* circuit court's dismissal of plaintiff real estate purchaser's third amended complaint affirmed where the complaint was both untimely and failed to state a valid cause of action against the defendant real estate attorney.

¶ 2 Plaintiff David Hill filed a multi-count complaint advancing claims of fraud, aiding and abetting fraud, breach of fiduciary duty and civil conspiracy against defendant John D. Malarkey

(Malarkey) in connection with an errant real estate purchase. The circuit court dismissed Hill's third amended complaint with prejudice, finding that the complaint failed to adequately state a valid cause of action against Malarkey and, alternatively, was also time-barred. Plaintiff appeals, arguing that the circuit court's order was entered in error. For the reasons set forth, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Purchase and Initial Pleadings

¶ 5 The litigation at issue in the instant appeal arose out of a 2008 real estate transaction. The following facts have been adduced from the relevant pleadings. On June 6, 2008, Hill purchased a 13-unit residential building located at 7823-37 South Essex (Essex Property or Property), intending it to be an investment property. The purchase was effectuated with the assistance of defendant A. Cortez Simmons (Simmons), who was an agent and employee of defendant DAC International, Ltd. (DAC), at the time of the transaction. Simmons located the bank-owned Property and informed Hill that it would soon be certified as a HUD (Housing of Urban Development) rental building, and as a result, would always be fully rented, making it a sound real estate investment. After Hill elected to proceed with the transaction, Simmons, through DAC, purchased the Essex Property from the bank and immediately resold the Property to Hill. Defendant Malarkey, an attorney with the firm Schain, Burney, Ross & Citron, Ltd., represented Simmons during the real estate transaction.

¶ 6 Approximately four to six weeks after the purchase, Hill learned that the Essex Property would not be certified as a HUD rental property. Thereafter, additional issues arose with respect to the management of the Property. As a result, on October 14, 2013, Hill filed a complaint against Simmons and DAC, in which he advanced various claims, including fraud, breach of

contract, breach of fiduciary duty, conversion, fraudulent conveyance and civil conspiracy. Simmons and DAC, however, failed to answer the complaint or appear in the matter. As a result, on February 18, 2014, a default judgment was subsequently entered against those defendants in the amount of $4,283,775.

¶ 7 Thereafter, on May 22, 2014, Hill filed an amended complaint, in which he named Malarkey and Elizabeth Colsant O'Brien,[1] another attorney employed by Schain, Burney, Ross & Citron, as defendants. The amended filing contained allegations of fraud, breach of fiduciary duty and civil conspiracy. Malarkey responded with a motion to dismiss the amended complaint pursuant to section 2-615 of the Illinois Code of Civil Procedure (Civil Code or Code) (735 ILCS 5/2-615 (West 2010)). In the motion, Malarkey argued that Hill's amended complaint failed to allege sufficient facts to state a valid claim against him for fraud, breach of fiduciary duty, or civil conspiracy. Malarkey also argued that Hill's suit was time-barred because it was premised on acts and omissions arising out of Malarkey's performance of legal professional services, and was thus subject to the two-year statute of limitations set forth in section 12-314.3(b) of the Civil Code (735 ILCS 5/13-214.3(b) (West 2010)). Because Hill discovered that that the Essex Property was not going to be certified as a HUD rental property approximately four to six weeks after the June 6, 2008, purchase, Malarkey argued that Hill's amended complaint filed on May 22, 2014, was untimely.

¶ 8 In a detailed written order, the circuit court found that Hill's amended complaint failed to state a valid claim for fraud, breach of fiduciary duty and civil conspiracy against Malarkey and dismissed the amended filing in accordance with section 2-615 of the Code. The circuit court

[1] O'Brien is not a party to this appeal; rather, this appeal solely involves defendant Malarkey and the specific claims alleged against him.

found "no need to address the statute of limitations argument" in light of its conclusion that Hill's amended complaint failed to state a valid claim against Malarkey.

¶ 9 Thereafter, on February 9, 2015, Hill filed a second amended complaint. The second amended filing mirrored the first amended complaint and included claims of fraud, breach of fiduciary duty, and civil conspiracy against Malarkey and O'Brien. Malarkey again moved to dismiss Hill's filing pursuant to section 2-615 of the Civil Code, arguing that Hill's second amended complaint merely contained "minor cosmetic changes" that did not correct the problems and deficiencies inherent in his first amended complaint. Malarkey also sought dismissal of Hill's second amended complaint pursuant to section 2-619 of the Code, arguing that the claims advanced therein were "barred by the two-year statute of limitations applicable to claims against an attorney arising out of any act or omission in the performance of professional services."

¶ 10 In a brief written order, the circuit court granted Malarkey's motion to dismiss Hill's second amended complaint pursuant to section 2-615 of the Code and granted Hill another opportunity to "replead" his claims against Malarkey. The circuit court did not address Malarkey's statute of limitations argument.

¶ 11 Thereafter, on August 21, 2015, Hill filed his third amended complaint, the complaint at issue in the instant appeal.

