2017 IL App (1st) 162225-U

FIRST DIVISION
December 4, 2017

No. 1-16-2225

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

MASUD M. ARJMAND, Plaintiff-Appellant, v. ENRICO J. MIRABELLI; BEERMANN PRITIKIN MIRABELLI SWERDLOVE, LLP; and NADLER PRITIKIN & MIRABELLI, LLC, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 15 L 10496 The Honorable William E. Gomolinski, Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court properly dismissed plaintiff's attorney malpractice complaint as time-barred.

¶ 2 Plaintiff Masud Arjmand hired defendant attorney Enrico Mirabelli to represent him in connection with a petition under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)) filed by Arjmand's ex-wife, Muneeza Rahman, in Du Page County circuit court. Rahman's 1401 petition sought to set aside a marriage settlement agreement (MSA) between the parties that resolved issues as to custody, child support, and disposition of the

parties' assets. After an 11-day hearing (the 1401 hearing), the Du Page County circuit court granted Rahman's 1401 petition and vacated the MSA. Arjmand obtained new counsel and appealed. On October 28, 2013, the Second District affirmed the circuit court's judgment. *In re Marriage of Arjmand*, 2013 IL App (2d) 120639.

¶ 3 On October 15, 2015, Arjmand filed a *pro se* verified complaint in Cook County circuit court for attorney malpractice against Mirabelli, as well as Nadler Pritikin & Mirabelli, LLC (the Nadler firm), and Beermann Pritikin Mirabelli Swerdlove, LLP (the Beermann firm), the two law firms with which Mirabelli was associated during his representation of Arjmand (collectively, defendants). Arjmand alleged that defendants were negligent in representing Arjmand during the 1401 hearing. The circuit court granted defendants' motion to dismiss the complaint pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2016)). Arjmand appeals. For the following reasons, we affirm the judgment of the circuit court.

¶ 4 BACKGROUND

¶ 5 For purposes of this appeal, we recite and accept as true all well-pleaded facts set forth in the complaint and draw all reasonable inferences from these facts in favor of plaintiff. *Edelman, Combs & Latturner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 164 (2003). In addition, a thorough recitation of the facts can be found in the Second District's opinion affirming the Du Page County circuit court's judgment vacating the MSA. *In re Marriage of Arjmand*, 2013 IL App (2d) 120639.

¶ 6 Arjmand and Rahman were married in October 2001. On June 3, 2009, Arjmand filed a petition in Du Page County circuit court for dissolution of marriage. The circuit court conducted a prove-up hearing on July 22, 2009. Arjmand was represented by counsel while Rahman represented herself *pro se*. The parties represented to the circuit court that they had reached the

MSA, as well as a joint parenting agreement for parties' two children.[1] Arjmand testified that the MSA provided Rahman with more than 50% of the marital assets. The MSA provided Rahman with $2000 per month in child support, which Arjmand testified was 28% of his net income. Rahman agreed to waive maintenance in light of the assets she received under the MSA. Rahman testified that she understood the MSA, and that she was entering into the agreement freely and voluntarily. The circuit court accepted the MSA and joint parenting agreement, and incorporated them into the judgment dissolving the marriage.

¶ 7 On April 4, 2011, Rahman filed a section 1401 petition to set aside the July 22, 2009, judgment order. She alleged that the MSA was unconscionable because it was procured by coercion and the fraudulent concealment of assets. In October 2011, Arjmand hired Mirabelli to defend him against the 1401 petition.[2] According to Arjmand's complaint, Arjmand and Mirabelli discussed "certain issues relating to [Arjmand's] defense" against the 1401 petition. Mirabelli allegedly declined Arjmand's requests to (1) have Arjmand testify at the hearing to explain certain estimates on financial statements, (2) obtain a valuation of the martial assets, (3) have bank officials testify as to whether they ever relied on Arjmand's estimates of the value of real properties in connection with certain loan applications, and (4) have Arjmand testify at the hearing to explain other "detrimental issues" that arose in connection with Arjmand's income and the division of assets. Mirabelli allegedly told Arjmand that Rahman had the burden of proof at the hearing, and Mirabelli allegedly refused to have Arjmand testify as the accuracy of any financial statements out of fear that Arjmand would perjure himself. Between February and May 2012, the Du Page County circuit court conducted a hearing on Rahman's 1401 petition.

