2017 IL App (1st) 171014-U

FOURTH DIVISION
May 24, 2018

No. 1-17-1014

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JUDY DEVITO, Plaintiff-Appellant, v. JANICE MUZYNSKI, as Representative of the Estate of Bernard Muzynski, D.D.S., Deceased, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County 15-L-05964 Honorable William E. Gomolinski, Judge Presiding

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Burke and Justice Ellis concurred in the judgment.

O R D E R

Held: Fraud claim arising out of dental care was properly dismissed because of two-year statute of limitations and four-year statute of repose and because patient failed to indicate dentist prevented timely discovery of a claim or lulled or induced patient to delay filing a claim until after statute of limitations had expired.

¶ 1 Judith M. DeVito sued Palos Heights, Illinois prosthodontist Bernard L. Muzynski, D.D.S., M.S., in 2015 concerning extensive restorative dental work he performed between 2009 and 2013. Muzynski moved to dismiss the fraud claim set out in DeVito's first amended complaint on grounds that the two-year statute of limitations and the four-year statute of repose for injury claims against medical professionals lapsed well before she filed suit. See 735 ILCS

5/13-212 (West 2014). The trial court granted Muzynski's section 2-615 motion. 735 ILCS 5/2-619(a)(5) (West 2014). On appeal, DeVito contends the limitations period was extended on March 8, 2016, when another dentist removed some of the defective implanted bridgework and informed her that Muzynski used chromium-cobalt alloy instead of the gold that he said he would use and for which he subsequently charged her and was paid. Shortly after DeVito filed this appeal, Muzynski died on April 27, 2017, and his wife Janice Muzynski, in her capacity as the executor of his estate, substituted as a party. Muzynski responds that the fraud claim was pled more than six years after the alleged representations that induced DeVito to undergo treatment and that DeVito did not allege or establish any affirmative acts or representations which were designed to and did prevent her from discovering her claim, so as to invoke the fraudulent concealment exception to the statute.

¶ 2 DeVito filed her original complaint on June 11, 2015, seeking damages for Muzynski's professional negligence, or alternatively, breach of a contact in connection with his restorative dental work. Chicago dentist Thomas G. Manos, D.D.S. was a concurrently treating dentist whom DeVito sued in a separate action. Manos's treatment plan dated April 8, 2009, proposed that he surgically restore DeVito's facial bones and remove tooth 5 through tooth 11 (DeVito's seven front upper teeth), and subsequently place implants at tooth 5 through tooth 11, in preparation for Muzynski to provide a fixed implant bridge. The record indicates that DeVito completed Muzynski's new patient form on March 23, 2009, when she was 65 years old and that she had a series of appointments with Muzynski between April 2009 and June 2013. DeVito's lawyer attached an affidavit indicating the complaint against Muzynski was being filed close to the expiration of a statute of limitations, and that the pleading would soon be supplemented with the statutorily-required affidavit indicating the lawyer consulted with and obtained a written

report from a dental health professional confirming that DeVito had a reasonable and meritorious cause. See 735 ILCS 5/2-622(1), (2) (West 2014) (requiring attorney affidavit and health practitioner report, and authorizing a 90-day extension when obtaining the report would cause the plaintiff to miss the filing deadline). DeVito consulted with that professional, the parties conducted discovery, and Muzynski filed a motion to dismiss her breach of contract count. The motion was not heard as DeVito withdrew her original pleading and filed her first amended complaint on April 29, 2016. This is the version on appeal.

