IN THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
MCHENRY COUNTY, ILLINOIS

PAUL DULBERG,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 17LA000377
	)	
THE LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST,	)	
	)	
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF COMBINED MOTION TO DISMISS

Defendants, LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST, by and through their attorneys, GEORGE K. FLYNN, and CLAUSEN MILLER P.C., pursuant to 735 ILCS 5/2-615, 735 ILCS 5/2-619(a)(5) and 735 ILCS 5/2-619.1, submit this Reply in Support of Defendants' Motion to Dismiss Plaintiff's Complaint at Law, and state as follows:

I. INTRODUCTION

One of the underpinnings of Dulberg's legal malpractice claim, is that a "high low agreement" he executed somehow caused him to settle his personal injury case for an amount lower than what he "expected." But Dulberg has failed to attach any such "high low agreement" to his complaint. He has also failed to identify the terms of the agreement in his complaint, and how the terms somehow affected his case. While in ¶ 3 of his Response he argues that the "high low agreement" was executed as part of the McGuire settlement, in view of Illinois Supreme Court Rule 137, he has not and cannot allege *in his complaint* that a "high low agreement" was executed as part of the McGuire settlement, or that Popovich or Mast had anything to do with it. In any case, the execution of a "high low agreement" by Dulberg in connection with the McGuire settlement makes little sense at the time, in view of Dulberg's later mediation and

settlement with the co-defendant, David Gagnon. Dulberg's mention of the "high low" coupled with his failure to explain its terms or significance, renders it a legal world equivalent of a "MacGuffin."

Dulberg cannot allege that he was "forced" to settle his case with the McGuires for $5,000. He had every right to reject a settlement, or to retain new counsel. In fact, he alleges that Popovich withdrew over 21 months before the case was concluded (he retained successor counsel to handle the case). Moreover, he willingly agreed to a settlement with the McGuires while continuing to prosecute his case against Gagnon. He also fails to allege how he would have fared any better against the McGuires, "but for" Popovich's alleged malpractice, and fails to explain why he waited over 2 years after Popovich withdrew in order to sue the firm. For these reasons, Dulberg's complaint must be dismissed with prejudice.

II. DULBERG FAILS TO PLEAD FACTS IN SUPPORT OF EACH REQUISITE ELEMENT OF A LEGAL MALPRACTICE CLAIM

Dulberg fails to support any of his conclusions that Popovich and Mast committed legal malpractice with factual support. It is not sufficient under Illinois law that the elements of a cause of action simply be regurgitated. In a legal malpractice action, not only must the elements of the legal malpractice claim be supported with facts, so must the allegations of the underlying case. However, Dulberg only makes conclusory statements in ¶ 21 of his Complaint, that additional actions should have been taken in the underlying case. But Dulberg fails to identify what those actions should have been.

Dulberg alleges that he was forced to settle his case against the McGuires for $5,000.00. He does not allege in his Complaint whether the McGuires made a settlement offer, or whether Dulberg made a settlement demand. Did Mast forward a written settlement offer to Dulberg? Did he accept it and mail back an executed release? How was he pressured to settle? Dulberg

also fails to explain the effect of a "high low agreement" that he allegedly executed. Dulberg attaches a page from a binding mediation award he allegedly received against David Gagnon, but he fails to attach the unexplained high low agreement. 735 ILCS 5/2-606, states in pertinent part:

> If a claim or defense is founded upon a written instrument, a copy thereof, or of so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein, unless the pleader attaches to his or her pleading an affidavit stating facts showing that the instrument is not accessible to him or her.

Dulberg fails to attach the high low agreement, or otherwise explain the terms of the agreement and its significance. He also fails to explain why he would enter a high low agreement with the McGuires 21 months prior to a mediation with Gagnon.

Because Dulberg fails to plead facts in support of each and every element of his legal malpractice claim and his underlying claim and how he would have prevailed "but for" the negligence of Popovich and Mast, his case must be dismissed pursuant to 735 ILCS 5/2-615.

