2019 IL App (1st) 181127-U

THIRD DIVISION
June 28, 2019

No. 1-18-1127

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JONATHAN WALDMAN, Plaintiff-Appellant, v. BENJAMIN EDLAVITCH, Defendant-Appellee.	)))))))))	Appeal from the Circuit Court of Cook County. No. 17 M1 124669 Honorable Catherine Schneider, Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Affirmed. Complaint was barred by statute of limitations.

¶ 2 In 2008, plaintiff Jonathan Waldman retained attorney Benjamin Edlavitch to prepare and file two patent applications. According to Waldman's complaint, Edlavitch did some work pursuant to the contract, but he ultimately repudiated the agreement by refusing to perform additional work unless Waldman paid an additional fee. Approximately nine years later,

Waldman filed this lawsuit, styled as a claim for anticipatory repudiation, seeking to recover from Edlavitch all of the money he paid him, $8,500 in total.

¶ 3 The circuit court ruled that Waldman's claim was barred by the statute of limitations. We agree and affirm the judgment.

¶ 4 BACKGROUND

¶ 5 The following facts are taken from Waldman's complaint. In May 2008, Waldman and Edlavitch entered into a written contract for legal services. This contract, clearly an attorney engagement agreement, is attached as an exhibit to the complaint.

¶ 6 Pursuant to the contract, Edlavitch was to draft and file two patent applications for Waldman, Waldman was to pay Edlavitch an advance of $7,000, and "[a]ny unused portion of the advancement" was to be refunded to Waldman "upon request." The contract further specified that (1) the "flat fee" for authoring and filing the first patent application was $2450; (2) the "flat fee" for authoring and the filing the second application was $3540; (3) Waldman was responsible for paying for "any costs and expenses," which Edlavitch estimated would collectively total $550 in costs assessed by the United States Patent and Trademark Office and the United States Postal Services; and (4) Edlavitch charged $150 per hour "for services rendered outside the scope of this agreement."

¶ 7 In August 2008, Edlavitch requested, and Waldman agreed, to pay an additional $1000 to file the second patent application.

¶ 8 In October 2008, Edlavitch requested that Waldman make a second additional payment for the second patent application. Waldman ultimately paid Edlavitch an additional $530.

¶ 9 In December 2008, Edlavitch told Waldman to contact him "regarding further additional fees required to file the second application." In response, Waldman wrote Edlavitch a letter

"demanding" that Edlavitch "honor the contract by completing performance without requiring additional fees." Edlavitch responded by telling Waldman that if he did not pay an additional fee, he would "send [Waldman] a termination letter and a bill."

¶ 10 Then, for nearly nine years, nothing happened—until September 2017, when Waldman filed this single-count lawsuit against Edlavitch. Styled as a claim for anticipatory repudiation, Waldman alleged that Edlavitch "had a duty to complete performance under the contract for the agreed flat fee of $7,000, or alternatively for the $8,000 or $8,530 paid by the plaintiff," and that Edlavitch "repudiated the contract by a clear manifestation of intention that he would not complete the promised performance except on terms that went beyond the contract."

¶ 11 In December 2017, Edlavitch filed a *pro se* motion to dismiss pursuant to section 2-619(a)(5) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(5) (West 2016)), arguing that Waldman's complaint was barred by the two-year statute of limitations applicable to claims arising out of the provision of legal services. See 735 ILCS 5/13-214.3(b) (West 2016).

¶ 12 On April 17, 2018, the circuit court dismissed Waldman's complaint with prejudice on limitations grounds. This appeal followed.

¶ 13 ANALYSIS

¶ 14 Edlavitch did not file a brief in this case. As the issue here is straightforward, we will consider the case on the merits. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131 (1976).

¶ 15 Section 2-619(a)(5) of the Code allows for dismissal of a complaint when barred by a statute of limitations. *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 84 (1995); 735 ILCS 5/2-619(a)(5) (2016). As with any Section 2-619 motion, we take as true all well-pleaded facts in the complaint, as well as any reasonable inferences from those facts. *Khan v.*

Deutsche Bank AG, 2012 IL 112219, ¶ 18. Our review is *de novo*. *Ferguson v. City of Chicago*, 213 Ill. 2d 94, 99 (2004).

¶ 16 The circuit court dismissed Waldman's complaint pursuant to section 13-214.3(b) of the Code, which provides: "An action for damages based on tort, contract, or otherwise (i) against an attorney arising out of an act or omission in the performance of professional services *** 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). As applied here, the question is whether the circuit court correctly ruled that the complaint is "[a]n action for damages based on *** contract *** arising out of an act or omission in the performance of [Edlavitch's] professional services." *Id*.