¶ 3 In her first amended pleading, DeVito indicated that she had extensive restorative dental work before becoming Muzynski's patient, and that he presented a written treatment plan on April 14, 2009 in which he would replace the multiple bridges she had on her upper row of teeth with a single bridge spanning tooth 3 through tooth 14, that is, replacing all but the upper back four teeth with a single bridge. In addition, Muzynski "explained" that the upper bridge would consist of pontics (artificial teeth) and abutments made of porcelain fused to gold, as this combination of materials would be "the most aesthetically comparable to [her] existing teeth" and would provide "additional stability." During this April 2009 appointment, DeVito anticipated future dental work and asked that the bridge be removable, and Muzynski agreed. Muzynski presented a second written treatment plan dated May 10, 2010 which again referred to porcelain-over-gold pontics and abutments. An oral prosthetics lab fabricated DeVito's bridge and shipped it to Muzynski on June 3, 2010 with paperwork indicating the materials were non-precious, that is, did not include gold. When Muzynski placed the bridge in DeVito's mouth on June 21, 2010, he again represented that the bridge was removable because it was attached by multiple screws. Instead, Muzynski permanently cemented the new bridge into place, and it proved to be ill-fitting to the extent that it was painful and allowed food debris to accumulate in

DeVito's mouth. DeVito made similar allegations about the replacement bridges Muzynski placed in the lower right and lower left quadrants of her mouth (teeth 27 to 31, and teeth 18 to 21), and alleged that the veneers he applied to her lower four front teeth (teeth 22 through 26) were also a poor fit. DeVito further alleged that on multiple visits in 2010, 2011, 2012, and 2013, she complained about the poor fit and debris accumulation, but Muzynski would either say that she was experiencing normal complications or that her bite would adjust over time, and also cautioned that removing the dental work would cause considerable damage. When DeVito asked on June 13, 2013 to nevertheless remove the upper bridge, Muzynski informed her for the first time that it was permanently cemented and that its removal would seriously damage "the surrounding structures." On March 8, 2016 (well after she ended treatment with Muzynski and about seven weeks before she amended her complaint), DeVito had a portion of the lower right bridge removed, it was x-rayed, and she was informed that neither it nor any of Muzynski's other bridgework contained gold, and that the prosthetics were actually made of considerably cheaper base metals. In Count I of her pleading, which was entitled "Negligence," DeVito sought damages due to Muzynski's failure to conform to accepted standards of dentistry and exercise due care. In Count II, which she entitled "Fraud," DeVito sought damages due to Muzynski's numerous misrepresentations of material facts, withholding of material facts, and overbilling, upon which she had relied to her detriment. DeVito specified that the misrepresentations included, among other things, stating that the upper bridge would be removable and that the pontics and abutments would be gold-over-porcelain.

¶ 4 Muzynski denied the material allegations and moved to dismiss the fraud count on grounds that this type of claim was time-barred by the statute of limitations and statute of repose set out in section 13-212 of the Code (735 ILCS 5/13-212 (West 2014)), and that the allegations

were also factually insufficient to state a claim. The motion was based in part on DeVito's consultation with Chicago dentist Allen J. Moses, D.D.S., who documented her concerns and his findings in a letter dated February 8, 2011. Moses concluded in his 2011 letter:

> "[Y]our complaints are reasonable and they should be correctable. In your present circumstance, however, it will be extremely difficult. Your bridgework is not recoverable. Everything appears to be cemented. This means it probably needs to be cut off to avoid trauma to the implants and abutments. It appears to mean not only starting over from scratch but removal of what has been done, new temporization, additional treatment to establish the correct bite and reevaluation of the long term efficacy of your implants."

¶ 5 During DeVito's deposition on September 19, 2013 in her suit against co-treater Manos, DeVito acknowledged receiving Moses's letter. Thus, DeVito acknowledged that on or about February 8, 2011, which was many years before she filed the first amended complaint adding the fraud count on April 29, 2016, and even before she first filed suit on June 11, 2015, she knew the bridgework was not removable. Moreover, the allegations that Muzynski committed fraud by using nonprecious metal was brought more than four years after the upper bridge was placed on June 21, 2010, the lower right bridge was placed on July 29, 2010, and the lower left bridge was placed on October 7, 2010. Accordingly, in September 2016, the trial court granted Muzynski's motion to dismiss the fraud count.

