IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, LAW DIVISION

PAUL R. DULBERG, INDIVIDUALLY AND THE PAUL R. DULBERG REVOCABLE TRUST	)	
Plaintiffs,	)	CASE NO. 2022L010905
vs.	)	
KELLY N. BAUDIN *A/KIA* BAUDIN & BAUDIN, BAUDIN & BAUDIN AN ASSOCIATION OF ATTORNEYS, LAW OFFICES OF BAUDIN & BAUDIN, BAUDIN & BAUDIN LAW OFFICES, WILLIAM RANDAL BAUDIN II *A/K/* A BAUDIN & BAUDIN, BAUDIN & BAUDIN AN ASSOCIATION OF ATTORNEYS, LAW OFFICES OF BAUDIN & BAUDIN, BAUDIN & BAUDIN LAW OFFICES, KELRAN, INC *AIK/A* THE BAUDIN LAW GROUP, Ltd., JOSEPH DAVID OLSEN, *AIKJA* YALDEN, OLSEN & WILLETTE LAW OFFICES, CRAIG A WILLETTE, *A/KIA* YALDEN, OLSEN & WILLETTE LAW OFFICES, RAPHAEL E YALDEN II, *AIK/A* YALDEN, OLSEN & WILLETTE LAW OFFICES, ADR SYSTEMS OF AMERICA, LLC., ASSUMED NAME ADR COMMERCIAL SERVICES, ALLSTATE PROPERTY AND CASULTY INSURANCE COMPANY	)	
Defendants.	)	

PLAINTIFFS PAUL R. DULBERG AND THE PAUL R. DULBERG REVOCABLE TRUST'S RESPONSE TO DEFENDANTS, JOSEPH DAVID OLSEN, CRAIG A. WILLETTE, AND RAPHAEL E. YALDEN II'S COMBINED MOTION TO DISMISS COUNT III OF PLAINTIFF'S COMPLAINT AT LAW

NOW COMES the Plaintiffs PAUL R. DULBERG AND THE PAUL R. DULBERG REVOCABLE TRUST by and through their attorney, Alphonse A Talarico and for their RESPONSE TO DEFENDANTS, JOSEPH DAVID OLSEN, CRAIG A. WILLETTE, AND RAPHAEL E. YALDEN II'S COMBINED MOTION TO DISMISS COUNT III OF PLAINTIFF'S COMPLAINT AT LAW pursuant to 735 ILCS 5/2-619.1 states as follows:

ARGUMENT

1. **DISMISSAL OF COUNT III *IS NOT WARRANTED* PURSUANT TO 735 ILCS5/2-619(a)(5) BASED ON THE STATUTES OF LIMITATIONS AND REPOSE.**

R1.1) The Baudin Defendants and the Olsen Defendants concealed their actions under the guise of Court Authority to the point the Plaintiff Paul R. Dulberg did not finally discover that he had been defrauded until Defendant ARD produced the Binding Mediation Agreement contained in their file, dated December 8, 2016, on October 26, 2022. (Please see Plaintiffs' Exhibits 6B and Exhibit 11 (the Binding Arbitration Agreement submitted to the Bankruptcy Court Case 14-83578 and the Binding Arbitration Agreement allegedly signed by Plaintiff Paul R. Dulberg on December 8, 2016.)

R1.2) The Olsen Defendants incorrectly claim that the relevant Statue of Limitation is 735 ILCS 5/13-214.3(b) and the relevant Statute of Repose is 735 ILCS 5/13-214.3(c). (Although not relevant herein the Olsen Defendants incorrectly state that "...Plaintiff did not file the instant lawsuit until December 13, 2022..." (Olsen 735 ILCS 2-619.1 Motion page 2 first paragraph, line 3) when the Plaintiffs' lawsuit was filed on December 8, 2022 which was within 6 years from the arbitration hearing date of December 8, 2016.

R1.2-1) The recent decision of the Illinois Supreme Court in ***SUBURBAN REAL ESTATE SERVICES, INC., et al., Appellees, v. WILLIAM ROGER CARLSON JR. et al., Appellants.2022 IL 126935*** the Court made it clear (and therefore the Law of Illinois) that there is a requirement that pecuniary loss be suffered by Plaintiff (not only knew or should have known) before the Statute begins to run when it stated:

¶ 1 In this case, we consider whether a legal malpractice claim was barred by the two-year statute of limitations in section 13-214.3(b) of the Code of Civil Procedure (735 ILCS 5/13-214.3(b) (West 2016)). The Cook County circuit court found that the limitations period on the claim had expired because plaintiffs' payment of attorney fees to new counsel constituted an injury triggering the statute. The appellate court reversed, finding that no realized injury that would trigger the limitations period existed until there was an adverse judgment in the underlying action. 2020 IL App (1st) 191953. For the following reasons, we affirm the appellate court's judgment.