¶ 12 Third Amended Complaint

¶ 13 In Hill's third amended complaint, he alleged that he was first introduced to Simmons in February 2008 by an unnamed third party who described Simmons as "a person who had knowledge and contacts in the Chicago real estate market" and who would be able to "secure low risk investments for Hill with reasonable rates of return." Upon their introduction, "Simmons

represented that, due to his superior knowledge and connections, he was privy to certain deals on properties at reduced prices that he could purchase on Hill's behalf, before the properties went to market, because those properties were not amenable to conventional financing." The two men met several times to discuss investment opportunities and strategies and ultimately "agreed upon an investment plan which would slowly build Hill's wealth by utilizing conservative real estate investments with a target rate of return to reach $250,000 per year within a 5-year period." In order to effectuate that goal and have the funds necessary to be able to purchase one of these target properties before it would be listed on the market, Hill "took out a home equity loan on his personal residence in the amount of $850,000.00."

¶ 14 Thereafter, sometime in April 2008, Simmons first provided Hill with details about the Essex Property. Specifically, Simmons informed Hill that he had a friend who worked at a bank who told him that the Essex Property "would be a HUD rental building," and as such, would always be "fully rented." Because the building would always be fully rented, Simmons informed Hill that "the rents from the tenants would pay all expenses related to the Essex Property" and that "Hill would have no out-of-pocket expenses." Given the benefits of the building, Simmons "represented that if the Essex Property were placed on the market, it would sell for $900,000, but that Hill could obtain the Essex Property for $725,000.00." Simmons, using his connections, could purchase the Essex Property from the bank and would then turn around and sell the Property to Hill.

¶ 15 Based on Simmons's representations, Hill ultimately decided to purchase the Essex Property. After informing Simmons of his decision, Simmons subsequently told Hill that he would retain a lawyer to represent Hill during the purchase. Sometime thereafter, defendant O'Brien "contacted Hill to inform him that she would be representing him at the closing."

Shortly before closing on the Property, Hill sought to establish a limited liability company to be the "owner" and title holder of the Essex Property. Accordingly, on June 5, 2008, defendant Malarkey, at Hill's request, filed the requisite paperwork with the Illinois Secretary of State to establish the following limited liability company: 7823 South Essex, LLC. Closing on the Essex Property occurred the following day, June 6, 2008. Unbeknownst to Hill, "both O'Brien and Malarkey were representing Simmons in the transaction of the Essex Property."

¶ 16 Approximately four to six weeks after closing on the Property, "Simmons informed Hill that they would not be able to obtain HUD approval because the repairs necessary to ready the Essex Property for HUD approval would be too expensive." Thereafter, Hill learned that the asking price for the Essex Property had actually been $550,000, and not $725,000, the price Simmons had previously represented to Hill. Hill alleged that Simmons "used the $725,000.00 figure to convert the $175,000.00 difference in funds from" Hill. He did not "discover" the pricing discrepancy or Simmons's fraudulent conversion until "late 2012 [or] early 2013."

¶ 17 Hill further alleged that "[i]n addition to stealing $175,000 from Hill in the purchase of the Essex Property, Simmons indicated that he would manage the Essex Property on behalf of Hill, which involved seeing that the rents were collected and that the expenses were paid for the Essex Property." After Hill agreed to permit Simmons to oversee the management of the Property, Simmons hired the Owner's Realty Group (ORG), a real estate management company, on April 1, 2010, to conduct the day-to-day management of the Property. "However, from the date of closing, June 6, 2008, until October of 2012, Simmons deliberately withheld rents, failed to pay expenses, and failed to communicate with ORG regarding the needs of the Essex Property." Moreover, "[d]espite the Essex Property being 90% occupied at the time of closing, from June 6, 2008, to sometime in the year 2012, Hill only received one check for rents in the

amount of $4,890.00 dated March 2, 2009." Instead of distributing rental proceeds to Hill in accordance with their agreement, Hill alleged that Simmons "converted the rents paid by tenants." Moreover, Simmons also "failed to use the expense money paid by Hill to pay expenses due for the Essex Property." Additionally, Hill alleged that Simmons also "failed to pay the necessary taxes on the Essex Property and make required repairs per Chicago City Codes." As a result of Simmons's failure to make necessary repairs, including remediating the basement after a flood, the Essex Property suffered substantial damage and was ultimately "vacated in October of 2012, causing substantial losses."