¶ 6 Muzynski then filed a separate motion to dismiss the negligence count, and again argued that the allegations were time barred. Muzynski now had the benefit of journal entries that DeVito made after each dental appointment. According to her journal, DeVito called Moses's office after receiving his letter in February 2011, and spoke with one of his staff members,

Gloria, who told DeVito that she should find a personal injury attorney because the letter confirmed that she had "damages." Additional entries that were written more than two years before DeVito filed suit indicated she was aware of injuries caused by the three bridges, such as an improper bite and lisping, and that Muzynski told her he was not going to remove the upper bridge as she requested. DeVito also journaled more than two years before filing suit that she knew immediately that the veneers on her front teeth were placed too high and were the wrong color. Her journal entry for April 2, 2013 indicated she asked Muzynski's office to send copies of her records to her attorney because she was contemplating filing this lawsuit, but she did not file the lawsuit until June 11, 2015. At her deposition, DeVito said she "knew right away" in June 2010 when he inserted the upper bridge that what he did caused "horrific ear problems" and rendered her unable to lift her head in the morning because he had "shoved" or "pushed" her jaw. With regard to her tongue and speech issues, DeVito said at her deposition that when Muzynski recemented her lower left bridge on March 26, 2012, that there was no longer enough room for her tongue, it then stuck out "all the time," and she was accidentally biting it. Muzynski argued that the Moses letter and DeVito's journal entries and deposition testimony showed that she knew for more than two years before filing suit that she was experiencing wrongfully caused injuries. After oral arguments, the trial court granted Muzynski's motion on March 17, 2017, and specified in a written order, "Plaintiff's case against Dr. Muzynski is dismissed with prejudice." During the hearing, the trial court said the "Moses consult" and DeVito's journal and deposition testimony indicated "absolutely positively" that DeVito knew of her injuries before the two-year statute of limitations passed. The court complimented DeVito's attorney for having "done a yeoman's job trying to protect [his] client's interests," but then said "facts are facts."

¶ 7 On appeal from the fraud count only, DeVito focuses on her allegations that she first learned on March 8, 2016, that her bridgework did not contain gold as Muzynski had represented. She points out that nothing in the deposition transcript or elsewhere in the record indicates she had prior knowledge of the true contents of her dental prosthetics. She contends that there is no way that she, as a layperson, could have possibly discovered on her own that Muzynski deceived and overbilled her for precious metal, and that she was duly diligent in learning these facts. She contends the base composition of her implants is material, as it is a "cause of her prolonged pain and suffering and disfigurement." We note that DeVito's fraud count does not concern physical pain and suffering and disfigurement and alleges only that DeVito experienced "serious pecuniary harm" because Muzynski used base metals instead of the gold she paid for and that which Muzynski advised "would be the most aesthetically comparable to [her] existing teeth and would also provide the additional stability." DeVito cites *DeLuna v. Burciaga*, 223 Ill. 2d 49, 71, N.E.2d 229, 242 (2006), for the proposition that it would be "an obvious and gross injustice" for Muzynski to benefit from the statute of repose. She concludes that her actual discovery of Muzynski's fraudulent concealment was timely and that she did not sleep on her rights, which first accrued on March 8, 2016, when another dental practitioner discovered the true contents of the bridgework. She contends the factual allegations that make up her first amended complaint clearly show she made a recent but timely discovery of Muzynski's lie about the gold, but the trial court "completely ignored" these allegations. DeVito also contends that the trial court made a "summary, terse, cursory ruling[]" and "offered no meaningful guidance in its summary oral and written ruling/final judgment how it arrived at its decision, other than the inapposite remark that Mrs. DeVito's counsel did his best." DeVito asks us to reverse the dismissal order and remand her cause for a trial.