[1]Rahman is the biological mother to the parties' two children, both of whom were born prior to the parties' marriage. Arjmand is the adoptive father to the two children.

[2]In October 2011, Mirabelli was a partner at the Nadler firm. In December 2011, Mirabelli joined the Beermann firm.

¶ 8 On May 14, 2012, the circuit court entered a lengthy written order vacating the MSA. First, the circuit court found that Rahman had not established any duress or coercion in the formation of the MSA. Next, the circuit court considered whether the MSA was unconscionable and whether there had been misrepresentations to the circuit court during the July 2009 prove-up hearing. The MSA listed numerous marital and nonmarital assets, but none of the assets were valued. The circuit court observed that (1) in 2007, Arjmand submitted documents to banks representing $27 million in holdings, (2) in 2008, Arjmand submitted a loan application expressing his own opinion that his net worth was approximately $18 million, and (3) in 2009, Arjmand stated to a third party that his income was $1.6 million. At the 1401 hearing, Arjmand testified that he received $5.5 million in nonmarital assets under the MSA and $1 million in marital assets. The circuit court observed, however, that the MSA contained no valuation of any assets, nor were any asset values established during the July 2009 prove-up hearing. And although Arjmand sought to provide asset values at the 1401 hearing, he offered no expert testimony to support his valuations.

¶ 9 The circuit court analyzed whether the MSA accounted for all of the marital assets and whether the division of assets was fair by examining various real estate investments made during the marriage. The circuit court concluded that many of the real estate investments were presumably marital property, and that the MSA provided Arjmand with all of the real estate holdings. It was undisputed that, starting in 1996, Arjmand worked for Anderson Consulting, which was later acquired by Accenture LLP. Immediately prior to the marriage, Arjmand received over 440,000 Founders shares in Accenture when it went public. He periodically sold some of these shares during the marriage and the proceeds were used to make various real estate investments through limited liability companies that he formed. Rahman was often a member of

the LLCs and was listed as a joint owner on the companies' bank accounts. The circuit court observed, however, that Arjmand's wages far exceeded the parties' reported household expenses and that the remaining wages were unaccounted for. The circuit court concluded that at least some of Arjmand's wages were used to make the real estate investments, and thus a presumption arose that the real estate investments were marital property. Under the MSA, Arjmand received all of the real estate holdings, both marital and nonmarital, while Rahman received $300,000, some accounts, cars, and jewelry, which Arjmand testified had a combined value of $1 million. Furthermore, the MSA did not mention two real estate investments made during the marriage, both of which were allocated to Arjmand under the MSA.

¶ 10 The circuit court further considered that Arjmand did not disclose his income either in the MSA or at the July 2009 prove-up. During the marriage, Arjmand earned over $650,000 per year, and in 2008, his net income was $915,000. The MSA provided $2000 per month for child support, which did not meet the statutory guidelines and the MSA provided no reason for the deviation. Additionally, the circuit court took into consideration Rahman's "waiver of maintenance in an eight year marriage with a large disparity of income[.]"

¶ 11 The circuit court concluded that (1) "the marital property division was so one sided, it was an unconscionable agreement," (2) "the child support calculations were an incorrect application of the law and without legal authority," and (3) the MSA "contained so many errors that affected the overall outcome of the asset distribution in the document; equity prevents its enforcement in the present form." The circuit court therefore vacated the MSA, but left the dissolution of marriage judgment intact.

¶ 12 An attorney at the Beermann firm forwarded Arjmand a copy of the circuit court's May 14, 2012, order the day it was entered, and Mirabelli emailed Arjmand later that same day.