¶ 18 With respect to defendant Malarkey, Hill alleged that "any requests and/or complaints sent or filed by the City of Chicago" as a result of Simmons's neglect of the Property, "were delivered to the attention of Defendant John Malarkey as the registered agent of 7823 S. Essex, LLC." However, "[o]n information and belief Defendant Malarkey made no efforts to contact or inform Plaintiff of the code violations or the delinquent taxes." Malarkey's role in the real estate transaction formed the basis for Hill's claims for fraud, aiding and abetting fraud, breach of fiduciary duty, and civil conspiracy. [2]

¶ 19 Hill attached a number of exhibits to his third amended complaint, including the real estate contract and deed to the Essex Property, letters sent by ORG to Simmons about repairs needed on the Property, and tax collection notices. In addition, Hill attached a letter sent to him from defendant O'Brien. The letter, dated May 29, 2008, pertained to the "real estate sales contract ('Contract') by and between Cortez Simmons ('Seller') and David W. Hill, Jr. ('Purchaser') pertaining to the property located at or about 7823-27 S. Essex Avenue, Chicago Illinois 60649 ('Property')." In the letter, O'Brien indicated that her firm had "initiated the

[2] Hill's third amended complaint also included a claim for aiding and abetting breach of fiduciary duty; however, because he does not argue that the circuit court erred in dismissing that claim, we need not discuss this claim on appeal. See Ill S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived ***").

process of setting up a limited liability company under the name 7823 S. Essex, LLC." and requested Hill to provide payment so that the paperwork could be filed with the Secretary of State "on an expedited basis." The letter concluded with the following language: "Please note that as indicated above, this firm represents Cortez Simmons and his affiliated entities as it pertains to this transaction. This correspondence should in no way be construed to mean that this firm represents you or your interests in this matter. You have the option to seek professional advice concerning all matters relative hereto. Execution of this letter acknowledges that you have read and understand the foregoing. If you have any questions regarding the above, please contact the undersigned." Defendants Malarkey and Simmons were both copied on the letter. Hill signed the letter, acknowledging and agreeing to its terms on May 30, 2008.

¶ 20 Dismissal of Third Amended Complaint

¶ 21 In response to Hill's third amended complaint, Malarkey filed a 2-615 motion to dismiss Hill's filing, arguing that dismissal with prejudice was warranted because Hill's filing "again fail[ed] to correct the deficiencies previously found by the [c]ourt." Moreover, Malarkey again asserted that Hill's claims were time-barred and that dismissal was also warranted pursuant to section 2-619 of the Civil Code.

¶ 22 In a brief written order, the circuit court dismissed with prejudice Hill's third amended complaint "pursuant to section 2-615." In its order, the circuit court also granted Malarkey's "motion to dismiss under section 2-619 based on a two-year statute of limitations," concluding that dismissal of Hill's third amended complaint was warranted under section 2-619 "even if the section 2-615 motion had been denied."

¶ 23 This appeal followed.

¶ 24 ANALYSIS

¶ 25 On appeal, Hill submits that the circuit court erred in dismissing his third amended complaint with prejudice. In pertinent part, Hill contends that his complaint stated valid claims against Malarkey for fraud, aiding and abetting fraud, breach of fiduciary duty, and civil conspiracy and that the circuit court erred in concluding otherwise. Hill further argues that the circuit court also erred in finding that his claims were time-barred.

¶ 26 Malarkey, in turn, responds that the circuit court properly dismissed Hill's third amended complaint with prejudice in accordance with section 2-615 of the Civil Code because Hill did not correct the deficiencies inherent in his previous filings and failed to state a valid claim against him. Moreover, Malarkey contends that Hill's claims, were as the circuit court correctly found, not filed within the applicable statute of limitations. As such, Malarkey maintains that dismissal was also proper under section 2-619 of the Code.

¶ 27 We will address the arguments in a different order than that discussed by the parties. That is, we will first determine whether Hill's claims against Malarkey were filed within the requisite statutes of limitation and whether dismissal of his third amended complaint pursuant to section 2-619 of the Civil Code (735 ILCS 5/2-619 (West 2012)) was proper.

¶ 28 The purpose of a motion to dismiss pursuant to section 2-619 of the Civil Code (735 ILCS 5/2-619 (West 2012)) is to provide litigants with the means to dispose of issues of law and easily proven issues of fact. *Zedella v. Gibson*, 165 Ill. 2d 181, 185 (1995); *Caywood v. Gossett*, 382 Ill. App. 3d 124, 128-29 (2008). The proponent of a 2-619 motion to dismiss admits the legal sufficiency of the factual allegations contained in the complaint, but asserts that the complaint is barred by an affirmative matter that defeats the claim. *Kedzie and 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993); *Caywood*, 382 Ill. App. 3d at 129. Section 2-619(a)(5) of the Code, in pertinent part, provides for the dismissal of a complaint that "was not

commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2010). When ruling on a 2-619 motion to dismiss, a court will construe all pleadings and supporting documents in the light most favorable to the nonmoving party. *Richter v. Prarie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 18; *In re Parentage of M.J.*, 203 Ill. 2d 526, 533 (2003); *Caywood*, 382 Ill. App. 3d at 128. The circuit court's dismissal of a complaint pursuant to section 2-619 of the Code is subject to *de novo* review. *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 115 (2008); *Amalgamated Transit Union, Local 308 v. Chicago Transit Authority*, 2012 IL App (1st) 112517, ¶ 12.

