2019 IL App (2d) 190165-U
No. 2-19-0165
Order filed September 16, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JERRY FREEMAN and CATHY FREEMAN, Plaintiffs-Appellants, v. WYNDHAM VACATION RESORTS, INC., STEPHANIE SCHRAGE, IYONNA RIVERS, and JOSEPH MINOR, Defendants (Wyndham Vacation Resorts, Inc., Defendant-Appellee).	)	Appeal from the Circuit Court of Stephenson County. No. 17-LM-144 Honorable Glenn R. Schorsch Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Birkett and Justice Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court properly dismissed as untimely plaintiffs' complaint for fraudulent concealment: the alleged concealment did not toll the limitations period, as defendant was merely silent, did not owe plaintiffs a fiduciary duty to speak, and "concealed" a contractual provision that plaintiffs easily could have discovered; (2) without an official account of the relevant hearing, we could not say that plaintiffs requested a ruling on their motion such that the trial court erred in failing to rule; (3) the trial court did not abuse its discretion in awarding defendant attorney fees under Rule 137, as plaintiffs' action was baseless.

¶ 2 Plaintiffs, Jerry Freeman and Cathy Freeman, appeal, *pro se*, from: (1) the dismissal of their amended complaint seeking recovery for fraudulent concealment in connection with their purchase of a timeshare property from one of the named defendants, Wyndham Vacation Resorts, Inc. (Wyndham), and (2) an order that the Freemans pay Wyndham $250 in attorney fees as a sanction pursuant to Illinois Supreme Court Rule 137 (eff. Jan. 1, 2018). Wyndham sought dismissal because, among other things, the complaint was not filed within the applicable limitations period. The Freemans argue on appeal that: (1) the alleged fraudulent concealment tolled the limitations period; (2) the trial court failed to rule on their request to dismiss the named individual defendants (Stephanie Schrage, Iyonna Rivers, and Joseph Minor) and add Robert Ruff as a new defendant; and (3) there was a good-faith basis for their complaint and the trial court therefore erred in awarding Wyndham attorney fees. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The Freemans filed their original complaint on June 16, 2017. The complaint misnamed Wyndham as "Wyndham Corporation." Although the record does not show that any of the defendants were properly served, Wyndham entered an appearance and the trial court corrected the misnomer. Wyndham moved to dismiss the complaint. The trial court granted the motion, dismissing the complaint without prejudice. After unsuccessfully moving for reconsideration, the Freemans filed a two-count amended complaint.

¶ 5 Count I of the amended complaint purported to state a claim for fraudulent concealment. The Freemans alleged that, in November 2000, they attended a sales presentation at which a Wyndham sales representative, Ruff, deceived them into purchasing a timeshare unit from Wyndham. According to the complaint, Ruff informed the Freemans that they could bequeath the timeshare to their children but failed to disclose an "in perpetuity" clause in their contract

with Wyndham that would bind their children to the Freemans' contractual obligations. The Freemans learned of the clause at a Wyndham sales presentation in 2016, after informing a representative that their children had no interest in the timeshare and that "the deed would just be defaulted to Wyndham when [the Freemans] passed on." The gravamen of the Freemans' fraudulent-concealment claim was that they would not have entered into the contract with Wyndham had they known that it would be binding on their children.[1] Count II sought an order directing Wyndham to accept an out-of-court settlement offer from the Freemans entailing cancellation of the contract.

¶ 6 Wyndham filed a combined motion to dismiss the amended complaint pursuant to sections 2-615, 2-619, and 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619, 2-619.1 (West 2016)). As pertinent here, Wyndham sought dismissal of count I under section 2-619 of the Code on the basis that the action was barred by the applicable five-year statute of limitations (735 ILCS 5/13-205 (West 2016)). The trial court granted the motion, dismissing the amended complaint with prejudice. However, the trial court also entered an order

[1] The "in perpetuity" clause stated, "This Contract is binding on the parties hereto and their heirs, legal representatives, successors and assigns." It is highly doubtful that the clause would have bound the Freemans' children personally had they chosen to disclaim their interests in the timeshare unit. See *Barrow v. Murphrey*, 383 S.E.2d 684, 685 (N.C. Ct. App 1989) (contract that was " 'binding on the parties, their heirs, successors and assigns' " bound the estate of the defendant's deceased husband, but did not personally bind his heirs).

providing that the contract was terminated. The trial court subsequently awarded Wyndham $250 in attorney fees pursuant to Rule 137. This appeal followed.