Mirabelli explained that "the insurmountable problem in all of this is the disparity in the award of property and—what I did not expect—the court found that transmutation has occurred in the properties (or most of them) are in fact marital property ***." He further explained that the circuit court found three major issues relative to the July 2009 prove-up, specifically that (1) Arjmand's representation that the child support was 28% of his net income was incorrect, (2) Arjmand's assertion that Rahman received over 50% of the marital estate was incorrect, and (3) the "waiver of maintenance was suspect at best." Mirabelli asserted that the circuit court put some of the blame on the attorney that handled the July 2009 prove-up, and Mirabelli further observed that Arjmand executed the MSA without noticing that certain property holdings were not listed. Arjmand and Mirabelli corresponded by email over the next few days, and the two met in person on May 17, 2012. Both Arjmand and Mirabelli emailed each other after the meeting, addressing how they wished to proceed. On May 19, 2012, Mirabelli wrote:

> "Assuming we do a [m]otion to [r]econsider[,] I think our firm handling the motion would not be a conflict—notwithstanding your comments about me committing malpractice in our case in chief. *** Much of our dispute comes from me refusing to be 'baited' into trying to explain away everything [Rahman's counsel] threw against the wall because, and I maintain the validity of this position, it was not our [b]urden of [p]roof *** to prove the agreement was fair. *** It was my strategy all along to not try and rebut every little thing[.]"

¶ 13 Arjmand, through new counsel, appealed the circuit court's judgment vacating the MSA. On October 29, 2013, the Second District affirmed the circuit court's judgment. *In re Marriage of Ajrmand*, 2013 IL App (2d) 120639. The appellate court found that circuit court's determination that some of Arjmand's wages were used to purchase real estate "was not

improper," (*id.* ¶ 34), and that the circuit court's finding the MSA unconscionable was supported by the lack of information provided to the circuit court at the July 2009 prove-up hearing and by the omission of certain assets from the MSA (*id.* ¶¶ 36-37). The appellate court also found no basis to disturb the circuit court's credibility determinations with respect to Arjmand's various statements of his own net worth—Arjmand's financial statements in 2009 and 2010 reflected assets worth $27 million and $31.5 million, respectively, yet Arjmand testified that his net worth at the time of the July 2009 prove-up hearing was only $4 million. *Id.* ¶ 40. The appellate court found that Arjmand "failed to establish by clear and convincing evidence" that the proceeds from the sale of his Accenture shares were deposited into the accounts of his various companies as "conduits" for his real estate investments, and therefore there was some evidence to support the circuit court's finding that nonmarital property was transmuted into marital property. *Id.* ¶ 43. Arjmand's remaining arguments about child support and other matters were rejected.

¶ 14 On October 15, 2015, Arjmand filed his verified *pro se* complaint against defendants in Cook County circuit court. Arjmand alleged that Mirabelli's emails led him to believe that he lost the 1401 hearing based on a combination of a mishandling of the July 2009 prove-up "as well as the erroneous circuit court ruling" on the 1401 petition. He alleged that the appellate court "highlighted weaknesses" in his case, and that a "[d]etailed analysis of the appellate opinion led [Arjmand] to conclude that the appellate court would not have affirmed the vacatur of the consent MSA had [defendants] taken the measures to address potential weaknesses in [his] position consistent with their duty to present the best possible case for [him]." He alleged that he first discovered defendants' malpractice when the appellate court issued its opinion. Specifically, he alleged that defendants breached a duty to him by failing to (1) "respond, rebut, or challenge unsupported allegations" by Rahman, (2) place favorable evidence on the record, (3) prepare a

