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5/9/2023 12:57 PM
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COOK COUNTY, IL
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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – LAW DIVISION

PAUL R. DULBERG, individually, and THE PAUL
R. DULBERG REVOCABLE TRUST,

Plaintiffs,

vs.

KELLY N. BAUDIN, et al.

Defendants.

Case No. 2022 L 010905
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DEFENDANTS, JOSEPH DAVID OLSEN, CRAIG A. WILLETTE, AND RAPHAEL E. YALDEN II'S, REPLY IN SUPPORT OF THEIR COMBINED MOTION TO DISMISS COUNT III OF PLAINTIFFS' COMPLAINT AT LAW

NOW COME the Defendants, JOSEPH DAVID OLSEN (“Olsen”), CRAIG A. WILLETTE (“Willette”), and RAPHAEL E. YALDEN II (“Yalden”) (collectively the “Olsen Defendants”) by and through their attorneys, LEWIS BRISBOIS BISGAARD & SMITH, LLP, and for their Reply in Support of their Combined Motion to Dismiss Count III of Plaintiffs’ Complaint at Law, state as follows:

INTRODUCTION

In their pending Motion to Dismiss Count III of Plaintiffs’ Complaint, the Olsen Defendants argue that dismissal is indicated for several independent reasons. In summary, Plaintiffs’ Complaint was not timely filed prior to the expiration of the statutes of limitations and repose, the Barton Doctrine bars Plaintiffs’ claim against Olsen, his bankruptcy trustee, the Affidavits of Willette and Yalden demonstrate they had no role in the underlying personal injury or bankruptcy case, and Plaintiffs have not plead sufficient facts to state a cause of action for either legal malpractice or aiding and abetting.

Plaintiffs’ Response to the Motion to Dismiss fails to refute even one of the aforementioned bases requiring dismissal. In arguing the statutes of limitations and repose do not apply, Plaintiffs

conflate the doctrines of legal incapacity and disability. Plaintiffs also cite to an 11th Circuit case in support of the proposition that the Barton Doctrine does not apply. However, the 7th Circuit has held that the Barton Doctrine applies to legal malpractice cases brought by debtors against their bankruptcy trustees. Further, Plaintiffs have failed to controvert the statements in the Affidavits of Defendants Willette and Yalden, wherein they each affirm they had no role in the underlying bankruptcy case. Accordingly, their statements are deemed true. Finally, Plaintiffs have not even attempted to argue how their claim against the Olsen Defendants is adequately pleaded. For each of these reasons, Count III should be dismissed, with prejudice.

ARGUMENT

I. COUNT III MUST BE DISMISSED PURSUANT TO THE APPLICABLE STATUTES OF LIMITATIONS AND REPOSE.

As noted in the Olsen Defendants' Motion to Dismiss, there is no dispute that Plaintiff, Paul Dulberg ("Dulberg") knew, or should have known, of his injury no later than December 8, 2016, when the mediation he alleges he did not consent to took place. *See* Motion to Dismiss at pp. 6-8. He knew the binding mediation occurred, that he had purportedly not consented to the mediation, that he would not receive the full \$561,000 awarded by the mediator based on the high-low agreement, and that his alleged harm had been wrongfully caused by the Baudin Defendants' alleged coercion to force his participation in the mediation. *See Exhibit A* at ¶¶82-93.

Plaintiffs' Complaint was filed more than two (2) years after December 8, 2016. Therefore, the instant action is not timely based on the statute of limitations, which ran out no later than December 8, 2018. *See Nelson v. Padgitt*, 2016 IL App (1st) 160571, ¶12 (citing *SK Partners I, LP v. Metro Consultants, Inc.*, 408 Ill. App. 3d 127, 130 (1st Dist. 2011)) ("[a]ctual knowledge is not necessary to trigger the limitations period, nor does the plaintiff need knowledge of a specific defendant's negligent conduct or knowledge of the existence of a malpractice claim.").

It is also undisputed that the bankruptcy court's approval of the binding mediation agreement, which Plaintiffs claim was orchestrated by Defendant Olsen and caused Dulberg harm, took place on October 31, 2016. *See Exhibit A* at ¶88. Under the statute of repose, the triggering event is the alleged act or omission by an attorney, not when the alleged harm occurred. *See Sorenson v. Law Offices of Theodore Poehlmann*, 327 Ill. App. 3d 706, 710 (2d Dist. 2002) (the "statute of repose runs from the time of the acts or omissions alleged to have caused injury"). Plaintiffs' Complaint was filed more than six (6) years later, and as such, is barred by the statute of repose. *See id.*

