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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, Plaintiff, vs. KELLY N. BAUDIN a/k/a BAUDIN & BAUDIN, et al. Defendants.	)	Case No.: 2022 L 010905

BAUDIN DEFENDANTS' REPLY IN SUPPORT OF THEIR SECTION 2-619.1 MOTION TO DISMISS

Defendants, KELLY N. BAUDIN, WILLIAM RANDAL BAUDIN, II and KELRAN INC. a/k/a THE BAUDIN LAW GROUP, LTD. a/k/a KELRAN INC. (referred to collectively as the "Baudin Defendants") by and through their attorneys, Tribler Orpett & Meyer P.C., submit this reply in support of their motion to dismiss Plaintiff's Complaint at Law:

I. PLAINTIFF'S CLAIMS FAIL FOR LACK OF PROXIMATE CAUSE

Plaintiff does not dispute the factual or legal grounds for the Baudin Defendants' motion. He does not dispute that he filed for Chapter 7 bankruptcy protection after sustaining the personal injuries that form the basis for the underlying lawsuit. Plaintiff likewise does not dispute that, by filing for bankruptcy protection, he lost standing to pursue his personal injury claim. The personal injury claim automatically became part of the bankruptcy estate and thus became the property of, and fell under the control of, the bankruptcy trustee. Plaintiff does not dispute that the bankruptcy trustee sought and obtained approval to attempt to resolve the personal injury claim via binding mediation,[1] at which the claim—owned by the bankruptcy estate—was ultimately resolved.

[1] The proceeding has been referred to at some times as a "mediation" and other times as an "arbitration". Because the exact nature of the proceeding is immaterial, we use only the term "mediation" for ease of reference.

In that Plaintiff did not own the underlying injury claim, Plaintiff cannot possibly prove the "but for" element of his claim – that but for the Baudin Defendants' alleged acts, he would have recovered more in the underlying proceeding. Plaintiff had no right or ability to recover *anything*.

There is likewise no merit (or value) in Plaintiff's argument that the mediation of the underlying claims violated an automatic stay under Section 362(a)(3) of the Bankruptcy Code. Under Section 362(a)(3), an automatic stay applies to "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate" 11 U.S.C. § 3623(a)(3). A stay would have applied to claims *against* Plaintiff, not to Plaintiff's claims *against others*.

Even if an automatic stay applied and thereby voided the mediation result, Plaintiff would still possess no claim against the Baudin Defendants. Plaintiff's claim is founded upon the idea that he received an insufficient sum at mediation. If the mediation was void, Plaintiff has no claim here.

There is also no merit in Plaintiff's "standing" argument. Plaintiff asserts that, if the bankruptcy estate owned Plaintiff's personal injury claim, the Baudin Defendants lacked standing to pursue the personal injury claim until the bankruptcy trustee took control. Plaintiff's assertion is nothing more than a red herring. Though Plaintiff may not have had standing to pursue his injury claim after he filed for bankruptcy, the fact remains that the bankruptcy trustee had standing to pursue the claim to its resolution, as it did via the binding mediation.

There is no merit in Plaintiff's argument that he can overcome proximate cause issues based on the alleged viability of his damages claim. Plaintiff received a $117,000 distribution via the residue of his bankruptcy estate. He asserts that, had there been no high-low agreement in the mediation, he might have received more. Myriad factors could have led Plaintiff to receive more, or less, through his own voluntary bankruptcy. But the mere presence of a claimed injury does nothing to overcome the proximate cause issue fatal to Plaintiff's claim. The bankruptcy trustee—not Plaintiff and not the Baudin Defendants—had the sole power to decide whether to mediate the personal injury claim and

on what terms.

There is no merit in Plaintiff's "abandonment" argument. Plaintiff asserts that the bankruptcy trustee abandoned Plaintiff's personal injury claim. Plaintiff seems to claim that the trustee abandoned the claim either: (1) by telling the bankruptcy court that he did not want to "micromanage" the litigation of the claim; or (2) via an email exchange with the Baudin Defendants in which the trustee asked the Baudin Defendants whether he or Plaintiff should sign the mediation agreement. Neither of the foregoing constitutes abandonment.