¶ 8 Muzynski responds that the dentist's silence does not qualify as an affirmative act or representation within the meaning of section 13-212 that was calculated to lull or induce DeVito into delaying the filing of her claim or to prevent her from discovering her claim. Muzynski relies on *Orlak* and *Smith* to support this argument that DeVito did not plead fraudulent concealment of an actionable wrong. *Orlak v. Loyola University Health System*, 228 Ill. 2d 1, 8, 885 N.E.2d 999, 1003-04 (2007); and *Smith v. Cook County Hospital*, 164 Ill. App. 3d 857, 862, 518 N.E.2d 336, 340 (1987). Citing *Hanks v. Cotler*, 2011 IL App (1st) 101088, 959 N.E.2d 728, Muzynski also contends that the defendant's activity must conceal the entire cause of action, not just the extent or nature of the plaintiff's injuries, in order to qualify as fraudulent concealment. Muzynski concludes that DeVito did not show that Muzynski took affirmative actions or made representations that were designed to and were successful in preventing her from filing suit until the action was time-barred by the statute. Accordingly, Muzynski asks us to affirm the trial court's dismissal of the fraud claim as untimely filed.

¶ 9 Section 2-619(a)(5) provides for the involuntary dismissal of an action on the basis that it was not filed within a statute of limitations period. *Bloom v. Braun*, 317 Ill. App. 3d 720, 725, 739 N.E.2d 925, 928 (2000); 735 ILCS 5/2-619(a)(5) (West 2014). An involuntary dismissal pursuant to section 2-619(a) is reviewed *de novo*. *Bloom*, 317 Ill. App. 3d at 925, 739 N.E.2d at 928. We look to whether a genuine issue of material fact precluded dismissal, or whether, absent an issue of fact, the dismissal was proper as a matter of law. *Bloom*, 317 Ill. App. 3d at 725, 739 N.E.2d at 928.

¶ 10 Section 13-212 of the Code of Civil Procedure sets out the applicable limitations period and provides in pertinent part:

> "(a) Except as provided in Section 13-215 of this Act, no action for damages for

> injury or death against any physician, dentist, registered nurse or hospital duly licensed under the laws of this State, whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever of such date occurs first, but in no event shall such action be brought more than 4 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death." 735 ILCS 5/13-212 (West 2014).

¶ 11 Thus, according to the statute, a suit arising out of patient care must be filed within two years after the plaintiff became aware or should have become aware of the provider's harmful action or inaction, but regardless of when the harm was discovered, the opportunity to file suit closes four years after the injurious conduct. Although both the two-year and four-year time limits are commonly called a statute of limitations, it is more accurate to state that the two year period is a statute of limitations and the four year outer limit is a statute of repose. *DeLuna*, 223 Ill. 2d at 61, 857 N.E.2d at 237 (distinguishing between a statute of limitations and a statute of repose). A statute of repose ends the possibility of liability after a defined period of time regardless of a potential plaintiff's lack of knowledge and curtails the long exposure to claims that was brought about by the discovery rule. *Cunningham v. Huffman*, 154 Ill. 2d 398, 406, 609 N.E.2d 321, 325 (1993). The General Assembly added the repose language in response to a perceived crisis in the cost and availability of medical malpractice insurance. *Orlak*, 228 Ill. 2d 1, 885 N.E.2d 999 (2007).

¶ 12 Section 13-215 provides an exception to the statute of limitations on actions arising from patient care and states: "Fraudulent concealment. 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 2014). Generally, fraudulent concealment consists of " 'affirmative acts or representations which are calculated to lull or induce a claimant into delaying filing of his claim or to prevent a claimant from discovering his claim' " until after the limitations period has run. *Wisniewski v. Diocese of Bellville*, 406 Ill. App. 3d 1119, 1154, 943 N.E.2d 43, 73 (2011); *Bloom*, 317 Ill. App. 3d at 726, 739 N.E.2d at 929 (same); *Waters v. Reingold*, 278 Ill. App. 3d 647, 660, 663 N.E.2d 126, 136 (1996) (fraudulent concealment consists of "affirmative action intended to exclude suspicion, prevent inquiry or induce Plaintiff to delay filing the claim"). " 'A plaintiff must plead and prove that the defendant made misrepresentations or performed acts which were known to be false, with the intent to deceive the plaintiff, and upon which the plaintiff detrimentally relied.' " *Wisniewski*, 406 Ill. App. 3d at 1154, 943 N.E.2d 43 (quoting *Orlak*, 228 Ill.2d at 18, 885 N.E.2d 999 at 1010). Therefore, mere silence on the part of the defendant and failure by the plaintiff to discover a cause of action is not enough to establish fraudulent concealment. *Wisniewski*, 406 Ill. App. 3d at 1154, 943 N.E.2d at 73. Furthermore, the statements or omissions must tend to conceal the cause of action, not just the injuries. *Bloom*, 317 Ill. App. 3d at 728, 739 N.E.2d at 925.

