2015 IL App (1st) 142455-U

No. 1-14-2455

Filed September 11, 2015

FIFTH DIVISION

IN THE APPELLATE COURT

OF ILLINOIS

FIRST JUDICIAL DISTRICT

LISA VITTI BESHKOV,	)	Appeal from the
	)	Circuit Court
Plaintiff-Appellant,	)	of Cook County
	)	
v.	)	No. 14 L 04278
	)	
KATTEN MUCHIN ROSENMAN LLP,	)	Honorable
	)	William Gomolinski,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justices Gordon and Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in finding plaintiff's complaint for breach of fiduciary duty and legal malpractice time-barred under section 13-214.3 of the Illinois Code of Civil Procedure (735 ILCS 5/13-214.3 (West 1994)). Therefore, we affirmed the trial court's grant of defendant's motion to dismiss the complaint.

¶ 2 Plaintiff Lisa Vitti Beshkov filed a complaint alleging breach of fiduciary duty and legal malpractice against defendant law firm Katten Muchin Rosenman LLP (Katten). She alleged Katten attorney Victor Bezman breached his fiduciary duty to her and

committed legal malpractice while representing and counseling her regarding her estate planning and inheritance management. Katten filed a combined motion to dismiss under section 2-619.1 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2012)). The court granted the motion, dismissing the breach of fiduciary duty count as duplicative of the legal malpractice count under section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)) and the complaint as time barred under section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2012)). On appeal, plaintiff argues the trial court erred in (1) applying the "reasonable time rule" to determine the complaint was time barred and determining the discovery date of her cause of action as a matter of law, (2) failing to address plaintiff's equitable estoppel argument and (3) ruling the breach of fiduciary duty count was duplicative of the legal malpractice count. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On April 16, 2014, plaintiff filed a verified complaint for "breach of fiduciary duty (constructive fraud)" and legal malpractice against Katten. As a result of a tolling agreement she executed with Katten, the effective filing date of the complaint is October 16, 2013. The allegations of the complaint and attachments thereto are summarized below.

¶ 5 A. Allegations of Complaint

¶ 6 Plaintiff and her sister Bonnie are the children of Linda Price Vitti. Upon the death of Linda's father, Linda would be the sole beneficiary of a family trust, the 1935 Trust. George Asch was the trustee. However, Linda executed an assignment of her interest in the 1935 trust. As a result, under the terms of the trust, she lost her absolute right to the trust principal and interest and instead, upon the death of Linda's father, trustee Asch

had the discretion to distribute the trust principal either to Linda or to her issue, plaintiff and Bonnie,

¶ 7 In 2000, both plaintiff and Bonnie set up irrevocable trusts (the 2000 trusts) with Asch as trustee. Each also executed an "assignment" of inheritance providing that any property each received by gift or inheritance would be assigned and transferred to Asch as trustee for their respective 2000 trusts, *i.e.*, would be distributed to their 2000 trusts rather than to plaintiff and Bonnie directly. In 2002, Bezman, a Katten attorney, began acting as plaintiff's estate planning attorney. He also represented plaintiff's sister Bonnie, her mother Linda and Linda's husband Joe Herbst. Bezman advised plaintiff to revoke her assignment of any inheritance to her 2000 trust. He drafted a revocation of the assignment and plaintiff executed it in December 2002.

¶ 8 In May 2003, Bezman sent plaintiff and Bonnie a letter informing them he was writing at their mother's request "in order to provide you with an explanation of the steps you have taken with respect to the Assignments you signed in May, 2000." He explained that, as a result of the assignments, everything plaintiff and Bonnie would receive under their mother's or grandparents' wills and any distributions from any trusts their mother or grandparents set up for their benefit would "automatically go to the new trusts you created [their respective 2000 trusts]." Bezman stated Asch was the trustee of the 2000 trusts. He explained "[y]ou cannot control the assets of these trusts or require that they be distributed to you, Rather, distributions will be made from these trusts only in [Asch's] discretion if he determines that such distributions would be in your 'best interests.' " Bezman stated that the 2000 trusts were irrevocable and

> "Therefore, the only way to 'undo' this arrangement is to have you

revoke the Assignments you made. I prepared revocations of these Assignments which I understand that you signed but which have not yet been delivered to me. The trusts you created do not protect assets from your creditors, and no estate tax advantages exist with respect to these trusts. While they may help protect the trust assets from your spouse in the event of a divorce, there are simpler ways of doing so that do not require you to give up all control over your assets. It was with these concepts in mind that we prepared the revocations.

I believe that the revocations will terminate this arrangement with respect to the new trusts of which George Asch is the Trustee so that none of your inheritance will pass to these trusts. Although you previously created these trusts, since they will not receive any assets, for all intents and purposes they will be considered to have never been created. Therefore, you will receive all of your inheritance from your grandparents and your mother in the manner in which they provided in their estate plans.

There is a risk that [Asch] could attempt to challenge your revocations of the Assignments and try to enforce the trust arrangements, however, I think there is only a small chance that he would be successful. It is my understanding that [Asch] currently has no knowledge of the revocations; therefore, we should consider whether to give [Asch] notice of these revocations at this time in order to learn his reactions to our action, and possibly now determine whether he is going to attempt to challenge

the revocations." (Emphasis in original.)

¶ 9 Linda's father died in 2004. Asch exercised his discretion and chose to distribute the 1935 trust principal equally to plaintiff and Bonnie rather than to Linda. In September 2004, plaintiff, Bonnie and Asch executed a "receipt, release and refunding agreement" (RRR agreement). The agreement recited the history of the 1935 trust and plaintiff's and Bonnie's creation of their 2000 trusts with Asch as trustee. It stated plaintiff and Bonnie had executed written instruments (the assignments) in May 2000 providing that any direct or indirect inheritance "from their maternal grandparents (or their ancestors or descendants)" would be held in their respective 2000 trusts.