In the Response, Plaintiffs advance two (2) arguments, neither of which have merit. First, Plaintiffs assert that because the Social Security Administration ("SSA") found Dulberg to be disabled and unable to work, he was legally incapacitated, tolling the statute of limitations and statute of repose. Response at pp. 3-4. Plaintiffs' argument is simply wrong. Plaintiffs incorrectly conflate the doctrine of legal incapacity with the threshold needed to obtain disability benefits from the SSA. "To be under a legal disability, 'a person must be entirely without understanding or capacity to make or communicate decisions regarding his person and totally unable to manage his estate or financial affairs.'" *Bloom v. Braun*, 317 Ill. App. 3d 720, 730-731 (1st Dist. 2000) (quoting *Selvy v. Beigel*, 309 Ill. App. 3d 768, 776 (1st Dist. 1999) (internal quotations omitted)). "Additionally, one is legally disabled if he or she 'was incapable of managing [his or] her person or property and could not comprehend [his or] her rights or the nature of the act giving rise to [his or] her cause of action.'" *Id.* (quoting *Sille v. McCann Constr. Specialties Co.*, 265 Ill. App. 3d 1051, 1054 (1st Dist. 1994)).

A determination made by the SSA that Dulberg was unable to work due to his injuries does not equate to "legal disability" as defined by Illinois courts. *See, e.g., Bloom*, 317 Ill. App. 3d at

732 (concluding plaintiff was not legally disabled for purposes of section 13-212 of the Code despite the SSA's declaration that she was "psychiatrically disabled"); *see also Doe v. Catholic Archbishop (In re Doe)*, 301 Ill. App. 3d 123, 127 (1st Dist. 1998) ("many impairments both physical and mental may be termed disabilities, but not all are legal disabilities."). Plaintiffs' argument has been rejected by Illinois courts, and is unavailing.

Plaintiffs also claim, without any legal support, that the statute of limitations for fraud should apply to the Plaintiffs' Complaint rather than 735 ILCS 5/13-214.3(b). Response at p. 4. Plaintiffs' undeveloped argument is erroneous, as it is well-established that 735 ILCS 5/13-214.3 applies to any claim against an attorney arising out of his or her performance of legal services, not just a legal malpractice claim. *See, e.g., Evanston Ins. Co. v. Riseborough*, 2014 IL 114271, ¶23 (the statute broadly "encompasses a number of potential causes of action in addition to legal malpractice"). Significantly, however, even accepting Plaintiffs' argument, the suit was still not timely as it was filed more than five (5) years after the binding mediation occurred on December 8, 2016. *See Exhibit A*. Even Plaintiffs' misguided "Hail Mary" attempt to avoid dismissal is unavailing. Dismissal of Count III of Plaintiffs' Complaint with prejudice pursuant to 735 ILCS 5/2-619(a)(5) is warranted.

II. DISMISSAL OF COUNT III IS ALSO APPROPRIATE BASED ON THE BARTON DOCTRINE.

As argued in the Olsen Defendants' Motion to Dismiss, under the Barton Doctrine, a debtor must obtain permission from the Bankruptcy Court to bring an action against his bankruptcy trustee. *See In re Linton*, 136 F.3d 544, 545-46 (7th Cir. 1998). The Barton Doctrine covers any "acts committed in [the trustee's] official capacity," as measured by "the nature of the function that the trustee or his counsel was performing during commission of the actions for which liability is sought." *McDaniel v. Blust*, 668 F.3d 153, 156-57 (4th Cir. 2012). If a plaintiff's suit violates the Barton Doctrine, the Court is without subject matter jurisdiction to hear the case. *See id.*

Plaintiffs concede in their Response that the instant suit arises out of Olsen's work and official capacity as Plaintiff Dulberg's bankruptcy trustee. *See* Response at pp. 5-6, Exhibits B-D. Plaintiffs further concede that they have not obtained permission from the bankruptcy court to bring suit against Olsen, his bankruptcy trustee. *See id.*

However, citing to a decision from the 11th Circuit, Plaintiff asks this Court not to apply the Barton Doctrine. *See Tufts v. Hay*, 977 F.3d 1204 (11th Cir. 2020). This argument is of no moment, however. While the 11th Circuit may not have applied the Barton Doctrine in a legal malpractice action against a bankruptcy trustee, the 3rd, 4th, and 7th Circuits have. *See In re J & S Props., LLC*, 872 F.3d 91, 98 (3d Cir. 2017); *McDaniel v. Blust*, 668 F.3d 153, 156-57 (4th Cir. 2012); *In re Linton*, 136 F.3d 544, 545-46 (7th Cir. 1998). This Court should follow these well-reasoned decisions, particularly the 7th Circuit opinion of *In re Linton*, and dismiss this matter with prejudice.