R1.3) There are pled facts which removes this case from the limitation periods advanced by the Olsen Defendants, 735 ILCS 5/13-214.3(b) and 735 ILCS 5/13-214.3(c) and into the limitation periods of 735 ILCS 5/13(e) and 735 ILCS 5/13(f) because Plaintiff Paul R. Dulberg was found disabled as of June 28, 2011, which is also his current status, by the Social Security Administration of the United States. (Please see Exhibit A attached)

735 ILCS 5/13(e) If the person entitled to bring the action is under the age of majority or under other legal disability at the time the cause of action accrues, the period of limitations shall not begin to run until majority is attained or the disability is removed.

735 ILCS 5/13(f) If the person entitled to bring an action described in this Section is not under a legal disability at the time the cause of action accrues, but becomes under a legal disability before the period of limitations otherwise runs, the period of limitations is stayed until the disability is removed. This subsection (f) does not invalidate any statute of repose provisions contained in this Section. This subsection (f) applies to actions commenced or pending on or after January 1, 2015 (the effective date of Public Act 98-1077).

R1.3-1) The Fact that Plaintiff Paul R Dulberg was found to be disabled as of June 28, 2011 and forward demonstrates that at all times relevant to all activities complained of Plaintiff Paul R. Dulberg was a disabled person.

R1.3-2) The term "under legal disability" is defined as follows:

GENERAL PROVISIONS
(5 ILCS 70/) Statute on Statutes.

5 ILCS 70/1.06) (from Ch. 1, par. 1007) Sec. 1.06. "Person under legal disability" means a person 18 years or older who (a) because of mental deterioration or physical incapacity is not fully able to manage his or her person or estate, or (b) is a person with mental illness or is a person with developmental disabilities and who because of his or her mental illness or developmental disability is not fully able to manage his or her person or estate, or (c) because of gambling, idleness, debauchery or excessive use of intoxicants or drugs, so spends or wastes his or her estate as to expose himself or herself or his or her family to want or suffering. Source: P.A. 88-380.)

R1.4) Additionally, both the Olsen Defendants and the Baudin Defendants have been alleged to have committed fraudulent actions and the limitations periods do not begin until the fraud is discovered. Said fraudulent activities were discovered on October 26, 2022 when Defendant ADR submitted its file copy of the Binding Mediation Agreement allegedly executed on December 8, 2016 and it was compared to the Binding Arbitration Agreement presented to the Bankruptcy Court on October 31, 2016. (Please see Plaintiffs' Exhibits 6B and Exhibit 11 (the Binding Arbitration Agreement submitted to the Bankruptcy Court in Case 14-83578 by Defendant Joseph D. Olsen and the Binding Arbitration Agreement allegedly signed by Plaintiff Paul R. Dulberg on December 8, 2016. Both documents are attached to Plaintiffs' Complaint at Law and subsequently attached to the Olsen Defendants Motion to Dismiss.)

R1.4-1) The Statute of Limitations for fraud is 5 years as follows:

(735 CS 5/13-205) (from Ch. 110, par. 13-205)
Sec. 13-205. Five year limitation. Except as provided in Section 2-725 of the "Uniform Commercial Code", approved July 31, 1961, as amended, and Section 11-13

of "The Illinois Public Aid Code", approved April 11, 1967, as amended, actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued.
(Source: P.A. 82-280.)

2. **THE *BARTON DOCTRINE* IS NOT APPLICABLE TO THIS CASE.**

R2.1) The "Barton Doctrine" is a bankruptcy court development.

R2.2) The ***Barton Doctrine*** , which has not been made a law by legislative activity, is based upon United States Supreme Court Case *Barton v. Barbour, 104 U.S. 126, 128 (1881)* where the Supreme Court established the general rule that a lawsuit cannot be brought against a receiver for acts done **within their authority** (Emphasis Added) without leave of the Court that appointed such receiver. The Court explained the *Barton* holding in terms of exclusive subject matter jurisdiction: failure to obtain leave from the appointing Court would result in "assumption of the powers and duties which belonged exclusively to another court ... and it would [make] impossible ... the duty of that court to distribute ... assets to creditors equitably and according to their respective priorities."(*Id.* at 136.)