¶ 10 The RRR agreement provided that, pursuant to the terms of the 2000 trusts, Asch designated Timothy Jones to replace him as trustee for the 2000 trusts and Asch resigned as trustee of those trusts. It further provided that, as a result of plaintiff and Bonnie's assignments, Asch would distribute one half of the 1935 trust assets to Jones as trustee of plaintiff's 2000 trust and the other half to Jones as trustee of Bonnie's 2000 trust. Asch agreed that he would distribute the assets to the beneficiaries "in accordance with the written instructions transmitted to him by [the beneficiaries] or by Victor H. Bezman, Esq., their personal representative."

¶ 11 Plaintiff alleged Bezman did not disclose her revocation of the assignment to Asch when the distribution of the 1935 trust occurred in September 2004 and, as a result, her $18 million share of the 1935 Trust passed to her irrevocable 2000 trust rather than to her directly. She claimed Bezman then recommended "a more 'efficient' irrevocable trust" for her and drafted a 2005 irrevocable trust (2005 trust), giving his other client, plaintiff's mother Linda, the power to appoint trustees to the trust when

necessary. Jones was appointed as trustee for this 2005 trust as well. Plaintiff alleged Bezman advised and counseled Jones as the trustee's attorney and, when she had questions or concerns regarding her 2005 trust, Jones deferred to Bezman for answers and explanations.

¶ 12 Plaintiff alleged she "informed Bezman she did not want an irrevocable trust" and "[c]onsequently, [*sic*] [her] inherited $18 [million] was moved into her irrevocable 2005 Trust and then split out among different planning mechanisms orchestrated by Bezman." She asserted Bezman set up various gift trusts in 2004 and 2005 as the lawyer for Linda, Bonnie and Herbst, proposed "an overall estate plan for the entire family" in 2005, set up a limited partnership to which each family member's trust contributed funds and arranged in 2007 to have her trust's share of the partnership purchased by a trust set up for her children (dynasty trust).

¶ 13 Plaintiff alleged: "During this entire time period, Bezman concealed the effect of [plaintiff's] revocation and counseled her that this planning was beneficial and the new planning would better protect her from creditors."[1] She stated: "At this point in time, [plaintiff] did not have full control of her money - or an independent lawyer to inform her of the effect of her revocation - and instead was given the impression she had the choice of letting the money sit in her current irrevocable trust or have it moved into

[1] Throughout her complaint, plaintiff complains of the "effect of the revocation" and "the revocation's effect." But the basis for her injury is Bezman's failure to inform to Asch that plaintiff had executed a revocation, as a result of which plaintiff's inheritance was distributed to her 2000 irrevocable trust rather than to her directly. Plaintiff knew from Bezman's 2003 letter to her that the *intended* effect of the revocation was to revoke her earlier assignment of her inheritance to her 2000 trust. But, as the revocation was not communicated to Asch and, therefore, never implemented, the revocation did not have its intended effect. It had no effect at all. We note that there is nothing in the record to show that Bezman received the revocation from plaintiff after she signed it.

better planning devices (that Bezman would draft and oversee) to make more money."

¶ 14 In 2009, Jones resigned as trustee of plaintiff"s 2005 trust and dynasty trust at her behest and Deutsche Bank became the new trustee. Plaintiff claimed that, when Deutsche Bank became trustee of her 2005 trust in 2009, it recorded that only $3,553,312 remained in that trust. She asserted it was only during Deutsche Bank's administration that she began to understand the full extent of Bezman's planning and the various "inter-trust loans."

¶ 15 In plaintiff's breach of fiduciary duty count, she alleged Bezman was her personal representative and attorney, she had trusted in his advice and counseling and he had failed to properly inform her of his many conflicts of interest. She asserted that, when her initial inheritance was being transferred to her 2000 trust, Bezman was aware he had drafted a revocation of her assignment of her inheritance but he "remained silent and did not inform [Asch] that said assignment had been previously revoked and [plaintiff's] money could be distributed outright to her." Plaintiff claimed:

> "But [for] this concealment from [plaintiff] and [Asch], [plaintiff's] inheritance could have been distributed to her outright.
>
> During this entire representation, Bezman concealed from [plaintiff] the effect of the revocation of her assignment and her rightful claim to her inherited $18,000,000. Only recently, when [plaintiff] retained independent counsel in 2009, did she discover the revocation's effect."

Plaintiff enumerated Bezman's alleged acts and omissions and claimed that, "[a]s a result of Bezman's actions and concealments," she had been deprived of her rightful inheritance. She alleged:

> "But for Bezman's silence as to the revocation, and Bezman's subsequent 'family planning,' which placed [plaintiff's] inherited $18 [million] into irrevocable trusts and partnerships, [plaintiff] would have had outright control and access to the inheritance. Instead, when [Deutsche Bank] took over as trustee, approximately $3,500,000.00 remained in [plaintiff's] 2005 trust. Because of Bezman's silence and related actions, [plaintiff] is without control or access to approximately $14 [million] of her inherited money.
>
> By remaining silent and concealing the effect of the revocation of the assignment from [plaintiff] and [Asch], Bezman benefitted other members of the family and his firm's business to the detriment of [plaintiff]."

She sought $14 million in damages for Bezman's "actions and concealments."

¶ 16 In plaintiff's legal malpractice count, she realleged and incorporated by reference the allegations in her breach of fiduciary duty count, added several other allegations and claimed, "[b]ut for Bezman's actions and omissions as [her] attorney, [her] inheritance would be within her control and not subject to loans orchestrated by Bezman, not subject to restrictive partnerships, and not subject to excessive fees and costs." She requested judgment against Katten for Bezman's actions in the amount of $14 million plus costs.