¶ 13 These concepts are illustrated by *Hauk*, in which the plaintiff, Catherine Hauk, was involved in a car accident in western Illinois, near Canton, and taken to a hospital emergency room complaining of severe lower back pain and pain in her right hip. *Hauk v. Reyes*, 246 Ill.

App. 3d 187, 188, 616 N.E.2d 358, 358 (1993). Her attending physician ordered x-rays of Hauk's chest, lumbosacral spine, and pelvis, and the films were interpreted by Dr. Jesse Reyes, who diagnosed a stable compression fracture of the spine and nondisplaced fractures of four ribs. *Hauk*, 246 Ill. App. 3d at 189, 616 N.E.2d at 359. Based on the diagnosis that was relayed to the attending physician and a consulting orthopedist, Hauk was given pain medication, put on bed rest with a gradual increase in activity, and permitted to use the bathroom with assistance. *Hauk*, 246 Ill. App. 3d at 189, 616 N.E.2d at 359. Within a day, Hauk was experiencing numbness from her hips and downward, and a consulting neurologist ordered an immediate CT scan which revealed that Hauk had experienced a comminuted, bursting fracture of her first lumbar vertebra, which should have been treated by immobilizing her and immediately undertaking surgery. *Hauk*, 246 Ill. App. 3d at 189, 616 N.E.2d at 359. Hauk underwent the surgery, but it was unsuccessful, and she permanently lost the use of all four limbs. *Hauk*, 246 Ill. App. 3d at 189, 616 N.E.2d at 359.

¶ 14 Reyes then altered the hospital records, so that the records produced to Hauk's attorney indicated that Reyes had made a correct and timely diagnosis of the fracture and recommended a CT scan or tomograms for further evaluation. *Hauk*, 246 Ill. App. 3d at 189, 616 N.E.2d at 359. A corroborating handwritten notation also appeared on the outside of Hauk's x-ray folder: "Attending physician notified about suspected Fx of L1 & CT scan suggested." *Hauk*, 246 Ill. App. 3d at 189, 616 N.E.2d at 359.

¶ 15 Thus, anyone reading the medical records would come to the conclusion that Reyes was not at fault and that Hauk's quadriplegia was caused by the failure of the attending physician and consulting orthopedist to follow through on Reyes's accurate diagnosis and suggested CT scan. *Hauk*, 246 Ill. App. 3d at 189, 616 N.E.2d at 359. Hauk filed a medical malpractice suit against

the attending physician and consulting orthopedist. *Hauk*, 246 Ill. App. 3d at 189-90, 616 N.E.2d at 359. Reyes's deception came to light during discovery, when the technician who took Hauk's x-rays and discussed them with Reyes stated that Reyes's preliminary, handwritten notes documented no serious problem, that Reyes revised his diagnosis the next day, and that Reyes must have prepared a second version of his initial report and backdated it. *Hauk*, 246 Ill. App. 3d at 190, 616 N.E.2d at 359. Other hospital staff corroborated the x-ray technician's account. *Hauk*, 246 Ill. App. 3d at 190, 616 N.E.2d at 359. Hauk then filed an amended complaint which included Reyes as a defendant. *Hauk*, 246 Ill. App. 3d at 191, 616 N.E.2d at 360. Hauk sought compensation for Reyes' negligent diagnosis and alleged that Reyes backdated his revised report and destroyed his preliminary notes so as to fraudulently conceal Hauk's cause of action against him for negligent diagnosis. *Hauk*, 246 Ill. App. 3d at 191, 616 N.E.2d at 360. The trial court found, however, that Hauk had not been diligent in discovering that Reyes concealed his negligent diagnosis, that she was not entitled to invoke the five-year exception to the statute of limitations, and that Reyes was entitled to summary judgment. *Hauk*, 246 Ill. App. 3d at 191, 616 N.E.2d at 360. The appellate court determined Hauk was reasonably diligent in pursuing discovery, found there was a fact dispute as to whether Reyes's x-ray interpretation report was intentionally backdated, vacated the summary judgment, and remanded for a trial as to whether Reyes engaged in conduct which extended the limitations period. *Hauk*, 246 Ill. App. 3d at 191, 616 N.E.2d at 360.