Under §554(a) of the Bankruptcy Code, there are three ways in which property of the bankruptcy estate may be abandoned; otherwise, property "remains property of the estate". 11 U.S.C. §554(d). First, a trustee may affirmatively abandon property of the estate but only "after notice and hearing." 11 U.S.C. §554(a). Here, no there was no notice of abandonment and no abandonment hearing. Second, the court may order the trustee to abandon property but only on request of a party and after notice and hearing. 11 U.S.C. §554(b). Here, there was no such order, no party requested abandonment, and there was neither notice nor a hearing. Third, scheduled property is abandoned if not administered by the time of closing. 11 U.S.C. §554(c). Here, the personal injury claim was administered. After mediation, proceeds of the claim were paid to the bankruptcy trustee and applied to the bankruptcy estate, Plaintiff received an amount consistent with his claimed Personal Injury Exemption, and then the residue was distributed to Plaintiff upon closing of the estate. (See Order Approving Payments of the Personal Injury Proceeds, attached to Motion to Dismiss as Ex. F.) There was no abandonment.

There is no merit in Plaintiff's statement that his claim should survive because the Baudin Defendants have "neither filed an answer denying the validity of Exhibit 10 [the Binding Mediation Award]… nor did they attach any affidavits disputing the validity of the Binding Mediation Award." (Pl. Resp. at 4.) Plaintiff's argument ignores the procedural posture of this case. The Baudin

Defendants moved to dismiss in lieu of an answer, in accord with Sections 2-615 and 2-619 of the Code of Civil Procedure and without waiving the ability to answer and make any appropriate denials should this Court deny this motion. 735 ILCS 5/2-615(a), (d); 735 ILCS 5/2-619(a), (d). Plaintiff's argument also ignores the position taken by the Baudin Defendants. Exhibit 10 is a copy of the Binding Mediation Award. The Baudin Defendants do not contest the validity of the award.

Plaintiff's arguments regarding proximate cause are unavailing. He had no right to any proceeds of the personal injury claim, so he cannot claim that the Baudin Defendants' actions or inactions proximately caused him to recover less of those proceeds that he otherwise would have.

II. PLAINTIFF'S CLAIMS ARE BARRED BY THE TWO-YEAR STATUTE OF LIMITATIONS

Plaintiff's fraudulent concealment argument fails for two independent reasons. First, he cannot rely upon the doctrine of fraudulent concealment as he has not pleaded any facts in support of the same in his counterclaim. Fraudulent concealment must be pleaded to be available. *McIntosh v. Cueto*, 323 Ill.App.3d 384, 390 (5th Dist. 2001) (rejecting the plaintiffs' argument that fraudulent concealment need not be pleaded in order to serve as a basis to toll or otherwise limit the application of the statutes of limitations and repose under Section 13-214.3). Here, Plaintiff has pleaded no allegations in support of a fraudulent concealment claim.

Second, even if Plaintiff had pleaded the purported facts that he now asserts in his response brief, the doctrine of fraudulent concealment still would not save his claim because Plaintiff has been aware of his claimed injury and the general set of circumstances that led to it since December 2016.

Under Illinois law, "the [fraudulent] concealment must consist of affirmative acts or representations that are calculated to lull or induce a claimant into delaying filing his claim or to prevent a claimant from discovering his claim." *Barratt v. Goldberg*, 296 Ill.App.3d 252, 257 (1st Dist. 1998). Where a plaintiff claims that his attorney concealed a cause of action, the plaintiff must establish that he "failed to discover [his] cause of action against defendant [attorney] due to the trust

and confidence placed in defendants as fiduciaries to toll the statute of limitations and invoke section 13-215 of the Code." *Id.* at 258.

Here, Plaintiff claims that he was damaged as a result of the high-low agreement that caused the mediation award of $561,000 to be reduced to $300,000. (Plaintiff's Complaint, ¶¶ 72-74, 80-81, attached to Motion to Dismiss as Ex. A.) Although Plaintiff may claim that he was not aware of the exact circumstances under which the mediation went forward, he knew enough in 2016 to have investigated whether he possessed a claim and, if so, against whom. Through the verified allegations of his own Complaint, Plaintiff admits that he was aware that the binding mediation was going forward despite his objection thereto, that he attended the mediation, and that the Baudin Defendants called him on December 12, 2016, and informed him of a $561,000 award subject to a 300,000 cap, and that he responded to the foregoing by stating "Yeah you two did good, real good and I thank both of you sincerely. I just can't help it, what I see here is a gift of $261,000 given to those responsible for my injuries." (Id. at ¶¶ 56, 57, 65-67.) Plaintiff further admits that he was told that the bankruptcy estate would receive the $300,000 award. (Id. at ¶ 68.) None of the foregoing was concealed from Plaintiff.[2]