¶ 17 B. Trial Court Proceedings

¶ 18 Katten filed a combined section 2-619.1 motion to dismiss. It argued the breach of fiduciary duty count should be dismissed under section 2-615 of the Code for failure to state a cause of action as Illinois does not recognize a claim for breach of fiduciary

duty separate and distinct from a claim for legal malpractice when, as in plaintiff's complaint, the same operative facts and same injury are alleged for both counts. It also argued both the breach of fiduciary duty and legal malpractice counts should be dismissed under section 2-619(a)(5) of the Code as time barred since plaintiff did not commence her action within the time limits set forth in section 13-214.3 of the Code (735 ILCS 5/13-214.3 (West 1994)).[2] Section 13-214.3 sets forth a two-year statute of limitations and six-year statute of repose for actions for damages based on tort, contract, or otherwise "against an attorney arising out of an act or omission in the performance of professional services." 735 ILCS 5/13-214.3 (West 1994).

¶ 19 Katten acknowledged that the operative date for determining compliance with the statute of limitations was October 16, 2013, the effective date of the tolling agreement between the parties. It argued that plaintiff's claimed injury was her lack of control or access to $14 million of her $18 million inheritance caused by Bezman's failure to inform Asch of the revocation. It claimed that plaintiff knew or reasonably should have known of her injury and that it was " 'wrongfully caused' " more than two years prior to October 16, 2013. Katten argued specifically that plaintiff knew or reasonably should have known of her injury in: (1) September 2004, when she signed the RRR agreement which expressly stated that her inheritance would be transferred to the 2000 irrevocable trust, (2) 2005, when her inheritance was transferred from the 2000 trust to the 2005 trust and (3) 2009, when, as she claimed in her complaint, she "began to understand" the effect

[2] Public Act 89-7 (eff. March 9, 1995) amended section 214.3. However, in *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 467 (997), our supreme court declared Public Act 89-7 void in its entirety. As a result, the 1994 version of section 214.3 is applicable here.

of Bezman's estate planning and "discovered the revocation's effect" when she retained new counsel and when Deutsche Bank became the new trustee for her 2005 trust and dynasty trust.

¶ 20 Katten also argued that any claims based on the following acts or omissions alleged by plaintiff in her complaint were no longer actionable under the section 13-214.3 statute of repose as they occurred more than six years before the October 16, 2013, effective date of the tolling agreement: (1) Bezman's failure to disclose the revocation of the assignment to Asch prior to the September 2004 transfer of plaintiff's inheritance to the 2000 trust, (2) his drafting of the 2005 irrevocable trust and transfer of funds from the 2000 trust to the 2005 trust, (3) his preparation of the overall estate plan in 2005 and (4) his preparation of a limited partnership agreement for Prospero prior to 2007.

¶ 21 In support of its assertion that plaintiff knew in April 2009, at the latest, of her causes of action, Katten attached to its motion to dismiss a copy of an April 30, 2009, six-page letter plaintiff sent to the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois (ARDC) complaining of Bezman's conduct and requesting a formal investigation of her complaint. Plaintiff told the ARDC that she had hired an estate planning attorney who informed her that, as a means to protect her assets, there had been options other than signing an irrevocable trust. She claimed "the disadvantages to signing an irrevocable trust were never explained to me by Bezman." Plaintiff asserted she learned during the process of interviewing trustees and working with her new attorney that she had given "complete control of [her] money" to Jones, whom Bezman had designated as the trustee for all of the family's trusts and was the

designated person to review and pay Bezman's legal bills. She claimed she learned she "had signed into a financial structure with no checks and balances" wherein "one man had unilateral control to make all the investment decisions and distributions he wanted to make." Plaintiff included a list of what she claimed were Bezman's conflicts of interest while he represented her and attached supporting documentation. She asserted she suffered financially and emotionally as a result of Bezman's "multiple conflicts of interest, unreasonable legal fees and unnecessary billing" and stated that, "[i]n drafting these trusts, it appears Mr. Bezman created a financial structure which was self serving for him, possibly my mother's husband and Tim Jones, the sole trustee."

¶ 22 Plaintiff responded to the combined motions to dismiss, arguing first that the breach of fiduciary duty count was not duplicative of the legal malpractice count as it alleged numerous distinct roles occupied by Bezman, each with separate and distinct fiduciary duties owed. She further argued the complaint was not time barred as the statute of limitations and statute of repose were tolled for five years by Bezman's fraudulent concealment pursuant to section 13-215 of the Code (735 ILCS 5/13-215 (West 2012)).[3] Plaintiff also argued Katten was equitably stopped from asserting a statute of limitations and statute of repose defense.[4]

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[3] Under section 13-215 of the Code, if a defendant fraudulently concealed a cause of action from the plaintiff, the plaintiff can bring the action within five years of discovering the cause of action. 735 ILCS 5/13-215 (West 2012).

[4] Plaintiff also argued the statute of repose for her legal malpractice action did not begin to run until late 2009, the last date on which Bezman performed any work encompassed by her cause of action. She did not raise this argument on appeal and it is, therefore, forfeit. Moreover, there was no continuing violation here.

"Illinois courts have rejected the continuous course of representation doctrine with regard to legal malpractice, finding that the statute of repose is not tolled merely by the continuance of the attorney-client relationship." *Mauer v. Rubin*, 401 Ill. App. 3d 630,

¶ 23 Katten replied, arguing among other things, that, even if plaintiff's allegations were sufficient to allege fraudulent concealment and estoppel, the five-year tolling period would not apply to extend the statutes of limitations or repose as plaintiff's allegations and affidavit showed she discovered her causes of action in April 2009, at which time a reasonable amount of time remained in both the statute of limitations (two years, until April 2011) and the statute of repose (17 months, until September 2010, assuming the date of injury was the September 2004 transfer of funds to the 2000 irrevocable trust) in which she could file her suit.