defense against Rahman's substantive unconscionability claims, (4) have the marital estate "competently valued and introduce expert testimony to substantiate" Arjmand's claims that the marital estate "was under water," (5) have bank officials testify as to whether they relied on Arjmand's "optimistic estimates of value of [the] marital estate in his financial statements submitted to those banks," (6) allow Arjmand to testify about why his financial disclosures differed from his testimony "at trial," (7) timely deliver to Rahman certain loan documents and timely introduce those documents during the 1401 hearing, (8) rebut allegations that the difference between Arjmand's wages and the household expenses were used to purchase marital property, and (9) advance other arguments in Arjmand's favor. He alleged that, but for defendants' negligence, the circuit court would not have vacated the MSA, or alternatively, he would have prevailed in the appellate court. He alleged that he sustained over $200,000 in damages by having to participate in the "post-1401 litigation," and would continue to suffer damages as the result of additional litigation.

¶ 15 Defendants filed a motion to dismiss Arjmand's complaint pursuant to section 2-619 of the Code. First, defendants contended that Arjmand's complaint was not filed within the two-year statute of limitations in section 13-214.3(b) of the Code (735 ILCS 5/13-214.3(b) (West 2014)) because he was aware of the defendants' alleged breaches at the time the Du Page County circuit court vacated the MSA on May 14, 2012. Second, defendants argued that Arjmand would not be able to prove that that defendants' alleged negligence was the proximate cause of his damages because there was no evidence that the circuit court would have decided the 1401 petition differently absent the alleged malpractice.

¶ 16 Arjmand filed a *pro se* written response to defendants' motion to dismiss. He argued that his claim was not time-barred because no "adverse judgment" had been entered that would start

the statute of limitations. He argued that he could not have reasonably discovered any injury at the time of the Du Page County circuit court's May 14, 2012, order, because he relied on Mirabelli's "unsolicited post-ruling assessment which held [Arjmand] responsible for his loss." Arjmand asserted that there was "uncertainty in both the *fact* of damages [*sic*] and the *amount* of damages that [he] might incur. A cause of action cannot yet be established." (Emphases in original.) Finally, he argued that there were questions of fact that precluded judgment as a matter of law, including the application of the discovery rule, injury, and damages.

¶ 17 On July 11, 2016, the circuit court entered a written order granting the motion to dismiss. The circuit court found that Arjmand's complaint was untimely because he knew or reasonably should have known of his alleged injury following the Du Page County circuit court's May 14, 2012, order granting Rahman's 1401 petition. Next, the circuit court found that Arjmand could not establish causation because he "provides no factual basis that any reasonable person would have reached a different conclusion [on Rahman's 1401 petition] absent [d]efendants' alleged negligence." The circuit court further found that "the existence of actionable damages was certain" when the Du Page County circuit court granted the 1401 petition in the form of costs that would inevitably be incurred to either re-litigate the settlement agreement or challenge the ruling on the 1401 petition.

¶ 18 Arjmand filed a timely notice of appeal from the circuit court's July 11, 2016, order.

¶ 19 ANALYSIS

¶ 20 On appeal, Arjmand argues that (1) the circuit court erred in finding that he could not prove proximate cause, (2) there is a question of fact as to when Arjmand knew that he had suffered an injury, and (3) defendants should be estopped from asserting a statute of limitations defense under a theory of equitable estoppel. We note that Arjmand is represented by counsel on

appeal, but no reply brief has been filed on his behalf. We address his equitable estoppel and statute of limitations arguments first.

¶ 21 When deciding a section 2-619 motion, a court accepts all well-pleaded facts in the complaint as true and will grant the motion when it appears that no set of facts can be proved that would allow the plaintiff to recover. *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 267 (2003). Under section 2-619(a)(5) of the Code, dismissal is warranted if the "action was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2016). Our review of an order granting a section 2-619 motion is *de novo*. *Moon v. Rhode*, 2016 IL 119572, ¶ 15.

¶ 22 We first address Arjmand's contention that defendants are equitably estopped from raising a statute of limitations defense. He argues that defendants "repeatedly told [him] that their strategy was correct and that [he] did not bear the burden to disprove [Rahman's] allegations." Arjmand claims that defendants maintained that "alternative strategies, such as including expert testimony regarding value, would not have yielded a different outcome."