¶ 16 There are no comparable circumstances here. Muzynski did not alter his treatment records to indicate that he and DeVito discussed base metal pontics instead of gold pontics. Muzynski did not alter the shipping documents from the oral prosthetics lab to indicate he thought he received and thus implanted what he believed to be gold pontics. Muzynski did not

change his billing records to reflect that he invoiced DeVito for pontics made of the lower-priced metal yet she inexplicably paid him for the higher-priced metal. These would be affirmative actions intended to exclude himself from suspicion of fraud, and indicate that DeVito overpaid because someone other than Muzynski was negligent during the ordering, production, or delivery of base metal pontics and the payment for precious metal pontics. There is nothing to suggest that Muzynski made any attempt to revise or backdate any records so as to fraudulently conceal his prior fraud about the contents of the pontics, and thus conceal that DeVito had a cause of action against him for fraud regarding the contents of the pontics. DeVito has not produced any evidence to establish that Muzynski acted with the intention of concealing his prior deceptive action.

¶ 17 DeVito argues that "the fraud which she alleges that dentist committed upon her was a fraudulent concealment by him." Thus, by DeVito's circular reasoning, the fraudulent concealment exception would apply to every fraud claim and would always extend the statute of limitations. We do not find this reasoning persuasive. Moreover, previous courts have rejected this argument and held that fraudulent misrepresentations which formed the basis of a cause of action did not also constitute a fraudulent concealment of that action, and that the plaintiff must allege specific acts or representations which tend to conceal the action. See e.g., *Keithley v. Mutual Life Insurance Co. of New York*, 271 Ill. 584, 591-95, 111 N.E. 503, 505-07 (1916) (where plaintiff alleged fraudulent statements induced her to purchase life insurance, her repetition of the fraud allegations did not invoke the fraudulent concealment exception to statute of limitations) (citing *Bates v. Preble*, 151 U.S. 149, 38 L.Ed. 106, 14 S. Ct. 277 (1894) (evidence of a conspiracy to obtain bonds that plaintiff kept in a safe deposit box to which her son had a key was not also evidence of fraudulent concealment; plaintiff needed evidence that

alleged conspirators also said or did something before or after the securities came into their hands to conceal the transaction from the plaintiff)); *Felix v. Patrick*, 145 U.S. 317, 46 L.Ed. 719, 12 S. Ct. 862 (1892) (where plaintiff failed to set out facts showing defendant prevented her from learning of his fraud, court was " 'left to infer that his concealment was that of mere silence, which is not enough [to constitute fraudulent concealment of an actionable wrong]' "). We do not find the fraudulent concealment exception to have any relevance to this suit. DeVito has not shown that a genuine issue of material fact precluded the dismissal of her fraud count as untimely.

¶ 18 Moreover, DeVito has unfairly contended that the trial court "ignored" clearly-pled facts, failed to explain the rationale for the ruling, and offered little more than a commiserating remark that counsel did his best for his client. In fact, the record we summarized above discloses the trial court was well-versed in the parties' arguments and the law, engaged in thoughtful and appropriate analysis at the hearing, and adequately explained the basis for the court's ruling before entering the written dismissal order. Thus, DeVito's inflammatory description of the trial court proceedings is unwarranted.

¶ 19 After considering the record and arguments, we conclude that the ruling was proper and supported by the law. Accordingly, we reject DeVito's appeal and affirm the trial court's ruling in favor of Muzynski.

¶ 20 Affirmed.