¶ 24 C. Trial Court's Rulings

¶ 25 On July 14, 2014, following a hearing on Katten's motion, the trial court entered an order dismissing "with prejudice without leave to amend" (1) the breach of fiduciary duty count pursuant to section 2-615 "because it alleges the same injury and operative

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642 (2010). Further, regarding a continuous course of negligent legal representation as plaintiff alleged here, " '[a] continuing violation or tort is occasioned by continuing unlawful acts and conduct, not by continual ill effects from an initial violation. [Citations.] Thus, where there is a single overt act from which subsequent damages may flow, the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so despite the continuing nature of the injury.' " *Mauer v. Rubin*, 401 Ill. App. 3d 630, 642 (2010) (quoting *Feltmeier v. Feltmeier,* 207 Ill.2d 263, 278–79, 278 Ill.Dec. 228, 798 N.E.2d 75, 85 (2003). Unless the alleged injury is cumulative or aggregate in nature or the actions of the attorney subsequent to the injury exacerbated the injury in some way, the continuing violation doctrine is not triggered in a legal malpractice acton. *Id.* Here, all of Bezman's alleged continuing tortious misconduct would not have occurred but for one initial violation: his alleged failure to inform Asch that plaintiff had revoked her assignment, as a result of which plaintiff's share of the 1935 trust did not go to her directly but instead went to her irrevocable 2000 trust over which she had no control. Once Bezman's silence caused the $18 million inheritance to go to plaintiff's irrevocable trust, the injury to her interest in controlling her inheritance was complete and Bezman's alleged legal malpractice thereafter did not aggravate that initial injury. Accordingly, the statute of repose will not be tolled by events occurring after that initial injury. See *Mauer*, 401 Ill. App. 3d at 644; *Hester v. Diaz*, 346 Ill.App.3d 550, 554-55 (2004); *Serafin v. Seith*, 284 Ill.App.3d 577, 586-87 (1996); *Lamet v. Levin*, 2015 IL App (1st) 143105, ¶¶ 19-25.

facts as count II" and (2) the breach of fiduciary duty and legal malpractice counts under sections 2-619 and 13-214.3. During the hearing, plaintiff agreed with the court that her main claim against Katten was that "Bezman failed to disclose her revocation of the assignment of her inheritance to the irrevocable trust to the Trustee before her grandfather died and [, as the Trustee did not know of the revocation,] the inheritance was distributed to that 2000 trust as opposed to her individually." The court noted plaintiff also alleged other actions by Bezman which contributed to her being deprived of her "rightful inheritance," such as his drafting of the 2005 trust and the limited partnership agreement, but that they did not appear to be the main claim.

¶ 26 The court first dismissed the breach of fiduciary duty count without leave to replead. It held the operative facts and resulting injury alleged in the breach of fiduciary duty count were the same as in the legal malpractice count and it did not know of "any set of facts that [plaintiff] could plead differently to clean up" the duplications since Bezman had been acting as her attorney throughout the entire period.

¶ 27 The court next addressed the timeliness of plaintiff's action. Plaintiff agreed with the court that the alleged malpractice occurred in September 2004, when Bezman allegedly committed the malpractice by failing to inform Asch that plaintiff had revoked the assignment of her trust proceeds and inheritance to the 2000 trust and, as a result, caused plaintiff's $18 million dollars from the 1935 trust to be deposited into her irrevocable 2000 trust where the money was outside her control. The court found the statute of repose therefore expired six years thereafter, in September 2010, more than three years before plaintiff entered into the tolling agreement with Katten.

¶ 28 Given plaintiff's assertion that the statute was tolled for five years by fraudulent

concealment, the court examined the question of when plaintiff knew of her cause of action. It found plaintiff's April 30, 2009, letter to the ARDC complaining of Bezman's conduct showed she had knowledge of her cause of action on that date and, as a result, the statute of limitations expired two years thereafter, on April 30, 2011. The effective filing date of plaintiff's complaint was October 16, 2013, more than two years after the statute of limitations expired. Noting that plaintiff disagreed that she had discovered her cause of action in April 2009, the court stated that, even if it took as true plaintiff's assertion during oral argument that she did not know she had a cause of action against Bezman/Katten until February or March 2010 when she was so informed by her new counsel, the statute of limitations would still have expired in March 2012, well before plaintiff entered into the tolling agreement in October 2013.

¶ 29 The court recognized that, under the fraudulent concealment statute, plaintiff had five years from her "knowledge date," until April 30, 2014, to file her cause of action unless, in an exception to the fraudulent concealment statute, a reasonable time remained within the statute of repose for her to file her action. It held that, assuming *arguendo* that Bezman had fraudulently concealed the cause of action from plaintiff, the evidence showed plaintiff knew of the cause of action by either April 30, 2009, (when she sent the ARDC letter) or December 31, 2009, (pursuant to the allegation in her complaint that she learned of the revocation's effect from her new counsel "in 2009") or March 2010 (when, according to her oral argument, she was informed of the effect of the 2004 transfer to the 2000 trust by new counsel). The court held plaintiff, therefore, had a reasonable amount of time, whether 16 months (ARDC letter), 9 months (complaint) or 6 months (oral argument) in which to file her action before the statute of

repose expired in September 2010.

¶ 30 Plaintiff responded that this was not a reasonable amount of time in which to discover whether she had a cause of action as the case was "a very complex and internal and exclusive process for private families and it's estate planning" and, moreover, Bezman was denying plaintiff access to information she needed. She argued that "there [was] no way a reasonable lawyer could get a case together to file a Complaint due to the nature of this case." The court disagreed and dismissed the complaint under the "reasonable time" exception to the fraudulent concealment statute. It acknowledged that dismissal of a cause of action under section 2-619 was "a drastic remedy" and stated it rarely granted a section 2-619 motion "at this stage of the game because there [are] always these questions of facts." However, in this case, based on plaintiff's letter to the ARDC, the allegations in plaintiff's complaint and the 2003 letter from Bezman, the court found "everything points to the April 30 [, 2009,] date that she knows by that date everything" and, in April 2009, she had a reasonable time left before the statute of repose "window closed in 2010" in which to file her complaint. It found no basis on which plaintiff could state a cause of action under the facts as alleged and, therefore, dismissed the complaint with prejudice and without leave to amend. Plaintiff filed a timely notice of appeal from the court's order on August 12, 2014.