¶ 23 Equitable estoppel is defined as "the effect of a person's conduct whereby the person is barred from asserting rights that might otherwise have existed against the other party who, in good faith, relied upon such conduct and has been thereby led to change his or her position for the worse." *Geddes v. Mill Creek Country Club, Inc.*, 196 Ill. 2d 302, 313 (2001). A plaintiff invoking the doctrine of equitable estoppel must demonstrate that (1) the defendants misrepresented or concealed material facts, (2) the defendants knew at the time he or she made the representations that they were untrue, (3) the plaintiff claiming estoppel did not know that the representations were untrue when they were made and when the plaintiff decided to act, or not, upon the representations, (4) the defendants intended or reasonably expected that the plaintiff would determine whether to act, or not, based upon the representations, (5) the plaintiff

reasonably relied upon the representations in good faith to his or her detriment, and (6) the plaintiff would be prejudiced by his or her reliance on the representations if the other person is permitted to deny the truth thereof. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 82-83 (2006). The plaintiff must be able to demonstrate that he reasonably relied on defendants' conduct or representations in forbearing suit, but need not show that the defendants intentionally misled the plaintiff. *Id.* at 83.

¶ 24 Here, Arjmand's cannot invoke equitable estoppel because he did not allege that defendants knowingly made any false representations, and he did not allege that defendants intended or reasonably expected that Arjmand would determine whether to act or not based upon the false representations. Accepting Arjmand's allegations as true, Mirabelli told Arjmand that Rahman had the burden of proof during the 1401 proceedings, and that expert testimony would not have changed the outcome of the proceeding. Arjmand's complaint fails to allege that Mirabelli made of either of these representations with knowledge that they were untrue and with the intention that Arjmand would rely on those representations when deciding whether to pursue a malpractice claim. There are simply no facts alleged in the complaint that would establish the type of conduct necessary to invoke equitable estoppel. We conclude that defendants are not equitably estopped from raising a statute of limitations defense to Arjmand's claims.

¶ 25 Next, Arjmand argues that there is a question of fact as to when Arjmand knew that he suffered an injury that was wrongfully caused by defendants. He first contends that neither the Du Page County circuit court's order granting Rahman's 1401 petition, nor the Second District's judgment affirming the circuit court's order, "imposed any direct financial detriment or any 'injury' to [Arjmand's] pecuniary interests." He contends that the vacatur of the MSA could actually result in a better outcome for him "once all of the facts are known." He argues that

"[g]iven the range of possible outcomes in the underlying litigation, damages in this case are purely speculative (and this case is premature)." Furthermore, he contends that attorney fees incurred in pursuing the appeal in the Second District "may have been inevitable regardless of [d]efendants' actions." Alternatively, he argues that even if he had suffered an injury at the time the Du Page County circuit court granted Rahman's 1401 petition, there remains a question of fact as to whether Arjmand knew that his injury was wrongfully caused.

¶ 26 Section 13-214.3(b) of the Code provides that an action for legal malpractice must be filed within two years from the time the plaintiff "knew or reasonably should have known of the injury for which damages are sought." 735 ILCS 5/13-214.3(b) (West 2016). When a plaintiff should have discovered his injury is ordinarily a question of fact, but judgment may be entered as a matter of law where the undisputed facts allow for only one conclusion. *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill. 2d 240, 250 (1994). We have long held that "a plaintiff is injured at the time an adverse judgment is entered, even if the amount of damages is uncertain or the judgment might later be reversed." *Butler v. Mayer, Brown & Platt*, 301 Ill. App. 3d 919, 923 (1998) (citing *Belden v. Emmerman*, 203 Ill. App. 3d 265, 270 (1990) and *Zupan v. Berman*, 142 Ill. App. 3d 396, 399 (1986)). However, "[t]he discovery rule 'delay[s] commencement until the person has a reasonable belief that the injury was caused by wrongful conduct, thereby creating an obligation to inquire further on that issue.' " *Butler*, 301 Ill. App. 3d at 923 (quoting *Dancor International, Ltd. v. Friedman, Goldberg & Mintz*, 288 Ill. App. 3d 666, 673 (1997)). "At some point the injured person becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved. [T]his is usually a question of fact." *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 416 (1981).