¶ 29 Section 13-214.3(b) of the Civil Code requires that any "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" 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 2010). Hill, however, argues that limitations provision set forth in section 13-214.3(b) of the Code is inapplicable to his claims against Malarkey because that provision only applies to legal malpractice claims. Given that his third amended complaint contains allegations of fraud, aiding and abetting fraud, breach of fiduciary duty, and conspiracy rather than legal malpractice, Hill contends that his complaint is subject to the general five-year statute of limitations period set forth in section 13-205 of the Code (735 ILCS 5/13-214.3 (West 2010)). Hill's argument that the two-year limitations period set forth in section 13-214.3(b) of the Code is restricted solely to legal malpractice claims, however, fails to accord with applicable case law. See, *e.g.*, *South Wells Commercial, LLC v. Horwood Marcus & Berk Chartered*, 2013 IL App (1st) 123660, ¶ 13 (rejecting the plaintiff's argument that the two-year limitations period set forth in section 13-214.3(b) of the Code was limited to legal malpractice claims, reasoning: "the plain language of the statute directs that the two-year limitation applies to

*all* claims against an attorney arising out of acts or omissions in the performance of professional services, and not just legal malpractice claims brought against an attorney by a client") (emphasis added)); see also *Evanston Insurance Co. v. Riseborough*, 2014 IL 113271, ¶ 23 (recognizing that "the statute broadly applies to 'action[s] for damages based on tort, contract, *or otherwise* *** arising out of an act or omission in the performance of professional services,' which encompasses a number of potential causes of action in addition to legal malpractice") (emphasis in original)); *Janousek v. Katten Muchin Rosenman LLP*, 2015 IL App (1st) 142989, ¶ 12 (stating that section 13-214.3(b) "applies to *any claim* concerning an attorney's professional services") (emphasis added).

¶ 30 In this case, the claims included in Hill's third amended complaint—including fraud, aiding and abetting fraud, breach of fiduciary duty and civil conspiracy—involve purported acts and omissions related to Malarkey's performance of professional legal services in connection with the Essex Property transaction. As such, we agree with the circuit court that the two-year statute of limitations period set forth in section 13-214.3(b) of the Code applies to the claims contained in Hill's third amended complaint. See, *e.g.*, *800 South Wells*, 2013 IL App (1st) 123660, ¶ 14 (finding that the plaintiff lessee's claim against defendant lessor's attorneys for allegedly aiding and abetting the lessor's breach of fiduciary duty was subject to the two-year statute of limitation set forth in section 13-214(b) of the Code because the claim arose out of the attorneys' provision of legal services to the lessor). Having identified the applicable limitations period, we must now determine whether Hill's complaint was timely filed.

¶ 31 Based on the plain language of the statute, Hill's complaint against Malarkey must have been filed "within 2 years from the time" that that Hill "knew or reasonably should have known of the injury for which damages are sought." 735 ILCS 5/13-214.3(b) (West 2010). This

provision incorporates the "discovery rule," which has the effect of delaying "the commencement of the statute of limitations until the plaintiff knew or reasonably should have known of the injury and that it may have been wrongfully caused." *Janousek*, 2015 IL App (1st) 142989, ¶ 13. Courts construing this provision have repeatedly held that a plaintiff's actual knowledge is not necessary to trigger this two-year limitations period. *Nelson v. Padgitt*, 2016 IL App (1st) 160571, ¶ 12; *Blue Water Partners, Inc. v. Edwin D. Mason, Foley & Lardner*, 2012 IL App (1st) 102165, ¶ 28; see also *Janousek*, 2015 IL App (1st) 141989, ¶ 13 (quoting *S. K. Partners I, LP v. Metro Consultants, Inc.*, 408 Ill. App. 3d 127, 230 (2011) (" 'under the discovery rule, a statute of limitations may run despite the *lack* of actual knowledge of negligent conduct' ")). Instead, the limitations period commences when the plaintiff " 'has a reasonable belief that the injury was caused by wrongful conduct, thereby creating an obligation to inquire further on that issue.' " *Janousek*, 2015 IL App (1st) 142989, ¶ 13 (quoting *Dancor International, Ltd v. Friedman, Goldberg & Mintz*, 288 Ill. App. 3d 666, 672 (1997)). "Knowledge that an injury has been wrongly caused 'does not mean knowledge of a specific defendant's negligent conduct or knowledge of the existence of a cause of action;' " rather, it simply means that the plaintiff "possesses sufficient information concerning an injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct has occurred." *Id*. (quoting *Castello v. Kalis*, 352 Ill. App. 3d 736, 744 (2004)). "Once a person knows or reasonably should know of both the injury and that it was wrongfully caused, 'the burden is upon the injured person to inquire further as to the existence of a cause of action.' " *Id*. (quoting *Castello*, 352 Ill. App. 3d at 745).