¶ 31 II. ANALYSIS

¶ 32 On appeal, plaintiff argues the trial court erred in (1) applying the "reasonable time rule" to determine the complaint was time barred and determining the discovery date of her cause of action as a matter of law, (2) failing to address plaintiff's equitable estoppel argument and (3) ruling the breach of fiduciary duty count was duplicative of

the legal malpractice count.

¶ 33 A. Dismissal of Complaint as Time barred

¶ 34 The trial court granted Katten's motion to dismiss the complaint pursuant to section 2-619(a)(5) of the Code, which provides for the involuntary dismissal of an action that "was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2012). A section 2-619 motion to dismiss " 'admits the legal sufficiency of the plaintiffs' complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiffs' claim.' " *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 13 (quoting *DeLuna v. Burciaga,* 223 Ill.2d 49, 59 (2006)). It admits all well-pleaded facts and reasonable inferences therefrom and should be granted only if the plaintiff can prove no set of facts that would support a cause of action. *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8. In ruling on a section 2-619 motion to dismiss, we must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party. *Id.* We review the trial court's dismissal of the complaint pursuant to section 2-619 *de novo*. *Id.* Similarly, we review the applicability of a statute of limitation or repose to a cause of action *de novo*. *Evanston Insurance Co.,* 2014 IL 114271, ¶ 13.

¶ 35 The court dismissed plaintiff's causes of action as they were not commenced within the statutes of limitation and repose set forth in section 13-214.3 of the Code (735 ILCS 5/13-214.3 (West 1994)). It found that, even if Bezman had fraudulently concealed plaintiff's causes of action, plaintiff was not afforded five years from the date of her discovery of the actions under the fraudulent concealment statute as, at the time she discovered her causes of action, sufficient time remained to file a complaint before the expiration of the statute of repose. It is uncontested that section 13-214.3 applies to

both plaintiff's breach of fiduciary duty count and her legal malpractice count. Section 13-214.3 "encompasses a number of potential causes of action in addition to legal malpractice" and "unambiguously applies to all claims brought against an attorney arising out of actions or omissions in the performance of professional services." *Evanston Insurance Co.*, 2014 IL 114271, ¶ 23.

¶ 36 Section 13-214.3 provides, in relevant part:

> "(b) 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 or (ii) against a non-attorney employee arising out of an act or omission in the course of his or her employment by an attorney to assist the attorney in performing 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.
>
> (c) Except as provided in subsection (d), an action described in subsection (b) 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 (West 1994).

¶ 37 Section 13-214(b) is a statute of limitations and "incorporates the 'discovery rule,' which serves to toll the limitations period to the time when the plaintiff knows or reasonably should know of his or her injury." *Snyder*, 2011 IL 111052, ¶ 10. A statute of limitations provides a time limit for bringing a cause of action, with the time beginning when the cause of action has ripened or accrued. *Evanston Insurance Co.,* 2014 IL

114271, ¶ 16; *Ferguson v. McKenzie*, 202 Ill. 2d 304, 311 (2001). Under the section 13-214.3(b) statute of limitations, plaintiff had two years from the time she knew or reasonably should have known of her injury in which to file her causes of action against Katten for Bezman's breach of fiduciary duty and legal malpractice.

¶ 38 Section 13-214.3(c) is a statute of repose, which "operates to curtail the 'long tail' of liability that may result from the discovery rule." *Snyder*, 2011 IL 111052, ¶ 10. Unlike a statute of limitations, "[a] statute of repose begins to run when a specific event occurs, regardless of whether an action has accrued." *Id.* A statute of repose is not tolled by the discovery rule or tied to the existence of any injury but rather extinguishes liability after a defined period of time. *Id.*; *Evanston Insurance Co.,* 2014 IL 114271, ¶ 16. The statute of repose in section 13-214.3(c) "prohibits the commencement of an action more than six years 'after the date on which the act or omission occurred.' 735 ILCS 5/13–214.3(c) (West 1994)." *Snyder*, 2011 IL 111052, ¶ 10. Therefore, plaintiff had six years from when Bezman committed the acts or omissions on which she based her claims to file her complaint, regardless of when her causes of action accrued.

¶ 39 Plaintiff acknowledged during the hearing on Katten's motion to dismiss that the act or omission which formed the basis for her complaint was Bezman's September 2004 failure to notify Asch that plaintiff had revoked her assignment of her inheritance to the 2000 trust, as a result of which plaintiff's share of the 1935 trust was not distributed to her directly but rather was distributed into her irrevocable 2000 trust, where it was outside her control. Thus, under the statute of repose, plaintiffs' suit had to have been filed in September 2010, six years after Bezman committed the alleged misconduct in September 2004. Pursuant to the tolling agreement between the parties, plaintiff

effectively filed her complaint on October 16, 2013, more than three years after the expiration of the six-year repose period. "After the expiration of the repose period, '[t]he injured party no longer has a recognized right of action.' " *Evanston Insurance Co.,* 2014 IL 114271, ¶ 16 (quoting *Goodman v. Harbor Market, Ltd.,* 278 Ill.App.3d 684, 691 (1995)). Therefore, unless a tolling provision or exception applies to the statute of repose, plaintiff's complaint was time barred.

¶ 40 Plaintiff argued below that she adequately pled that Bezman fraudulently concealed her causes of action from her and thus her claims fell within the five-year "safe harbor" provision of section 13-215 of the Code, the Illinois fraudulent concealment statute. Section 13-215 provides:

> "If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled hereto, 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 2012).

If applicable in a particular case, section 13-215 provides an "exception" to both the section 13-214(b) statute of limitations and the section 13-214(c) statute of repose. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 67-68, 71-75 (2006). Neither a statute of limitations nor a statute of repose would be triggered if an attorney purposely concealed the discovery of his negligence. *Id*. at 73 (paraphrasing *Cunningham v. Huffman*, 154 Ill. 2d 398, 407 (1993) ("If the physician should purposely conceal the discovery of the negligence, however, neither the statute of limitations nor the statute of repose would be triggered.")).