III. DULBERG IS ESTOPPED FROM REPUDIATING HIS SETTLEMENT AGREEMENT

Dulberg asserts that he is not estopped from taking a position in this case that he did not understand the terms of his $5,000.00 settlement agreement with the McGuires. His attempt to distinguish *Larson v. O'Donnell*, 375 Ill. App. 3d 702 (1st Dist. 2007) fails. Dulberg argues that unlike *Larson*, here there is no record of Dulberg testifying to knowing exactly what the terms of the settlement agreement[sic][were]. (Response, p. 8). However, here there is no dispute that Dulberg knowingly executed the settlement release in favor of the McGuires. Moreover, in a case cited by Dulberg, *Seymour v. Collins*, 2015 IL 118432 the Illinois Supreme Court wrote that "a statement under oath was not among the requirements for judicial estoppel." *Seymour* at *P38.

Dulberg also continues to argue in pages 8 and 9 of his Response that he was unable to make an informed decision about accepting settlement because he was never informed "by his attorneys that a "high low" agreement would limit his recovery against the remaining defendants." (Response, ¶¶ 23 and 26). As discussed above, Dulberg has not and cannot allege in his complaint that Popovich or Mast had any involvement with any such "high low" agreement. Accordingly, his argument that they failed to inform him of the effects of the agreement, and how it could limit his recovery against the remaining defendants, is not well plead and amounts to a "red herring". In fact, in ¶ 20 of his complaint, Dulberg sets forth the time frame of the execution of the "high low" agreement: "Following the execution of the mediation agreement with the "high low agreement" contained therein, and the final mediation award, Dulberg realized for the first time that the information MAST and POPOVICH had given Dulberg was false and misleading..." Which is it? Is he claiming that the "high low" was executed in 2015 prior to Popovich's and Mast's withdrawal, or at mediation (almost 2 years later in 2017)? Obviously Popovich and Mast could not have counseled Dulberg regarding a "high low" agreement he apparently executed 21 months after their attorney-client relationship ended. The allegations concerning the "high low" agreement are not well plead and are dispositive of Dulberg's claims under section 2-615 and 735 ILCS 5/2-619 (a)(9).

IV. DULBERG'S RELIANCE ON THE DISCOVERY RULE TO DELAY THE COMMENCEMENT OF THE STATUTE OF LIMITATIONS IS UNAVAILING

Dulberg confirms in his Response that he is attempting to rely on the discovery rule in order to toll the statute of limitations. He also relies on language from the case of *Goodman v. Harbor Market, Ltd.*, 278 Ill. App. 3d (1st Dist. 1995) for the proposition that he is "presumed unable to distinguish any misapplication or negligence by the Defendants, on his own [sic]." He also alleges that he was provided with a legal opinion after the December 16, 2016 mediation

[with Gagnon] at which time he learned for the first time "that the information MAST and POPOVICH had given DULBERG was false and misleading, and that in fact, the dismissal of the McGuires was a serious and substantial mistake." (Response, p. 11). How was the information misleading?

Again, Dulberg fails to describe how the settlement and dismissal of the McGuires was a mistake. But more importantly, he does not allege what happened in the 21 months after defendants were discharged as his counsel. Under Illinois law, he cannot simply bury his head in the sand. There was nothing preventing Dulberg from inquiring about the McGuires' liability from his successor counsel, also a personal injury attorney. If he felt pressured into settling with the McGuires, why did he not seek a second opinion at the time of the settlement?

Dulberg has the burden of proving the date of discovery, and here he has failed to even allege sufficient facts to support a tolling of the limitations period. For that reason, his complaint must be dismissed with prejudice pursuant to 735 ILCS 5/2-619(a)(5).

V. CONCLUSION

WHEREFORE, for the reasons stated in their Motion to Dismiss and Memorandum in Support, and as stated herein, Defendants, LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST, pursuant to 735 ILCS 5/2-615 and 735 ILCS 5/2-619(a)(5), and 735 ILCS

5/2-619.1, respectfully request this Honorable Court dismiss Plaintiff's Complaint at Law with prejudice, and for any further relief this Court deems fair and proper.

/s/ George K. Flynn

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was caused to be served by Email and/or U.S. Mail by depositing same in the U.S. Mail at 10 S. LaSalle Street, Chicago, IL 60603, and properly addressed, with first class postage prepaid, on the 10th day of April, 2018, addressed to counsel of record as follows:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Certificate of Service are true and correct.