2018 IL App (2d) 180184-U
No. 2-18-0184
Order filed December 20, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ROBERT K. NEUMAN,	)	Appeal from the Circuit Court
	)	of McHenry County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 17-LA-244
	)	
JOHN W. GAFFNEY,	)	Honorable
	)	Thomas A. Meyer,
Defendant-Appellee.	)	Judge, Presiding

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Birkett and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant did not commit any acts of fraudulent concealment that would toll the statute of repose for a legal malpractice action; therefore, the trial court properly dismissed the plaintiff's complaint.

¶ 2 The plaintiff, Robert Neuman, filed a legal malpractice action against the defendant, John Gaffney. Finding Neuman's action was barred by the statute of repose, the circuit court of McHenry County dismissed Neuman's action with prejudice. On appeal, Neuman argues that Gaffney's act of fraudulent concealment tolled the statute of repose. We affirm.

¶ 3 I. BACKGROUND

¶ 4 This case evolves out of the Illinois State Police's affirmative action policy established in the 1970s. Pursuant to the policy, white males applying for employment with the State Police were required to achieve higher written examination scores than females and Hispanic and black male applicants in order to obtain employment. In 1992, a Chicago federal court, in the case of *Koski v. Gainer*, 92 C 3293, certified a class action for white male applicants who the State police had allegedly discriminated against. On September 30, 1997, the district court found for the class on some of their claims, ruling that the Illinois State Police's hiring practices discriminated against white men by requiring their test scores to be higher than those of women or racial minorities. On March 26, 1999, the district court then directed the State to send a class notice, "Notice of Judgment in Class Action," informing the recipients that they had been identified as absent class members and the court had found liability in their favor. The notice also told the class members that the case did not reach the issues of potential back pay and other pay relief. The notice further provided that recipients of the notice were not "to telephone, write or contact the plaintiffs' attorney, the defendants' attorney or the court" but rather direct questions to their own attorney.

¶ 5 On April 26, 1999, Gaffney filed a putative class action, *Mittvick v. State of Illinois*, 99 C 50143, in federal court in Rockford. The complaint named John Mittvick and Edward Urban as plaintiffs and class representatives. The complaint sought back pay and other relief against the State following the finding of liability in *Koski*. The State moved to dismiss the *Mittvick* case, asserting that the plaintiffs had failed to file charges of discrimination with the Equal Employment Opportunity Commission, and they had missed the time limit.

¶ 6 On November 17, 1999, the federal court entered an order in *Mittvick* stating that "Plaintiff's oral motion to dismiss this case without prejudice" was granted.

¶ 7 On January 3, 2000, Gaffney sent a letter to John Mittvick updating him on the status of the federal litigation in Rockford. Specifically, he wrote:

> "Shortly after the filing of the Federal lawsuit in Rockford, the original class action plaintiff in Chicago (Kim Sutherland) filed a motion for classwide relief in the still pending Chicago lawsuit. Shortly after that, the State of Illinois made a motion to dismiss the Rockford lawsuit as those issues were being dealt with in Chicago. After several court dates and discussions with the Judge on these issues, the Judge has dismissed the Rockford Federal Lawsuit since the same relief that we are seeking there is now being sought in Chicago.
>
> Therefore, all the issues of potential backpay and other monetary damages are being dealt with in the Chicago litigation. Unfortunately, since the class already has an attorney representing it in Chicago, I cannot step in and continue my representation of you in that lawsuit."

Gattfney then provided Attorney Sutherland's address and phone number and suggested that Mittvick contact her. He also said that Mittvick could call him with any questions.

¶ 8 On August 9, 2015, Neuman filed a petition to intervene in the *Mittvick* case. He asserted that he was an absent member of the *Koski* and *Mittvick* case and that he had just learned about the *Mittvick* case on July 22, 2015. Neuman argued that his petition for intervention was timely because the Mittvick case had never really been dismissed. He argued that the trial court's order of November 17, 1999, indicated that only one of the two named plaintiffs had been dismissed. Second, he asserted that the *Mittvick* court could not have validly dismissed the case without notifying absent class members (such as himself) of the dismissal, which it did not do. The

district court dismissed Neuman's petition to intervene. The district court explained that the 1999 case had been validly dismissed so intervention was not possible.

¶ 9 Neuman appealed the dismissal of his petition to intervene to the Seventh Circuit Court of Appeals. On December 6, 2016, the Seventh Circuit found that Neuman's arguments were meritless and affirmed the district court's decision. The Seventh Circuit explained that the record revealed that Neuman was already aware of a possible case in 2001 and that a diligent person would have investigated the prospect of a case then. Neuman's fifteen-year delay in trying to intervene was thus attributable to his own lack of diligence. The Seventh Circuit also found without merit Neuman's assertion that Mittvick's attorney had lied to Mittvick about the status of his case. The Seventh Circuit stated that "[e]ven if this is true, none of these statements was made to Neuman. So Neuman cannot validly contend that [Gaffney's] statements delayed his request to intervene."