¶ 41 However, "[b]y its terms, section 13-215 applies only to fraudulent concealment cases [where] a party is unwittingly induced not to file his action until after expiration of the limitations period." *Muskat v. Sternberg,* 211 Ill.App.3d 1052, 1061 (1991). "[C]ourts have declined to apply fraudulent concealment and equitable estoppel to toll the statute of repose in cases where 'the claimant discovers the fraudulent concealment, or should have discovered it through ordinary diligence, and a reasonable time remains within the remaining limitations period.' " *Mauer v. Rubin*, 401 Ill. App. 3d 630, 649 (2010) (quoting *Smith v. Cook County Hospital,* 164 Ill.App.3d 857, 862 (1987)). " 'If at the time the plaintiff discovers the "fraudulent concealment" a reasonable time remains within the applicable statute of limitations, [section 13-215] does not toll the running of the limitation period.' " *Morris v. Margulis*, 197 Ill. 2d 28, 38 (2001) (quoting *Anderson v. Wagner,* 79 Ill.2d 295, 322 (1979)). " 'This rule is logical because once a party discovers the fraud, it is no longer concealed, and if time remains within which to file the action, section 13-215 cannot operate to toll the limitations period.' " *Id*. (quoting *Muskat,* 211 Ill.App.3d at 1061). "Thus, where a plaintiff has been put on inquiry as to a defendant's fraudulent concealment within a reasonable time before the ending of the statute of repose, such that he should have discovered the fraud through ordinary diligence, he cannot later use fraudulent concealment as a shield in the event that he does not file suit within the statutory period." *Mauer*, 401 Ill. App. 3d at 649.

¶ 42 Assuming *arguendo* that plaintiff sufficiently alleged that Bezman fraudulently concealed her causes of action, her complaint shows she discovered the alleged fraudulent concealment in 2009. She alleged:

"Bezman concealed from [her] the effect of the revocation of her

> assignment and her rightful claim to her inherited $18 [million]. Only recently, when [she] retained independent counsel in 2009, did she discover the revocation's effect."

Giving plaintiff the benefit of doubt, we will assume she retained independent counsel and discovered the "revocation's effect" and, thus necessarily Bezman's alleged fraudulent concealment of his failure to notify Asch regarding the revocation, on the last day of 2009: December 31, 2009. Plaintiff then had the full two years under the statute of limitations and nine months remaining under the statute of repose (which expired in September 2010) to file her action.

¶ 43 Applying the "reasonable time" exception to the five-year fraudulent concealment exception, the court dismissed plaintiff's complaint as time barred, holding that, when she discovered the $18 million had gone to the 2000 irrevocable trust and was outside her control, she still had a reasonable amount of time in the repose period in which to file her complaint. The court determined plaintiff's April 2009 letter to the ARDC showed she knew then of her injury and Bezman's possible fraudulent concealment, which gave her 17 months in which to file her complaint before the statute of repose expired in September 2010. It also determined that, even if plaintiff did not learn of Bezman's silence regarding the revocation and possible fraudulent concealment until she retained new counsel in 2009 as she alleged in her complaint, she then still had nine months in which to file her complaint before the statute of repose expired. The court stated even nine months remaining in the statute of repose was a reasonable amount of time in which to file her complaint.

¶ 44 During the hearing on the motion to dismiss, plaintiff had asserted that, although

she retained new counsel in 2009, she did not discover "the initial injury that caused that money to flow to her irrevocable trust rather than to her directly" until "February or March 2010." She claimed her new counsel did not discover until February or March 2010 that there was "a revocation issue." Even taking plaintiff's unsupported verbal assertion regarding when she discovered her causes of action as true, she then discovered her causes of action at the latest in March 2010 and had six months, until September 2010, in which to file her complaint before the statute of repose expired. Although the trial court did not use the March 2010 date as plaintiff's "discovery" date, it did note in that regard that courts had held even a six month period to be a reasonable amount of time in which to file an action.

¶ 45 Plaintiff argues the court erred in applying the reasonable time rule as (1) our supreme court rejected the rule, (2) the determination of "reasonable time" cannot be decided as a matter of law, (3) the determination of the date on which plaintiff discovered her cause of action cannot be determined as a matter of law and (4) insufficient time remained in the repose period for plaintiff to bring suit.

¶ 46 1. Rejection of the Reasonable Time Rule

¶ 47 Plaintiff first argues the trial court erred in applying the "reasonable time" rule, asserting our supreme court expressly rejected the rule in *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72 (1995). In *Hermitage Corp.*, the court "decline[d] to adopt the 'reasonable time' rule" in applying the discovery rule to a statute of limitations as "[o]therwise, the amount of time within which an injured party could sue would depend on the fortuity of the date of discovery" and "adopting a 'reasonable time' rule would lead to a lack of certainty and increased litigation concerning what

constitutes a reasonable time to file suit." *Hermitage Corp.*, 166 Ill. 2d at 83-84. Noting that the case did not "involve a fraudulent concealment issue that might extend the statute of limitations," the court specifically declined to address its earlier decision in *Anderson v. Wagner*, 79 Ill.2d 295 (1979), in which it had applied the reasonable time rule in a case involving fraudulent concealment.[5] *Id*. at 83. Nevertheless, plaintiff argues *Hermitage Corp*. should be applied here as, if the supreme court declined to wield the reasonable time rule against the plaintiff in a straightforward action where no fraud is alleged, "surely it should not be wielded against plaintiffs encountering a repose window and fraudulent concealment."

¶ 48 Plaintiff's argument is forfeit. As Katten points out, plaintiff did not raise her argument that the reasonable time rule should not be applied in fraudulent concealment cases to the trial court. Although Katten had argued below that the reasonable time rule defeated plaintiff's fraudulent concealment argument, plaintiff did not address this argument. Instead, during the hearing on Katten's motion to dismiss, she agreed with the trial court that the statutes of limitations and repose had run on her actions and concurred with the court's statement that "all we have left is whether the statute of repose is tolled by Victor Bezman's alleged fraudulent concealment." Plaintiff's counsel told the court:

> "I think we are on the same page so far. Really, Judge, I would agree. I think we are coming down, we are narrowing it to that reasonable amount of time, whether she had [a] reasonable amount of time left in that repose

[5] "If at the time the plaintiff discovers the 'fraudulent concealment' a reasonable time remains within the applicable statute of limitations, section 22 of the Limitations Act [now section 13-215 of the Code] does not toll the running of the limitation period." *Anderson*, 79 Ill. 2d at 322.

window to gather the facts to file a valid complaint in the Circuit Court."