¶ 27 We first reject Arjmand's argument that he did not suffer any injury when the Du Page County circuit court granted Rahman's 1401 petition. The Du Page County circuit court's order granting Rahman's 1401 petition was an adverse judgment because it reopened the MSA, and would necessarily require additional litigation to divide up the marital estate, litigation that Arjmand clearly indicated he wished to pursue. In fact, Arjmand alleged in his complaint that he had already incurred over $200,000 in damages as a result of the vacatur of the MSA, despite acknowledging in his complaint that the "exact amount of damages sustained by plaintiff shall not be known until final resolution of the underlying litigation." We find that Arjmand suffered a cognizable injury when the 1401 petition was granted.

¶ 28 We further find that there is no question of fact as to whether Arjmand knew or reasonably should have known in May 2012 that Mirabelli's alleged conduct wrongfully caused Arjmand's injury. Arjmand's complaint asserted that he hired Mirabelli and they discussed certain issues relating to the defense of the 1401 petition. Mirabelli allegedly declined Arjmand's requests to (1) have Arjmand testify at 1401 hearing to explain certain estimates on financial statements, (2) obtain a valuation of the martial assets, (3) have bank officials testify as to whether they ever relied on Arjmand's estimates of the value of real properties in connection with certain loan applications, and (4) have Arjmand testify at the 1401 hearing to explain other "detrimental issues" that arose in connection with Arjmand's income and the division of assets. After the Du Page County circuit court vacated the MSA, defendants provided Arjmand with a copy of the order, which contained a detailed explanation of its reasons for granting the 1401 petition, including Arjmand's failure to present any expert evidence to support his arguments regarding the value of assets itemized in the MSA. The crux of Arjmand's malpractice claim is that defendants breached a duty by not (1) following Arjmand's advice to have the marital estate

appraised, (2) calling Arjmand as a witness during the hearing on the 1401 petition to explain the estimates on his financial disclosures, and (3) rebutting Rahman's allegations about the difference between Arjmand's wages and the household expenses in order to challenge the allegations regarding transmutation of the proceeds from the Accenture shares. Arjmand was aware of Mirabelli's strategy going in to 1401 hearing, was aware that Mirabelli was not going to introduce evidence that Arjmand wanted introduced, and, either upon or shortly after receiving the Du Page County circuit court's May 14, 2012, order, knew or reasonably should have known that the circuit court's judgment was based in part on the failure to introduce evidence to corroborate Arjmand's position. It is therefore clear that Arjmand was on notice that the choices Mirabelli made in defending against the 1401 petition may have contributed to 1401 petition being granted.

¶ 29 Furthermore, Arjmand attached to his complaint an email from Mirabelli dated May 19, 2012, stating that the two spoke in person on May 17, 2012, and that Arjmand made comments about Mirabelli "committing malpractice in our case in chief." It is clear that as of May 2012, Arjmand believed that he lost the 1401 petition because of how Mirabelli handled the 1401 hearing, and that he had suggested that Mirabelli committed malpractice. Arjmand was on notice that his injury may have been wrongfully caused by Mirabelli's handling of the hearing on the 1401 petition, and therefore he had a duty to make further inquiries.

¶ 30 In sum, Arjmand was on notice of a potential malpractice claim against defendants as early as May 2012. He filed his complaint for malpractice in October 2015, which was outside of the two-year statute of limitations. His complaint was time-barred, and was properly dismissed. We therefore do not need to address any of the parties' remaining arguments on appeal.

¶ 31 CONCLUSION

¶ 32 For the foregoing reasons, the judgment of the circuit court is affirmed

¶ 33 Affirmed.