Plaintiff cannot dispute that, by no later than December 2016, he knew of his claimed damages, knew that a Binding Mediation Agreement was entered into containing a high-low provision, knew that a $561,000 net award was given, knew that the award was reduced to $300,000 pursuant to the high-low agreement, and believed that he could have recovered more had the high-low agreement not been entered into, allegedly without his approval. No purported cause of action

[2] Plaintiff cannot dispute that he has long been aware of the circumstances that gave rise to his current lawsuit. Plaintiff filed a legal malpractice complaint against his original lawyers, Hans Mast and the Law Offices of Thomas J. Popovich, P.C., on November 28, 2017. In November 2017, Plaintiff alleged that "[he] received a binding mediation award of $660,000 in gross, and a net award of $561,000 [but] unfortunately a 'high-low' agreement had been executed by [Plaintiff] Dulberg, reducing the maximum amount he could recover to $300,000 based on the insurance policy available." (See Dulberg Complaint Against Mast, ¶ 16, attached as Ex. 7 to Plaintiff's Response.) In that complaint, Plaintiff further alleged that he "suffered serious and substantial damages, not only as a result of the injury as set forth in the binding mediation award…." (Id. at ¶ 22.)

was concealed from him.

The only "fact" that Plaintiff claims he learned after December 2016 was that his signature was affixed to the Binding Mediation Agreement, purportedly without his knowledge or approval.[3] But Plaintiff did not "own" the claim that was proceeding to binding mediation and had no power to decide whether or on what terms the mediation would proceed. It does not matter whether he signed his own name, whether the bankruptcy trustee signed his name, or whether someone else did. It does not even matter *that* a mediation agreement was signed. All that matters is that the bankruptcy trustee and defense resolved the claim on terms to which they agreed.

There is likewise no merit in Plaintiff's argument that the statute of limitations is tolled due to his physical disability. Here, Plaintiff conflates the doctrine of *legal* disability with a *physical* disability. The statute of limitations is tolled only where the plaintiff is under a legal disability. Under Illinois law, this means that the "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, 730-31 (1st Dist. 2000) (quoting *Selvy v. Beigel*, 309 Ill.App.3d 768, 776 (1st Dist. 1999)). Plaintiff's physical disability does not equate to a legal disability through which the limitations period might be tolled.

There is also no merit in Plaintiff's argument that a five-year statute of limitations should apply to his claims, rather than the two-year statute of limitations found in Section 13-214.3 of the Code. Plaintiff has sued the Baudin Defendants in connection with their provision of legal services. Under Illinois law, the two-year statute of limitations found in Section 13-214.3 of the Code applies to all actions against attorneys arising from the provision of legal services, regardless of the legal theory under which suit is brought. *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶¶ 19-20.

There is also no merit in Plaintiff's argument that the six-year statute of repose applies to her

[3] See FN 2, *supra*. In the Mast lawsuit, Plaintiff alleged that *he* executed the high-low agreement.

claim, as opposed to the two-year statute of limitations found in the same Code provision, Section 5/13-214.3. Section 13-214.3 sets forth both a statute of limitations, 735 ILCS 5/13-214.3(b), and a statute of repose, 735 ILCS 5/13-214.3(c). The fact that a statute of repose exists does not mean that the statute of limitations does not apply.

There is no value in Plaintiff's assertion that, under *Suburban Real Estate Services, Inc. v. Carlson*, 2022 IL 126935, the two-year statute of limitations for claims against attorneys does not begin to run until the plaintiff has been injured. (Pl. Resp. at 13.) Though the proposition is accurate, it is unclear why Plaintiff cites to *Carlson*, as his claim is founded upon the premise that he was injured upon entry of the mediation award about six years before he filed the instant lawsuit.

WHEREFORE, Defendants, KELLY N. BAUDIN, WILLIAM RANDAL BAUDIN, II and KELRAN INC. a/k/a THE BAUDIN LAW GROUP, LTD. a/k/a KELRAN INC., respectfully request that this Honorable Court enter an order dismissing with prejudice all claims against such Defendants, including those contained within Counts 1 and 2 of Plaintiff's Complaint at Law and for any other relief that is fair and just.

Respectfully submitted,

TRIBLER ORPETT & MEYER, P.C.

By: */s/Jeremy N. Boeder*
One of the Attorneys for Defendants, KELLY N. BAUDIN, WILLIAM RANDAL BAUDIN, II and KELRAN INC. a/k/a THE BAUDIN LAW GROUP, LTD. a/k/a KELRAN INC.

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