Plaintiff then went on to argue that the time remaining under the statute of repose after her discovery of the fraudulent concealment was not a "reasonable" amount of time in which to file her complaint given the complexity of her action. At no point did she argue that the reasonable time rule should not be applied in a case alleging fraudulent concealment. "An appellant who fails to raise an issue in the circuit court forfeits that issue on appeal." *Olson v. Williams All Seasons Co.*, 2012 IL App (2d) 110818, ¶ 41. Accordingly, plaintiff has forfeited her argument that the reasonable time rule should not be applied in fraudulent concealment cases.

¶ 49 Further, even were we to consider plaintiff's argument, we would find it unpersuasive as (a) we are applying the reasonable time rule to a repose provision and not to a statute of limitations incorporating the discovery rule (section 13-214(b)), (b) *Hermitage Corp*. specifically declined to address the application of the rule to fraudulent concealment and (3) in a subsequent case, *Morris v. Margulis*, 197 Ill. 2d 28 (2001), our supreme court applied the principle in a fraudulent concealment case, thus demonstrating that it had not rejected the reasonable time rule in fraudulent concealment cases . The trial court did not err in applying the reasonable time rule.

¶ 50 2. Determination of Reasonable Time as a Matter of law

¶ 51 Citing only to *Leffler v. Emgler, Zoghlin & Mann*, 157 Ill.App.3d 718 (1987), plaintiff argues the reasonable time rule involves questions of fact that cannot be determined as matter of law and the trial court therefore erred in determining that a reasonable amount of time remained in the repose period as a matter of law. In *Leffler*, the court considered the question of whether 17 months was a reasonable amount of

time during which the plaintiff could have filed his cause of action. The court held this was a question of fact for the trial court's determination and, finding no evidence in the record to show that the trial court addressed the issue, remanded to the trial court for a hearing to determine whether 17 months was a reasonable amount of time during which plaintiff may have filed his cause of action. *Lefler*, 157 Ill.App.3d at 722. Plaintiff argues that, as the parties disagreed regarding what a reasonable amount of time would be for the filing of plaintiff's action and she had made a jury demand in the case, the trial court should have left it for the jury to decide whether a reasonable time remained in the repose period for plaintiff to bring her complaint.

¶ 52 *Leffler* does not stand for the proposition that the "reasonable time" question cannot be decided as matter of law. The *Lefler* court remanded the "reasonable time" question to the trial court because the trial court had not considered the question, not because the question cannot be decided as a matter of law. Here the court did consider the question, finding as a matter of law that a reasonable time remained for plaintiff to file her action and, as a result, the fraudulent concealment exception did not save plaintiff's untimely complaint. Many cases after *Lefler* have decided the question of "reasonable time" as a matter of law, granting section 2-619 motions to dismiss on the ground that the fraudulent concealment statute did not apply since a reasonable time remained to file a cause of action. See *e.g.*, *Kheirkhahvash v. Baniassadi*, 407 Ill. App. 3d 171, 183 (2011); *Mauer v. Rubin*, 401 Ill. App. 3d 630, (2010); *Turner v. Nama*, 294 Ill. App. 3d 19, 28 (1997); see also *Smith v. Cook County Hospital*, 164 Ill.App.3d 857, 863 (1987) (on motion for summary judgment). The court did not err in determining, as a matter of law, that a reasonable time remained for plaintiff to file her action.

¶ 53 3. Determination of Discovery Date as a Matter of Law

¶ 54 Plaintiff also argues the trial court erred "when it entertained several different 'discovery dates' as a matter of law and eventually fixed plaintiff's discovery of her causes of action to one such date as a matter of law." Plaintiff argues that it was for the trier of fact rather than the trial court to determine the date on which she discovered her causes of action. " 'The question of when a party knew or reasonably should have known both of an injury and its wrongful cause is one of fact, unless the facts are undisputed and only one conclusion may be drawn from them.' *" Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 21 (quoting *Nolan v. Johns–Manville Asbestos,* 85 Ill.2d 161, 171 (1981)).

¶ 55 Plaintiff's assertion that a question of fact exists regarding when she discovered her causes of action is belied by her complaint. In the complaint, plaintiff specifically alleged that she discovered "the revocation's effect" when she retained new counsel in 2009. The "revocation's effect" is her injury, the $14 million injury she alleged she suffered when Bezman failed to communicate her revocation to Asch and, as a result, Asch distributed her $18 million inheritance to the irrevocable 2000 trust rather than to her directly.[6] This is the injury on which plaintiff based both of her causes of action and, when she discovered it, she was on notice that it might have been wrongfully caused and Bezman might have had fraudulently concealed his misconduct from her. Taking the well pled facts in plaintiff's complaint as true, there is, therefore, only one conclusion to be drawn from plaintiff's allegation: she discovered her injury *at the latest* in 2009

[6] Plaintiff told the trial court during the hearing on Katten's motion to dismiss: "I would contend the malpractice occurs when [the $18 million from the 1935 trust] initially goes into the first irrevocable trust to begin with."

and, at that time, was put on inquiry that it might have been wrongfully caused and Bezman fraudulently concealed her cause of action from her. There being only one possible conclusion from plaintiff's allegations, plaintiff's discovery date can be determined as a matter of law and, under the most generous interpretation of her complaint, set as occurring on December 31, 2009.