¶ 10 On July 19, 2017, Neuman filed a legal malpractice complaint against Gaffney in the circuit court of McHenry County. The complaint alleged that Gaffney, as counsel in the *Mittvick* case, owed a fiduciary duty to provide notice to unknown and unnamed absent class members prior to the dismissal of the underlying suit. The complaint further alleged that Gaffney had falsely stated that (1) the Judge had dismissed the case rather than that the case had been voluntarily dismissed; (2) that class wide relief was dealt with in Chicago, because in actuality it had not been certified for monetary relief; (3) he could not continue to represent Mittvick when he actually could.

¶ 11 On September 5, 2017, Gaffney filed a motion to dismiss Neuman's complaint pursuant to section 2-619 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619 (West 2016)). Gaffney argued that Neuman's complaint was barred by the six-year statute of repose for legal

malpractice claims set forth in section 13-214.3 of the Code (735 ILCS 5/13-214.3 (West 2016)). In response, Neuman argued that the six-year statute of repose was not applicable because Gaffney had fraudulently concealed to Mittvick that the real reason Mittvick's complaint was dismissed was because Gaffney had requested that the complaint be voluntarily dismissed.

¶ 12 On February 16, 2018, the trial court dismissed Neuman's complaint with prejudice. The trial court explained that Neuman's action was barred by the statute of repose. The trial court further explained that Gaffney had not engaged in any fraudulent concealment because he had not concealed the existence of the order dismissing Mittvick's complaint.

¶ 13 On March 9, 2018, Neumann filed a timely notice of appeal.

¶ 14 II. ANALYSIS

¶ 15 On appeal, Neumann argues that the trial court erred in dismissing his complaint. Neumann insists that his complaint was not barred by the statute of repose because Gaffney's interactions with Mittvick amounted to fraudulent concealment.

¶ 16 The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). Section 2-619(a)(9) permits involuntary dismissal where "the claim asserted *** is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2016). The phrase "affirmative matter" refers to something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 486 (1994). An order granting this type of motion to dismiss is given *de novo* review on appeal. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993).

¶ 17 Section 13–214.3 of the Code of Civil Procedure provides that a legal malpractice action "must 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 2016). Additionally, such an action "may not be commenced in any event more than 6 years after the date on which the act or omission occurred." 735 ILCS 5/13–214.3(c) (West 2016); see also *Lamet v. Levin*, 2015 IL App (1st) 143105, ¶ 16.

¶ 18 Section 13–215 of the Code, the fraudulent concealment statute, provides as follows:

> "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 2016).

¶ 19 A defendant's fraudulent concealment tolls the statute of repose for legal malpractice actions. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 74 (2006). A plaintiff alleging fraudulent concealment must generally show affirmative acts by the defendant that are designed to prevent the discovery of the action. *Clay v. Kuhl*, 189 Ill. 2d 603, 613 (2000). "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).

¶ 20 Here, the underlying premise of Neuman's fraudulent concealment assertion is that Mittvick, as class representative, was tricked into not doing anything else on behalf of the uncertified class because Gaffney did not tell him that his case had been voluntarily dismissed. Stated differently, Neuman suggests there is a material difference between a case being dismissed (which Gaffney clearly indicated had happened) and a case being voluntarily

dismissed. Neuman does not explain what that difference is, however, and it is not this court's role to develop a rationale to support his argument. See *Express Valet, Inc. v. City of Chicago*, 373 Ill. App. 3d 838, 855 (2007) ("A reviewing court is entitled to have the issues on appeal clearly defined with pertinent authority cited and a cohesive legal argument presented. The appellate court is not a depository in which the appellant may dump the burden of argument and research").

¶ 21 Reviewing Gaffney's letter of January 3, 2000, there is no indication that he attempted to conceal anything relevant from Mittvick. He told Mittvick that the complaint had been dismissed and that Mittvick would have to seek a new attorney going forward. This provided Mittvick sufficient information about how to proceed. Although Neuman insists that Gaffney's letter included several misrepresentations, such misrepresentations, even fraudulent ones, are not equivalent to acts of fraudulent concealment. *Cangemi v. Advocate South Suburban Hospital*, 364 Ill. App. 3d 446, 458 (2006).

¶ 22 Relying on *Henderson Square Condominium Ass'n v. LAB Townhomes, LLC*, 2015 IL 118139, ¶ 40, Neuman emphasizes that Gaffney was in a fiduciary relationship with Mittvick and therefore Gaffney had a "duty to reveal the facts to [Mittvick], and that his silence when he ought to speak, or his failure to disclose what he ought to disclose, is as much a fraud at law as an actual affirmative false representation." We do not disagree with the legal proposition set forth in *Henderson Square*. However, there is nothing in the record to suggest that Gaffney failed to disclose anything that he ought to have disclosed to Mittvick.

¶ 23 Accordingly, as there is nothing in this case to indicate that Gaffney committed any acts of fraudulent concealment that would toll the statute of repose for a legal malpractice action, the trial court properly dismissed Neuman's complaint.

¶ 24 Finally, we note that Gaffney requests that we impose sanctions against Neuman for having filed a frivolous appeal. We deny that request.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we affirm the judgment of the circuit court of McHenry County.

¶ 27 Affirmed.