R2.2-1) Not all the Federal Districts follow the ***Barton Doctrine.***

R2.2-3) The Bankruptcy Court Districts that follow the ***Barton Doctrine*** have added Trustees that they have appointed to the protection announced in *Barton v. Barbour* decision.

R2.2-4) There are two exceptions to the Barton Doctrine that make
it applicable to this case as follows:

I) the ultra vires exception to both *Barton v. Barbour, 104 U.S. 126,*

128 (1881) and the ***Barton Doctrine*** that the action(s) complained

of must be within the authority of the office of the named

defendant (the activity of the Olsen Defendants is alleged to be

Legal Malpractice-Aiding And Abetting A Fraud which is not

within the authority of the Olsen Defendants and therefore outside

the protections of the ***Barton Doctrine)*** ;

II) the loss of jurisdiction argument found in **Tufts v. Hay, 977 F.3d 1204 (11th Cir. 2020) where the court stated**

"We are persuaded by the view advocated by Tufts counsel and hold that the Barton doctrine has no application when jurisdiction over a matter no longer exists in the bankruptcy court. Our holding flows from Barton itself: when the bankruptcy court lacks jurisdiction, there are no "powers and duties which belong[ ]" to that court to be usurped by the district court "entertain[ing] jurisdiction of th[e] suit." Barton, 104 U.S. at 136. As one bankruptcy court has noted, decisions explaining the rationale for the Barton doctrine look to "the bankruptcy court's jurisdiction over the bankruptcy case and the powers that flow from that jurisdiction." In re WRT Energy Corp., 402 B.R. 717, 722 (Bankr. W.D. La. 2007). For example, courts have recognized that the Barton doctrine is based on "the bankruptcy court's exclusive in rem jurisdiction over the estate" and "the oversight and supervisory responsibilities of bankruptcy courts." Id. (citing In re Crown Vantage, Inc., 421 F.3d 963, 971, 974 (9th Cir. 2005) and In re Lowenbraun, 453 F.3d 314, 321–22 (6th Cir. 2006)). Similarly, this Court has observed that a plaintiff's claims can "fall within the scope of the Barton doctrine because they are 'related to' [the] bankruptcy proceeding," such that the bankruptcy court has jurisdiction.

Lawrence, 573 F.3d at 1270–71. As Tufts argues, "a logical corollary to that holding" is that the Barton doctrine does not apply once the bankruptcy court lacks jurisdiction.

As a rule, district courts have jurisdiction to refer to bankruptcy courts "all cases under" the Bankruptcy Code and "all civil proceedings ... arising in or related to cases under" the Bankruptcy Code. 28 U.S.C. § 1334(a) – (b) , see 28 U.S.C. § 157(a). "[T]he test for determining whether a civil proceeding is related to bankruptcy [under section 1334(b)] is whether the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy." In re Lemco Gypsum, Inc., 910 F.2d 784, 788 (11th Cir. 1990) (quotation marks omitted). Thus, under this Court's precedent, the Bankruptcy Court here was properly vested with jurisdiction to consider this action if it could conceivably have an effect on Biltmore's bankruptcy estate.

The question of whether this action "could conceivably have an effect on" Biltmore's bankruptcy estate is an easy one here, because both parties have agreed it cannot. During a hearing on Hay's motion to dismiss for lack of subject matter jurisdiction, counsel for Hay "concede[d] th[e] fact" that because "the Chapter 11 case has been dismissed," there is "no conceivable effect ... that this case would have on the estate." Hay confirmed this concession during oral argument before our Court. Thus, under the "conceivable effects" test for section 1334(b), the Bankruptcy Court did not have jurisdiction to consider Tufts's action, and Tufts counsel were not required to obtain leave from that court before filing this action in the District Court.2 The Barton doctrine did not therefore

[977 F.3d 1210]

Tufts v. Hay, 977 F.3d 1204 (11th Cir. 2020)

deprive the District Court of subject matter jurisdiction over this case.3 We expressly note that our holding here creates no categorical rule that the Barton doctrine can never apply once a bankruptcy case ends. We address this case only,

and here these parties agreed this action could have no conceivable effect on the bankruptcy estate. On this record, the Bankruptcy Court lacked jurisdiction, and the Barton doctrine does not apply.

3. THE AFFIDAVITS OF CRAIG A. WILLETTE AND RAPHAEL E. YALDEN II DO NOT DEMONSTRATE THAT THEY HAD NO ROLE IN THE BANKRUPTCY OR THE UNDERLYING CASE.