¶ 7 II. ANALYSIS

¶ 8 Before we address the merits, we note that the Freemans have filed a motion to supplement their reply brief. We ordered the motion taken with the case. The Freemans argue that a "word error" in a motion filed in the trial court might have led the trial court to believe that Schrage, Rivers, and Minor incurred legal fees in connection with this lawsuit. It is not altogether clear what the point of the argument is. In any event, the Freemans offer no reason why they should be permitted to make new arguments in an appeal that is fully briefed. The motion also states that the Freemans "did not receive Stephenson Counties [*sic*] CERTIFICATION OF SUPPLEMENT TO THE RECORD until July 29, 2019"; that one of this court's deputy clerks told them that they needed to supplement the record; and that the deputy clerk sent them "the aforementioned report of the proceedings." Again, it is not clear what point the Freemans are trying to make. Nor is it clear what relief they want from this court. We deny the Freemans' motion and turn our attention to the merits of this appeal.

¶ 9 The Freemans argue that the trial court erred in concluding that the statute of limitations barred this action. Wyndham raised the statute-of-limitations defense as grounds for dismissing the action pursuant to section 2-619. Section 2-619 provides, in pertinent part:

> "(a) Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit:
>
> * * *

> (5) That the action was not commenced within the time limited by law."
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> 735 ILCS 5/2-619(a)(5) (West 2016).

When reviewing the dismissal of an action pursuant to section 2-619, "we take as true all well-pleaded factual allegations of the complaint." *Moncelle v. McDade*, 2017 IL App (3d) 160579, ¶ 17. Our review is *de novo*. *Id.*

¶ 10 The Freemans argue that their fraudulent-concealment claim was timely because they did not discover the claim until 2016, when they learned of the existence of the "in perpetuity" clause that Ruff failed to disclose. Section 13-215 of the Code (735 ILCS 5/13-215 (West 2016)) provides, "If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such cause of action, and not afterwards." The Freemans rely on *Henderson Square Condominium Ass'n v. LAB Townhomes, LLC*, 2015 IL 118139, ¶ 36, which explained that "[u]nder the fraudulent concealment doctrine, the statute of limitations will be tolled if the plaintiff pleads and proves that fraud prevented discovery of the cause of action." The Freemans did not allege that Wyndham actively concealed the "in perpetuity" clause. Instead, the alleged fraudulent concealment consisted of Ruff's failure to disclose the clause. The *Henderson Square* court noted that fraudulent concealment must ordinarily consist of more than mere silence. *Id.* ¶ 40. However, as the *Henderson Square* court observed, that rule does not apply when the person accused of fraudulent concealment is a fiduciary. *Id.* The *Henderson Square* court relied on the following passage from *Orlak v. Loyola University Health System*, 228 Ill. 2d 1, 19 (2007):

> "It is the prevailing rule that, as between persons sustaining a fiduciary or trust or other confidential relationship toward each other, the person occupying the relation of fiduciary

> or of confidence is under a duty to reveal the facts to the plaintiff (the other party), 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 or act; and that mere silence on his part as to a cause of action, the facts giving rise to which it was his duty to disclose, amounts to a fraudulent concealment ***." (Internal quotation marks omitted.)

The *Henderson Square* court further noted that, in such cases, a party seeking to toll the limitations period must specifically plead "[t]he facts that indicate that the fraud was kept concealed through confidence placed in the fiduciary." *Henderson Square*, 2015 IL 118139, ¶ 40.

¶ 11 The Freemans' reliance on *Henderson Square* is misplaced. They did not allege any facts that would establish the existence of a fiduciary duty. "A fiduciary relationship may arise as a matter of law by virtue of the parties' relationship, *e.g.*, attorney-client, or it may arise as a result of the special circumstances of the parties' relationship where one places trust in another so that the latter gains superiority and influence over the former." *State Security Insurance Co. v. Frank B. Hall & Co.*, 258 Ill. App. 3d 588, 595 (1994). Wyndham did not owe a fiduciary duty to the Freemans as a matter of law. The profit motive underlying a real estate transaction such as this one dictates that the parties act in accordance with their own economic interests. Fiduciaries are strongly discouraged from engaging in business transactions with those to whom they owe a fiduciary duty. See *Curtis v. Fisher*, 406 Ill. 102, 109 (1950). It follows that a relationship that is transactional by its nature does not give rise to fiduciary duties. The Freeman alleged no special circumstances that would transform this business relationship into a fiduciary relationship.

