

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of LEO G. CHARRON.

SANDRA L. GUARA, as Personal Representative
and Individually, SHERRY J. MARCO, DAVID
B. CHARRON, and JOHN MICHAEL
CHARRON,

Plaintiffs-Appellants,

v

JEFFREY L. FANTO, GERALD F.
FITZGERALD, JR., and FITZGERALD &
CRAWFORD, LLP,

Defendants,

and

FITZGERALD & DAKMAK, PC,

Defendant-Appellee.

UNPUBLISHED
October 9, 2014

No. 316186
Wayne Circuit Court
Family Division
LC No. 2009-741470-CZ

Before: RIORDAN, P.J., and CAVANAGH and TALBOT, JJ.

PER CURIAM.

Plaintiffs, Sandra L. Guara, individually and as personal representative for the Estate of Leo Charron (Leo), Sherry J. Marco, David B. Charron, and John Michael Charron, appeal as of right the trial court order granting summary disposition in favor of defendant, Fitzgerald & Dakmak, P.C. (Fitzgerald & Dakmak).¹ We affirm.

¹ Because defendant Fitzgerald & Dakmak is the only defendant a party to this appeal, “defendant” will refer to Fitzgerald & Dakmak.

I. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

We review the grant of summary disposition *de novo*. *Burton v Macha*, 303 Mich App 750, 754; 846 NW2d 419 (2014). “Summary disposition is properly granted under MCR 2.116(C)(7) when the plaintiff’s complaint is barred by the applicable statute of limitations or repose.” *Id.* “In determining whether a party is entitled to judgment as a matter of law pursuant to MCR 2.116(C)(7), a court must accept as true a plaintiff’s well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff’s favor.” *Farm Bureau Mut v Combustion Research Corp*, 255 Mich App 715, 720; 662 NW2d 439 (2003). “If the facts are not in dispute, whether the statute bars the claim is a question of law for the court.” *Burton*, 303 Mich App at 754 (quotation marks and citation omitted). “Statutory construction is a question of law that we review *de novo* on appeal.” *Id.* at 755.

B. ANALYSIS

Plaintiffs first contend that the trial court erred in finding that the AIM, Inc. bankruptcy proceedings were not at issue in this case, and did not impact the statute of limitations. We disagree.

In its opinion denying plaintiffs’ motion for reconsideration, the trial court provided several reasons for denying reconsideration based on the statute of limitations. One such reason was that plaintiffs failed to present any evidence that the bankruptcy matter and the legal malpractice action arose out of the same matter (as separate retainer agreements suggested otherwise). Now on appeal, plaintiffs attack any suggestion that the bankruptcy matter was independent from the underlying malpractice claims. Plaintiffs argue that the trial court should have considered the continued representation in the bankruptcy matter when analyzing the statute of limitations.

Pursuant to MCL 600.5805(6), the statute of limitations is two years for an action charging malpractice. According to MCL 600.5838(1), a claim of malpractice “accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity *as to the matters out of which the claim for malpractice arose*, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.” (Emphasis added). Thus, at issue here is whether “the matters out of which the claim for malpractice arose” extended to the federal bankruptcy proceedings.

“The gravamen of an action is determined by reading the claim as a whole.” *Aldred v O’Hara-Bruce*, 184 Mich App 488, 490; 458 NW2d 671 (1990). Pursuant to MCR 2.111(B), a complaint must include “[a] statement of facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend[.]” In other words, “[a] plaintiff must provide sufficient facts in his or her complaint to give the defendant notice of the claims against which he or she must defend.” *Kincaid v Cardwell*, 300 Mich App 513, 529; 834 NW2d 122 (2013).

In their complaint, plaintiffs only provided a cursory reference to the bankruptcy proceedings. Plaintiffs raised six discrete issues in the fact section of their complaint: the Frank Vallecorsa loan, estate administration, tax matters, the Nancy Stec (Stec) account, Stec's breach of fiduciary duty, and attorney fees. Legal representation in the bankruptcy proceeding was not listed as an issue.² While plaintiffs referenced the bankruptcy proceedings later in the complaint, they did so in a conclusory manner devoid of any detail or allegations.