III. THE UNCONTRADICTED AFFIDAVITS OF YALDEN AND WILLETTE ALSO SUPPORT DISMISSAL PURSUANT TO 735 ILCS 5/2-619(A)(9).

In the Motion to Dismiss, Defendants contend that attorneys Yalden and Willette played no role in Plaintiff Dulberg's bankruptcy case, and in fact never spoke to him. Affidavits to this effect were attached to the Motion to Dismiss. Plaintiffs did not file a counter-affidavit, nor otherwise attempt to contradict Yalden's or Willette's affirmations. These statements are therefore deemed true. *See Callaghan v. Village of Clarendon Hills*, 401 Ill. App. 3d 287, 291 (2d Dist. 2010) ("If the plaintiff fails to provide a counter affidavit to challenge the facts alleged in the defendant's supporting affidavits, the facts of defendant's affidavits are deemed admitted.").

Instead, Plaintiffs refer to Olsen's appointment as the bankruptcy trustee and fees paid to Olsen for such work as bankruptcy trustee, in an attempt to refute the representations made in Yalden's and Willette's respective affidavits. *See* Response at pp. 8-9, Exhibits B-D. But those

references are unrelated to what Yalden and Willette attest to, namely, that neither had a role in the underlying bankruptcy or personal injury case. *See* Motion to Dismiss, **Exhibits B & C**. Indeed, Yalden has been retired from the practice of law since 2013. *Id.* at **Exhibit C**, ¶3. Plaintiffs have not identified a single allegation in the Complaint asserting a breach of the standard of care or act in furtherance of any fraud committed by Yalden or Willette. Based upon the uncontroverted statements in their affidavits, dismissal of Defendants Yalden and Willette with prejudice pursuant to 735 ILCS 5/2-619(a)(9) is indicated.

IV. PLAINTIFFS' COMPLAINT DOES NOT ADEQUATELY PLEAD A CAUSE OF ACTION AGAINST THE OLSEN DEFENDANTS.

Ostensibly admitting defeat, Plaintiffs fail to cite any allegations in the Complaint which adequately allege a cause of action for either legal malpractice or aiding and abetting. Response at pp. 10-11. Instead, Plaintiffs simply incorporate the paragraphs contained Count III, and state they sufficiently support their causes of action. *Id.* Plaintiffs are mistaken.

Foundationally, Plaintiffs have not demonstrated how the Dulberg Trust has standing to bring this suit. *See* Motion to Dismiss at p. 12. Further, Plaintiffs have not demonstrated how any of the Olsen Defendants breached the standard of care. *See id.* at p. 13. Nor have Plaintiffs pleaded specific facts that the Olsen Defendants: (1) aided the Baudin Defendants in performing a wrongful act that caused an injury; (2) were generally aware of their roles as part of the overall tortious activity when providing the assistance; and (3) knowingly and substantially assisted the principal violation. *See id.* at pp. 13-15; *Johnson v. Filler*, 2018 IL App (2d) 170923, ¶16.

All that Plaintiffs have alleged is that Defendant Olsen filed a motion in the Bankruptcy Case to have Baudin appointed as counsel in the Underlying Case and to approve the binding mediation agreement. *See Exhibit A* at ¶¶52-55, 82-93. These acts were required as part of Dulberg's bankruptcy. *See* 11 U.S.C. § 541(a)(1) (2018) (a voluntary chapter 7 bankruptcy filing

creates a bankruptcy estate that includes “all legal or equitable interests of the debtor in property as of the commencement of the case.”); *see also Holland v. Schwan's Home Serv., Inc.*, 2013 IL App (5th) 110560, ¶116 (holding that assets of the bankruptcy estate include a debtor’s causes of action).

Olsen followed the Bankruptcy Code in appointing Baudin and having the binding mediation agreement approved. *See id.* This action does not meet the pleading requirements to maintain Plaintiffs’ claims against any of the Olsen Defendants. Accordingly, dismissal with prejudice is further supported pursuant to 735 ILCS 5/2-615.

WHEREFORE, Defendants, JOSEPH DAVID OLSEN, CRAIG A. WILLETTE, and RAPHAEL E. YALDEN II, respectfully request that this Honorable Court enter an Order providing for the following relief:

- A. Granting their Combined Motion to Dismiss Count III of Plaintiffs’ Complaint at Law;
- B. Dismissing each of them from this matter, *with prejudice*; and,
- C. For such other and further relief this Honorable Court deems equitable and just.

Respectfully submitted,

**DEFENDANTS, JOSEPH DAVID
OLSEN, CRAIG A. WILLETTE, and
RAPHAEL E. YALDEN II**

By: /s/George J. Manos
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