¶ 32 Hill suggests that the statute of limitations did not begin to run "until late 2012 or early 2013 when [d]efendants drained the last iota of value from the Essex Property, leading to its

evacuation and sale," and that his complaint against Malarkey, filed on May 22, 2014, was therefore timely. In contrast, Malarkey contends that the statute of limitations began running approximately four to six weeks after the June 6, 2008 closing of the Property when Hill learned that the Property would not obtain HUD certification. Because the HUD status was a key factor in Hill's decision to purchase the Essex Property and because most of the alleged misrepresentations identified in the complaint pertained to the HUD status of the Property, Malarkey argues that Hill discovered his injuries by July 2008, which triggered the statute of limitations period. Given that Hill did not bring suit against him until May 22, 2014, Malarkey argues that the circuit court properly found that Hill's claims were time-barred.

¶ 33 Based on the pleadings, it is evident that Hill discovered that Simmons's representations concerning the HUD status the Essex Property were not true approximately "four to six weeks" after the June 6, 2008, real estate closing. The pleadings also reveal that Hill had reason to suspect that Simmons was mismanaging the Essex Property sometime shortly thereafter. In pertinent part, Hill alleged in his third amended complaint that although the Property was "90% occupied from the date of the closing, June 6, 2008, until sometime in the year 2012, [he] only received one check for rents in the amount of $4,890.00 dated March 2, 2009." Given the high occupancy rate, Hill should have expected to receive regular rental proceeds. Accordingly, when those rental proceeds were not forthcoming, Hill should have known that something was amiss regarding the management of the Property and, at that point, he was obligated to inquire further to determine whether there was a valid cause of action. See *Janousek*, 2015 IL App (1st) 142989, ¶ 13.

¶ 34 Hill, however, suggests that this March 2009 payment was "submitted to him solely to assuage any concerns he might have upon learning that the property was not eligible for HUD

vouchers," and "intended to lead [him] to believe that despite that the failure to qualify for HUD vouchers, the investment would still produce the regular rental income that [d]efendants had promised." Although not done explicitly,[3] Hill seemingly invokes the fraudulent concealment doctrine (735 ILCS 5/13-215 (West 2008), which effectively tolls the running of a statute of limitations or statute of repose when a defendant fraudulently conceals the existence of a cause of action from a plaintiff. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 66 (2006). The fraudulent concealment doctrine, however, is not applicable where a plaintiff has been put on inquiry as to a defendant's concealment and should have discovered the fraud through ordinary diligence. *Prospect Development, LLC v. Kreger*, 2016 IL App (1st) 150433, ¶ 28. In this case, when Hill did not receive rental proceeds from Simmons following the March 2009 payment, he would have been on notice that something was amiss regarding the management of the Essex Property and should have discovered the purported fraud using ordinary diligence. We reiterate that "[k]nowledge that an injury has been wrongly caused 'does not mean knowledge *of a specific defendant's negligent conduct* or knowledge of the existence of a cause of action;' " rather, it simply means that the plaintiff "possesses sufficient information concerning an injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct has occurred." (Emphasis added.) *Janousek*, 2015 IL App (1st) 142989, ¶ 13 (quoting *Castello*, 352 Ill. App. 3d at 744). Because Hill argues that Malarkey was part of Simmons's purported fraud, he cannot now use the fraudulent concealment doctrine "as a shield" to excuse his untimely filing against Malarkey. *Prospect Development*, 2016 IL App (1st) 150433, ¶ 28.

¶ 35 Ultimately, regardless of whether the statute of limitations began running in 2008, when Hill discovered that the Essex Property would not receive HUD status, or 2009 when Hill failed

[3] Hill does not actually use the term "fraudulent concealment" or cite to the relevant statutory provision in his appellate brief.

to receive any additional rental proceeds following the March 2009 payment, it is clear that Hill's complaint against Malarkey, filed on May 22, 2014, was commenced well outside of the applicable two-year statute of limitations set forth in section 13-214.3(b) of the Code. As such, the circuit court properly found that Hill's complaint was untimely.

¶ 36 Even if we were to find that Hill's claims involved some type of "continuing tort" or "continuing violation"[4] and that his complaint was filed within the applicable statute of limitations, we would nonetheless conclude that reversal is not warranted because the circuit court properly dismissed his third amended complaint pursuant to section 2-615 of the Civil Code for failure to state a valid claim against Malarkey.

¶ 37 A motion to dismiss filed pursuant to section 2-615 of the Civil Code attacks the legal sufficiency of a complaint based on alleged defects that are apparent on the face of the document. 735 ILCS 5/2-615 (West 2010); *Kanerva v. Weems*, 2014 IL 115811, ¶ 33; *Tedrick v. Community Resource Center, Inc.*, 235 Ill. 2d 155, 160-01 (2009); *Country Mutual Insurance Co. v. Olsak*, 391 Ill. App. 3d 295, 301-02 (2009). Because Illinois is a fact-pleading jurisdiction, plaintiffs are required to file legally and factually sufficient complaints to avoid dismissal. *Illinois Insurance Guarantee Fund v. Liberty Mutual Insurance Co.*, 2013 IL App (1st) 123345, ¶ 14. When reviewing a section 2-615 motion to dismiss, the circuit court must admit as true all well-pleaded facts contained on the face of the complaint and in any accompanying exhibits as well as all reasonable inferences that may be drawn from those facts and disregard any conclusions that are unsupported by allegations of fact. *Tedrick*, 235 Ill. 2d at