R3.1) Plaintiffs do not file counter affidavits as the following Bankruptcy documents from Case 14-83578 belies the false assertions in the affidavits that " I had no role in the aforementioned bankruptcy case or personal injury case. I did not perform work on either matter, as a trustee or as an attorney, nor did I have knowledge of any of the specifics of the binding mediation alleged in Plaintiff's Complaint at Law in the instant matter." (Please see Olsen Defendants Exhibit B #7. The Affidavit of Craig A. Willette attached to the Olsen Defendants Motion to Dismiss.) and "I had no role as an attorney in the bankruptcy case or personal injury case noted in Plaintiffs' Complaint at law, nor do I have any knowledge of the binding mediation referred to in Plaintiffs' Complaint at Law." (Please see Olsen Defendants Exhibit C #6 The Affidavit of Raphael E, Yalden II attached to the Olsen

Defendants Motion to Dismiss.)

R3.2) On September 26, 2016 appointed Trustee Joseph D. Olsen filed a Motion to Employ Attorneys for the Trustee in Case 14-83578 "...that being the law firm of Yalden, Olsen & Willette as counsel for the trustee." (Please see Plaintiffs' Exhibit B attached)

R3.3) On October 3, 2016 and based upon a motion of Joseph D. Olsen, the appointed Trustee in Case 14-83578 the Bankruptcy Court entered an order granting Trustee Joseph D. Olsen Motion "to employ Yalden, Olsen & Willette generally and Joseph D. Olsen and Craig A. Willette in particular..." (Please note that the order drafted and presented to Honorable Thomas M. Lynch, United States Bankruptcy Judge, by Trustee Joseph D. Olsen does not designate hiring the law firm of Yalden, Olsen & Willette but Yalden, Olsen & Willette individually. (Please see Plaintiffs' Exhibit C attached)

R3.4) 0n June 29, 2017 in case 14-83578 Trustee Joseph D. TRUSTEE"S Olsen filed and was entered **CHAPTER 7 TRUSTEE'S FINAL ACCOUNT AND DISTRIBUTION REPORT CERTIFICATION TIIAT TIIE ESTATE IIAS BEEN FULLY ADMINISTERED AND APPLICATION**

TO BE DISCHARGED (TDR)

R3.4-1) The aforesaid report in the section Titled **EXHIBIT 4 – CHAPTER 7 ADMINISTRATIVE FEES AND CHARGES** first and second lines indicates Trustee Compensation – Joseph D. Olsen $12, 428.68, Trustee Expenses Joseph d. Olsen $83. 33 and continuing on lines 3 and 4 states Attorney for trustee Fees (Trustee Firm) Joseph D. Olsen $2.226.00 (Please see Plaintiffs' Exhibit D attached) Therefore the Olsen Defendants were hired individually or paid as a Law Firm or both but in any case were paid $2.226.00 for work performed.

R4.) **PLAINTIFFS' ALLEGATIONS STATE A CAUSE OF ACTION FOR AIDING AND ABETING A FRAUD AGAINST THE OLSEN DEFENDANTS**

R4.1) The Olsen Defendants' Motion to Dismiss pursuant to 735 ILCS 5/2-615 belie their own motion when they state that in order to state a claim for aiding and abetting by an attorney a "plaintiff must allege that: (1) the party whom the defendant aided performed a wrongful act that caused an injury; (2) the defendant was generally aware of his role as part of the overall tortious activity when he provided the assistance; and (3) the defendant knowingly and substantially assisted the principal violation. *Johnson*, 2018 IL App (2d) 170923, ¶16.

4.1-1) The Olsen Defendants then proceed to say that the allegations are little more than unsupported conclusions while at the same time stating the noted facts fail to state specific facts to support an aiding and abetting cause of action. (Please see **DEFENDANTS, JOSEPH DAVID OLSEN, CRAIG A. WILLETTE, AND RAPHAEL E. YALDEN II'S,**

COMBINED MOTION TO DISMISS COUNT III OF PLAINTIFFS' COMPLAINT AT LAW page 14 first full paragraph.

4.1 2) Additionally the Olsen Defendants fail to take into consideration that Plaintiffs' Count 3 incorporates all the facts contained previously stated when it pled - 82. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 78, inclusive, of this Complaint, as if fully restated herein.

WHEREFORE, Plaintiffs PAUL R. DULBERG, INDIVIDUALLY AND THE PAUL R. DULBERG REVOCABLE TRUST that this Honorable Court Deny The OLSEN DEFENDANTS 735 ILCS 5/2 619.1 Motion in its entirety or either to permit or require pleading over or amending pursuant to 735 ILCS 5/2-615(d).

Dated. April 25, 2023, Respectfully submitted,

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