¶ 17 Waldman's claim here, for anticipatory repudiation, is unquestionably an action for breach of contract. *Busse v. Paul Revere Life Insurance Co.*, 341 Ill. App. 3d 589, 594 (2003) (anticipatory repudiation is actionable as breach of contract); *Draper v. Frontier Insurance Co.*, 265 Ill. App. 3d 739, 745 (1994) (same). And it is one for damages based on that breach. The complaint alleges that, "[a]s a result of defendant's repudiation, the plaintiff suffered damages of $8,530 and other consequential damages." The prayer for relief is consistent with that allegation. Simply put, the complaint alleges that Edlavitch didn't perform the service, so Waldman wants his money back, plus any consequential damages resulting from that breach.

¶ 18 Waldman's claim also "aris[es] out of an act or omission in the performance of professional services." 735 ILCS 5/13-214.3(b) (West 2016). It cannot be seriously disputed that an attorney's act of preparing and filing patent applications constitutes the "performance of professional services." And the complaint alleges an act or omission on Edlavitch's part. Again, the complaint alleges that Edlavitch didn't perform the service he promised to provide. Failing to

perform a contractual promise is obviously an omission. See Black's Law Dictionary (11th ed. 2019) (defining "omission" as, among other things, "A failure to do something; esp., a neglect of duty," or "Something that is left out, left undone, or otherwise neglected"). Or perhaps we could view the allegation as Edlavitch's improper refusal to complete the work for the initial flat-fee charge—some hybrid of an act or omission. Either way, the behavior attributed to Edlavitch here is undoubtedly an act or omission arising out of the performance of professional services.

¶ 19 The phrase in subsection (b) of section 13-214.3 has been given a broad construction. For example, it is not limited to claims of legal malpractice; section 214.3(b)'s " 'arising out of' language indicates an intent by the legislature that the statute apply to *all* claims against attorneys concerning their provision of professional services." (Emphasis added.) *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 23. The complaint here alleges a claim concerning Edlavitch's provision of professional services. The two-year time bar in section 214.3(b) thus governs this claim.

¶ 20 Waldman denies that his claim involves the provision of professional services, arguing instead that this is little more than a garden-variety dispute over fees. But that is not what his complaint says. His complaint requests the return of every penny he paid Edlavitch. He is alleging that Edlavitch didn't complete his performance, and thus Waldman is entitled to all his money back (plus other consequential damages resulting from that breach). That is not a dispute over fees; that is a dispute over Edlavitch's performance of legal services.

¶ 21 If the lawyer were accused of keeping too high a percentage of the proceeds of a settlement from his client, we agree that we would face a closer question of whether the lawyer's conduct constituted the "provision of professional services" under section 13-214.3(b). That was the factual setting of *Continental Casualty Co. v. Donald T. Bertucci, Ltd.*, 399 Ill. App. 3d 775,

784 (2010), an insurance coverage case on which Waldman heavily relies, which did not concern section 13-214.3(b). In interpreting coverage language in an insurance policy, we held that keeping too much of a client's settlement money wasn't the provision of any "professional service" that required specialized skill; it was just basic theft of the client's money. *Id.*

¶ 22 But even if that insurance-coverage decision, with all its policy definitions, could be analogized to a statute our supreme court has told us to construe broadly, we would find it distinguishable for the reasons we have already given. A dispute over fees may have served as the backdrop for the break-up of the attorney-client relationship here, as alleged in the complaint, but the cause of action is not a fee dispute. Waldman is not merely claiming that he should have been charged $7,000 but instead was charged $8,500, and he wants the difference of $1,500. *That* would be a mere dispute over fees, and the applicability of section 13-214.3(b) would be a closer question. Instead, Waldman is saying that Edlavitch breached the contract, and he is thus entitled to a full refund of *all* money paid, $8,530, plus other consequential damages.

¶ 23 That, in our view, is a claim "for damages based on *** contract *** against an attorney arising out of an act or omission in the performance of professional services." 735 ILCS 5/13-214.3(b) (West 2016). The two-year limitations period applies.

¶ 24 If the complaint's allegations are true, we are sympathetic to Waldman, and we are not suggesting that the law would not provide him a remedy. But he must invoke that remedy within two years of the accrual of his claim. *Id.* As Waldman filed this claim nearly nine years after it accrued, the circuit court correctly found the complaint to be time-barred.

¶ 25 CONCLUSION

¶ 26 The judgment of the circuit court is affirmed.

¶ 27 Affirmed.