[4] We note that Hill's brief contains a single parenthetical citation to a case discussing the continuing tort or continuing violation rule, which in effect, provides that "where a tort involves a continuing or repeated injury, the limitations does not begin to run until the date of the last injury or the date the tortuous acts cease." *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 278 (2003) (applying this rule to a woman's intentional infliction of emotional distress claim against her ex-husband). Hill, however, fails to fully develop his argument and clearly explain why that rule should apply to his specific claims. We note that " '[t]he appellate court is not a repository into which the appellant may foist the burden of argument and research.' " *Carlson v. Rehabilitation Institute of Chicago*, 2016 IL App (1st) 143853, ¶ 36 (quoting *Ramos v. Kewanee Hospital*, 2013 IL App (3d) 120001, ¶ 37).

161; *Beahringer v. Page*, 204 Ill. 2d 363, 365 (2003); *Illinois Insurance Guarantee Fund*, 2013 IL App (1st) 123345, ¶ 14. A motion to dismiss, however, does not admit specific allegations contained in the complaint that conflict with exhibits. *Dobias v. Oak Park and River Forest High School Dist. 200*, 2016 IL App (1st) 152205, ¶ 50. Ultimately, the relevant inquiry is whether the factual allegations contained in the complaint, when viewed in the light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Green v. Rogers*, 234 Ill. 2d 478, 491 (2009); *Illinois Insurance Guarantee Fund*, 2013 IL App (1st) 123345, ¶ 14. A motion to dismiss pursuant to section 2-615 of the Code should be granted only where it is clearly apparent that there are no set of facts that can be proved that would entitle the plaintiff to recovery. *Kanerva*, 2014 IL 11581, ¶ 33; *Green*, 234 Ill. 2d at 491. A circuit court's order granting or denying a section 2-615 motion to dismiss is subject to *de novo* review. *Heastie v. Roberts*, 226 Ill. 2d 515, 531 (2007); *Kean v. Walmart Stores, Inc.*, 235 Ill. App. 3d 351, 361 (2009).

¶ 38 To state a valid fraud claim, a plaintiff must allege that: the defendant made a false statement of material fact; the defendant knew the statement was false; the defendant intended that the statement induce the plaintiff to act; the plaintiff relied on the purported veracity of the defendant's false statement; and the plaintiff suffered damages as a result of his reliance on the statement. *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 496 (1996); *Phillips v. DePaul University*, 2014 IL App (1st) 122817, ¶ 71; *Oldendorf v. General Motors Corp.*, 322 Ill. App. 3d 825, 831 (2001). A high standard of specificity is imposed on fraud pleadings. *Merrilees v. Merrilees*, 2013 IL App (1st) 121897, ¶ 15; *Chatham Surgicore, Ltd. v. Health Care Service Corp.*, 356 Ill. App. 3d 795, 803 (2005). Accordingly, "[a] successful common law fraud complaint must allege, with specificity and particularity, facts from which fraud is the necessary

or probable inference, including what representations were made, when they were made, who made the representations and to whom they were made." *Connick*, 174 Ill. 2d at 496-97. Although fraud usually involves misrepresentations of fact, " '[f]raud also may consist of the intentional omission or concealment of material fact under circumstances creating an opportunity to speak.' " *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15, 25 (2003) (quoting *H.K. Warner v. Lucas*, 185 Ill. App. 3d 351, 354 (1989)). Accordingly, to establish fraud by omission of a material fact, " 'it is necessary to show the existence of a special or fiduciary relationship, which would raise a duty to speak.' " *Weidner v. Karlin*, 402 Ill. App. 3d 1084, 1087 (2010) (quoting *Lidecker v. Kendall College*, 194 Ill. App. 3d 309, 317 (1990)).

¶ 39 Here, we find that Hill failed to allege sufficient facts to establish a fraud claim against Malarkey. In his third amended complaint, Hill alleged that Malarkey "perpetrated a fraud against" him by engaging in a number of acts and omissions, including: (1) stating that he would represent Hill even though there was a conflict of interest because he already represented Simmons; (2) filing the paperwork to establish Hill's LLC and acting as if he was working in Hill's best interests notwithstanding the May 2008 letter; (3) acting as the LLC's registered agent while aiding and abetting fraud against Hill; (4) failing to inform Hill of the discrepancy between the Bank's purchase price and Simmons's purchase price of the Essex Property; and (5) failing to inform Hill of the delinquent taxes and/or code violations that arose with respect to the Essex Property.