¶ 12 We need not rely solely on the absence of a fiduciary duty. Even if Wyndham did owe the Freemans a fiduciary duty, the claim of fraudulent concealment would fail. To establish fraudulent concealment on the basis of the defendant's silence, it is not enough to show that the defendant had a duty of disclosure. It is also necessary to show, *inter alia*, that " 'the plaintiff could not have discovered the truth through reasonable inquiry or inspection, or was prevented from making a reasonable inquiry or inspection, and justifiably relied upon the defendant's silence as a representation that the fact did not exist.' " *Abazari v. Rosalind Franklin University of Medicine & Science*, 2015 IL App (2d) 140952, ¶ 27 (quoting *Bauer v. Giannis*, 359 Ill. App. 3d 897, 902-03 (2005)). This is true even when the defendant owes a fiduciary duty to the plaintiff. See *D'Attomo v. Baumbeck*, 2015 IL App (2d) 140865, ¶ 60 (even assuming, *arguendo*, that the defendant had a duty to disclose arising from a fiduciary or confidential relationship, fraudulent-concealment claim was properly dismissed because "[the] [p]laintiffs' complaint lack[ed] any allegation that they could not have discovered the truth through reasonable inquiry or inspection, or were prevented from making a reasonable inquiry or inspection.").

¶ 13 Here, a reasonable inquiry would, at the very least, have entailed reading the contract. "[A] party who signs an instrument relying upon representations as to its contents when he has had an opportunity to ascertain the truth by reading the instrument and has not availed himself of the opportunity, cannot be heard to say that he was deceived by misrepresentations." (Internal quotation marks omitted.) *Nilsson v. NBD Bank of Illinois*, 313 Ill. App. 3d 751, 762 (1999). Had the Freemans read the contract with Wyndham before signing it, they would have known then and there of the existence of the "in perpetuity" clause. Thus, whether or not Wyndham owed the Freemans a fiduciary duty, the Freemans could not justifiably rely on its failure to

disclose the "in perpetuity" clause as a representation that the contract contained no such clause. In view of the foregoing, we conclude that Wyndham's failure to disclose the "in perpetuity" clause did not toll the limitations period.

¶ 14 We next consider the Freemans' contention that the trial court erred by failing to acknowledge their request to join Ruff as a defendant. We find no error. On September 27, 2017, while Wyndham's motion to dismiss the original complaint was pending, the Freemans moved to amend their complaint to add Ruff as a defendant and to dismiss Schrage, Rivers, and Minor from the suit. However, the Freemans did not notice the motion for a hearing. The trial court heard and granted the motion to dismiss on October 3, 2017. The record on appeal includes neither a transcript of the hearing nor an authorized substitute (see Ill. S. Ct. R. 323(c), (d) (eff. July 1, 2017)), so we cannot determine whether the Freemans made any effort to obtain a ruling at that hearing. It is well established that "an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Accordingly, there is no basis for us to conclude that the absence of an express ruling on the motion was error.

¶ 15 The Freemans also assert that the trial court should have added Ruff as a defendant in response to their motion to reconsider the dismissal of their original complaint. That motion did not request that Ruff be added as a defendant. Rather, it asserted that "[b]y inference *** Ruff was the defendant in that he is accused by [the Freemans] *** of having initiated fraudulent concealment by withholding fiduciarily pertinent information from [the Freemans] in order to procure their signature on the timeshare contract." Furthermore, adding Ruff as a defendant

would not have rescued the complaint from dismissal, so we can conceive of no reason why the Freemans should have been permitted to add him.

¶ 16 Finally, we consider the Freemans' argument that the trial court erred in awarding Wyndham its attorney fees under Rule 137. That rule provides, in pertinent part:

> "Every pleading, motion and other document of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other document and state his address. *** The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. *** If a pleading, motion, or other document is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion or other document, including a reasonable attorney fee." Ill S. Ct. R. 137(a) (eff. Jan. 1, 2018).

The decision regarding the imposition of sanctions under Rule 137 is committed to the sound discretion of the trial court, and its decision will not be overturned absent an abuse of discretion. *Kuykendall v. Schneidewind*, 2017 IL App (5th) 160013, ¶ 40. "An abuse of discretion occurs

when no reasonable person could have shared the view taken by the trial court." *Garlick v. Bloomingdale Township*, 2018 IL App (2d) 171013, ¶ 25.

¶ 17 The Freemans contend that they "put forth a good-faith argument concerning fraudulent concealment and the extension or modification of the Henderson case and/or [section 13-215 of the Code] in the instant cause to prevent the application of the statute of limitations." We disagree. The Freemans have offered no basis for extending *Henderson* to nondisclosure by a nonfiduciary. Nor do they provide any reason for extending the limitations period based on nondisclosure of terms in a contract that they did not bother to read. The trial court did not abuse its discretion in awarding attorney fees to Wyndham.

¶ 18 III. CONCLUSION

¶ 19 For the foregoing reasons, the judgment of the circuit court of Stephenson County is affirmed.

¶ 20 Affirmed.