¶ 56 Plaintiff is correct that there was some question below regarding exactly when she knew of her injury, but all of these other discovery dates would have been even earlier than December 31, 2009. For example, plaintiff arguably was put on notice of her injury in September 2004, when she executed the RRR agreement in which she agreed that Asch would distribute her share of the 1935 trust proceeds to her 2000 irrevocable trust under the terms of her 2000 assignment or when the funds were actually transferred into the 2000 trust.[7] Further, plaintiff's April 30, 2009, letter to the ARDC arguably shows, as the trial court found, that plaintiff already knew of her injury on that date and that Bezman might have hidden it from her. However, these earlier dates are irrelevant here as, if plaintiff had discovered her cause of action earlier than December 31, 2009, she then would have had even more time in which to file her complaint and the court would have been even more likely to find that reasonable time remained in which to file her action. The complaint contained no allegation that plaintiff discovered her injury and the fraudulent concealment any later than when she retained her new

[7] Plaintiff clearly knew from the terms of the RRR agreement that Asch was unaware of the revocation and that her share of the 1935 would go to her irrevocable 2000 trust. She also already knew from the 2003 letter she received from Bezman that the funds in the irrevocable 2000 trust were beyond her control. Therefore, even if Bezman did not inform plaintiff that he had not notified Asch regarding the revocation and that her share of the 1935 trust would be deposited beyond her control into her 2000 trust, plaintiff's complaint arguably shows she already should have known this as early as September 2004 when she signed the RRR agreement.

counsel in 2009. Therefore, as the trial court noted in granting Katten's motion to dismiss the complaint, there was no set of facts plaintiff could plead to save her action, *i.e.*, to show she discovered the fraudulent concealment any later than December 31, 2009, when a reasonable nine months remained to file her action before the expiration of the statute of repose. Accordingly, the court did not err in determining plaintiff's discovery date as a matter of law.

¶ 57 4. Reasonable Time Remaining

¶ 58 Plaintiff next argues that the amount of time remaining in the repose period was insufficient for bringing her action given the complexity and private nature of the estate planning and the fact that Bezman, the only source of the information she needed, had yet to provide her with her client file and had instructed "all essential parties involved (his other clients)" to delete plaintiff's emails without reading them. Nine months remained in the statute of repose when plaintiff's counsel informed her of the revocation's effect, of Bezman's failure to communicate the revocation to Asch given that Asch distributed the $18 million into the 2000 trust rather than to plaintiff directly. At that time, plaintiff, through the exercise of ordinary diligence, discovered or should have discovered Bezman's alleged fraudulent concealment of his omission and her causes of action. Nine months is a reasonable time, as a matter of law, in which to investigate the matter, determine whether there was any wrongdoing and file a complaint. See *e.g.*, *Turner*, 294 Ill.App. 3d at 28 (eight months is "ample time" to bring suit as a matter of law); *Sabath v. Mansfield*, 60 Ill. App. 3d 1008, 1015 (1978) ("eight months in which to file suit after any inducement for delay had passed ***, as a matter of law, was ample time"); *Smith*, 164 Ill.App.3d at 864 ("six months was a reasonable time within which

[the plaintiff] could have filed his complaint after the alleged fraud was discovered").

¶ 59 Plaintiff argues her suit was so complex and Bezman so obstructive in providing her access to the information that she needed to investigate the matter that nine months was insufficient time in which to prepare her action. However, plaintiff's complaint and her April 2009 letter to the ARDC show she was already aware in 2009 of Bezman's alleged conflicts of interest and that he had not told Asch regarding her revocation of the assignment. She already knew in 2009 that, as a result of Bezman's alleged omission, her $18 million distribution from the 1935 trust had been placed beyond her control into the 2000 trust and from there into various other estate planning devices. Plaintiff knew from her new trustee Deutsche Bank that only $4 million remained in her trust and she also knew that Bezman had not told her of his omission and the resulting distribution to her 2000 trust. Plaintiff might not have known the minutia of Bezman's actions but she knew enough or could with ordinary diligence have discovered enough to determine whether she had a cause of action against Bezman and/or Katten. As plaintiff should have discovered the fraudulent concealment through ordinary diligence and nine months is a reasonable amount of time in which to file her suit within the repose period, the fraudulent concealment exception does not apply to save plaintiff's action. The court did not err in dismissing plaintiff's complaint as time barred on this basis.

¶ 60 B. Equitable Estoppel Argument

¶ 61 Plaintiff argues the trial court erred "when it failed to consider, denied or otherwise ignored" her equitable estoppel argument. As with the fraudulent concealment exception, the doctrine of equitable estoppel will not apply to a case if the defendant's conduct terminated within ample time to allow the plaintiff an opportunity to file a cause

of action within the limitation period. *Barratt v. Goldberg*, 296 Ill.App.3d 252, 259 (1998). Here, Bezman's alleged misconduct necessarily terminated, at the latest, in 2009, when, according to plaintiff's complaint, she retained new counsel and learned of her injury, "the revocation's effect." As held above, assuming plaintiff learned from her new counsel of her injury on December 31, 2009, she then had ample time, nine months, in which to file her cause of action before the expiration of the statute of repose. Accordingly, as Bezman's alleged misconduct terminated with ample time for plaintiff to file her cause of action within the repose period, the doctrine of equitable estoppel does not apply. The trial court did not err in declining to address her equitable estoppel argument.

¶ 62 In sum, as the fraudulent concealment exception and the doctrine of equitable estoppels do not apply to plaintiff's action, her breach of fiduciary duty and legal malpractice counts were time barred. The trial court's order dismissing plaintiff's complaint on this basis is affirmed.

¶ 63 C. Dismissal of Breach of Fiduciary Duty Count

¶ 64 Plaintiff lastly argues that the trial court erred in dismissing her breach of fiduciary duty count as duplicative of her legal malpractice count. Given our determination that the trial court properly dismissed the entire complaint as time barred, we need not address this argument.

¶ 65 III. CONCLUSION

¶ 66 For the reasons stated above, we affirm the decision of the trial court dismissing plaintiff's complaint with prejudice.

¶ 67 Affirmed.