¶ 40 Initially, we note that the only affirmative false statement of material fact alleged in Hill's third amended complaint was Malarkey's purported statement that he would represent Hill at the closing of the Essex Property. The third amended complaint, however, does not contain any reference to a specific conversation wherein defendant Malarkey "stated that he would

represent" Hill. Although Hill alleges that defendant O'Brien contacted him at an unspecified date and time and "inform[ed] him that she would be representing him," he cites to no similar conversation involving Malarkey. Moreover, based on the pleadings, it does not appear that O'Brien mentioned Malarkey's name during the conversation discussing legal representation. Even if Hill's vague mention of a brief conversation with O'Brien was sufficient to meet the heightened standard of specificity required of fraud claims (*Merrilees*, 2013 IL App (1st) 121897, ¶ 15; *Chatham*, 356 Ill. App. 3d at 803) and was sufficient to also encompass Malarkey's provision of legal services, Hill could not have justifiably relied on any statement that Malarkey was representing him at the closing of the Essex Property given the May 29, 2008, letter that was furnished to him by O'Brien. The letter, which is attached to Hill's third amended complaint, clearly states that the firm of Schain, Burney, Ross & Citron, Ltd., "represents [defendant] Cortez Simmons and his affiliated entities as it pertains to [the Essex Property] transaction. This correspondence should in no way be construed to mean that this firm represents you or your interests in this matter." It is well-established that when allegations contained in a pleading contradict facts disclosed in an exhibit, the exhibit controls. *Farmers Auto Insurance Ass'n v. Danner*, 394 Ill. App. 3d 403, 412 (2009); see also *McCormick v. McCormick*, 118 Ill. App. 3d 455, 460 (1983) ("where the averments in an exhibit attached to a complaint conflict with the allegations of the complaint, they negate such allegations"). The May 2008 letter, thus defeats any contradictory claim contained in Hill's third amended complaint that Malarkey agreed to act as Hill's attorney with respect to the Essex Property transaction in an effort to defraud him.

¶ 41 Hill's claim that Malarkey also engaged in fraud by omission when he failed to disclose issues pertaining to the Property is similarly unavailing. As set forth above, to state a claim for

fraud by omission, it is essential to " 'show the existence of a special or fiduciary relationship, which would raise a duty to speak.' " *Weidner*, 402 Ill. App. 3d at 1087 (quoting *Lidecker*, 194 Ill. App. 3d at 317). Hill argues that Malarkey was his attorney and therefore that a fiduciary relationship existed, which obligated Malarkey to inform him about Simmons's purchase price of the Essex Property as well as the tax issues and building code violations that arose with respect to the Property following the purchase as a result of Simmons's mismanagement. Although it is true that a fiduciary relationship exists between a client and his attorney as a matter of law (*DeLuna v. Burciaga*, 223 Ill. 2d 49, 73 (2006); *Pippen v. Pedersen and Houpt*, 2013 IL App (1st) 111371, ¶ 22), whether an attorney-client relationship exists depends upon whether both the client and the attorney consented to its formation (*Meriturn Partners, LLC v. Banner and Witcoff, Ltd.*, 2015 IL App (1st) 131883, ¶ 10; *Kensington's Wine Auctioneers and Brokers, Inc. v. John Hart Fine Wine, Ltd.*, 392 Ill. App. 3d 1, 13 (2009)). Consent may be express or implied (*Meriturn Partners*, 2015 IL App (1st) 131881, ¶ 10); however, neither the client (*Meriturn Partners*, 2015 IL App (1st) 131883, ¶ 10) nor the attorney can unilaterally create an attorney-client relationship (*People v. Simms*, 192 Ill. 2d 348, 382 (2000)). In this case, as set forth above, the complaint does not contain any allegation that Hill had any direct communication with Malarkey about legal representation. Moreover, Hill does not allege that he sought out legal advice from Malarkey about establishing an LLC or that Malarkey provided him with such advice. Instead, he simply alleges that Malarkey filed the requisite paperwork with the Secretary of State after Hill made the decision to "set up a limited liability company *** to hold title and be the owner of the Essex Property" prior to closing on the Property. Although Hill points to the May 2008 letter as evidence of their attorney-client relationship, we have already concluded that Hill's claim that Malarkey agreed to be and acted as his attorney with respect to the Essex

Property transaction is actually contradicted by the letter. As stated above, the letter controls over the contradictory allegations contained in Hill's filing. *Farmers Auto Insurance*, 394 Ill. App. 3d at 412 *McCormick v. McCormick*, 118 Ill. App. 3d at 460. Because no attorney-client fiduciary relationship existed between Malarkey and Hill, Malarkey was not obligated to advise Hill about Simmons's purchase price or about any issues that arose with respect to the Property due to Simmons's mismanagement. Accordingly, Malarkey's failure to do so did not amount to fraud by omission. Therefore, we conclude that the circuit court did not err in finding that Hill failed to state a claim for fraud against Malarkey.

¶ 42 We similarly find that Hill failed to state a valid claim against Malarkey for aiding and abetting fraud. To state an aiding and abetting claim, a plaintiff's complaint must allege that: (1) the party whom the defendant aided performed a wrongful act that caused the plaintiff an injury; (2) the defendant was regularly aware of his role as part of the overall tortious activity at the time that he assisted the other party; and (3) the defendant knowingly and substantially assisted the principal violation. *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15, 27-28 (2003) (citing *Wolf v. Liberis*, 153 Ill. App. 3d 488, 496 (1987)). Initially, we note that Hill's claim for aiding and abetting fraud is included in the same count in the complaint as the above mentioned fraud claim. See 735 ILCS 5/2-603(b) (West 2012) (requiring that "[e]ach separate cause of action upon which a separate recovery might be had shall be stated in a separate count or counterclaim ***"). Although Hill identified a number of Malarkey's purported actions and inactions in support of his fraud claim, his aiding and abetting fraud claim is not pleaded with any specificity or clarity whatsoever. There is nothing in Hill's lengthy, but largely conclusory, pleading that establishes that Malarkey was aware of Simmons's tortious activity or that he knowingly and

substantially assisted Simmons's fraudulent behavior. The circuit court thus committed no error in finding that Hill failed to state a valid claim against Malarkey for aiding and abetting fraud.

¶ 43 We similarly conclude that the circuit court did not err in finding that that Hill failed to state a valid claim against Malarkey for breach of fiduciary duty. In order to state a valid claim for breach of fiduciary duty, the plaintiff must allege that a fiduciary duty exists, the defendant breached that duty, and the breach proximately caused the plaintiff's injury. *Neade v. Portes*, 193 Ill. 2d 433, 444 (2000); *Pippen v. Pedersen and Houpt*, 2013 IL App (1st) 111371, ¶ 22. Hill argues that he stated a valid claim for breach of fiduciary duty because he alleged that Malarkey was his attorney and that Malarkey's actions and inactions relative to the Essex Property transaction constituted violations of Malarkey's "duties of loyalty and honesty" that he owed to Hill as a result of their attorney-client fiduciary relationship. Although it is well-established that a fiduciary relationship exists between a client and his attorney as a matter of law (*DeLuna*, 223 Ill. 2d at 73) and that " '[t]he fiduciary duty owed by an attorney to a client encompasses the obligations of fidelity, honesty, and good faith' " (*Pippen*, 2013 IL App (1st) 111371, ¶ 22 (quoting *Metrick v. Chatz*, 266 Ill. App. 3d 649, 656 (1994)), we have already determined that there was no attorney-client fiduciary relationship between Malarkey and Hill. Absent a fiduciary relationship, Hill's claim for breach of fiduciary duty necessarily fails. See, *e.g.*, *Kehoe v. Saltarelli*, 337 Ill. App. 3d 669, 676 (2003) (affirming the dismissal of the plaintiff's claim for breach of fiduciary duty against an attorney where the exhibits attached to the complaint rebutted the plaintiff's allegation that the attorney agreed to represent him and thus no fiduciary relationship or duty ever existed).

¶ 44 Finally, we conclude that Hill failed to state a valid claim against Malarkey for civil conspiracy. Civil conspiracy is an intentional tort wherein two or more people come together

" 'for the purpose of accomplishing by concerted action either an unlawful purpose or a lawful purpose by unlawful means.' " *McClure v. Owens Corning Fiberglass Corp.*, 188 Ill. 2d 102, 133 (1999) (quoting *Buckner v. Atlantic Plant Maintenance, Inc.*, 182 Ill. 2d 12, 23 (1998)); see also *Midwest Enterprises, Inc v. Noonan*, 2015 IL App (1st) 132488, ¶ 82. It "has the effect of extending liability for a tortious act beyond the active tortfeasor to individuals who have not acted but have only planned, assisted or encouraged the act." *McClure*, 188 Ill. 2d at 133; see also *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 62 (1994). To state a claim for civil conspiracy, a plaintiff must allege facts establishing that: (1) the defendant entered into an agreement with one or more persons to accomplish by concerted action either an unlawful purpose or a lawful purpose by unlawful means; (2) a tortious act was committed in furtherance of the agreement; and (3) the plaintiff suffered an injury that was caused by the defendant. *Merrilees*, 2013 IL App (1st) 121897, ¶ 49; see also *McClure*, 188 Ill. 2d at 133. Ultimately, "[b]ecause conspiracy is not an independent tort, 'if a plaintiff fails to state an independent cause of action underlying [the] conspiracy allegations, the claim for conspiracy also fails.' " *Merrilees*, 2013 IL App (1st) 121897, ¶ 49 (quoting *Indeck North American Power Fund, L.P. v. Norweb PLC*, 316 Ill. App. 3d 416, 432 (2000)).

¶ 45 Here, having found that Hill failed to state valid claims for fraud, aiding and abetting fraud, and breach of fiduciary duty, his civil conspiracy claim, premised on those underlying causes of action necessarily fails. See *Merrilees*, 2013 IL App (1st) 121897, ¶ 52; *Thomas v. Fuerst*, 345 Ill. App. 3d 929, 936 (2004).

¶ 46 CONCLUSION

¶ 47 The judgment of the circuit court is affirmed.

¶ 48 Affirmed.