Under count I of the complaint (legal malpractice), plaintiffs alleged negligence in the “[m]ismanagement of the bankruptcy adversarial proceedings involving Vallecorsa[.]”³ Under count IV (breach of fiduciary duty), plaintiffs alleged that attorney Gerald Fitzgerald violated his fiduciary duty when “compromising the bankruptcy proceedings to assist Fanto to the detriment of the Estate[.]” Plaintiffs provided no details regarding the alleged legal malpractice in the bankruptcy proceedings. They did not identify any specific action defendants undertook that was negligent, nor articulate on what grounds any conduct constituted legal malpractice. The remainder of the 18-page complaint is devoted entirely to the deficiencies in the estate and tax planning and administration, as well as the decision to enter into the Vallecorsa loan transaction.

Reading the complaint as a whole, the gravamen is a legal malpractice claim arising out of the estate, tax, and loan negotiation transactions. In other words, “the matters out of which the claim for malpractice arose” did not relate to the bankruptcy proceedings. MCL 600.5838(1). The fact that plaintiffs did not name as defendants Robert Peurach or Dakmak Peurach, PC—even though they represented plaintiffs in the bankruptcy proceeding—reinforces this conclusion. In fact, plaintiffs filed a separate legal malpractice action against Peurach and Dakmak Peurach for their representation during the bankruptcy proceedings.⁴

Accordingly, the bankruptcy proceedings are not within the scope of the malpractice claims alleged in this case. As the remainder of the allegations—estate and tax planning and administration, and the loan negotiation—occurred more than two years before plaintiffs filed

² Plaintiffs stated that “[d]uring the course of the adversarial proceedings, the Estate incurred significant attorney fees and costs, and was forced to accept a settlement less than the full value of the mortgage, interest, and other benefits of the mortgage.” However, it is not clear if plaintiffs were faulting the loan transaction itself, or the legal representation during the bankruptcy proceedings.

³ Plaintiffs also alleged that Jeffrey Fanto compromised the rights of the estate during the bankruptcy proceedings, but again failed to identify any specific action, behavior, or basis for legal malpractice.

⁴ Plaintiffs were not successful in their suit against Peurach and Dakmak Peurach. Fitzgerald & Dakmak was not a defendant in that case.

suit, the trial court properly found that the statute of limitation barred the current action. MCL 600.5805(6); MCL 600.5838(1).⁵

Alternatively, plaintiffs argue that the trial court should have taken into account MCL 600.5855, fraudulent concealment, to toll the statute of limitations. MCL 600.5855 provides:

If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

“Fraudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action. The acts relied on must be of an affirmative character and fraudulent.” *Doe v Roman Catholic Archbishop of Archdiocese of Detroit*, 264 Mich App 632, 642; 692 NW2d 398 (2004) (quotation marks and citation omitted). A “plaintiff must plead in the complaint the acts or misrepresentations that comprised the fraudulent concealment.” *Id.* at 643. As this Court articulated in *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 48; 698 NW2d 900 (2005):

Generally, for fraudulent concealment to postpone the running of a limitations period, the fraud must be manifested by an affirmative act or misrepresentation. The plaintiff must show that the defendant engaged in some arrangement or contrivance of an affirmative character designed to prevent subsequent discovery. If liability were discoverable from the outset, then MCL 600.5855 will not toll the applicable period of limitations. [Quotation marks and citation omitted.]

Thus, a defendant must engage in deceptive behavior that was “planned to prevent inquiry or escape investigation[.]” *Doe*, 264 Mich App at 642. However, an exception to the rule that fraud must be manifested in an affirmative act or misrepresentation is if a fiduciary relationship exists. *Brownell v Garber*, 199 Mich App 519, 527; 503 NW2d 81 (1993). It is plaintiffs’ burden to prove fraudulent concealment. *Id.* at 531.

Plaintiffs posit that in failing to disclose numerous conflicts of interest, despite being in a fiduciary relationship with the beneficiaries of the estate, defendant was guilty of fraudulent concealment sufficient to toll the statute of limitations. Plaintiffs have failed to plead fraudulent concealment with sufficient specificity. See *Doe*, 264 Mich App at 643. In their complaint,

⁵ Because any claims relating to the bankruptcy matter were not properly pleaded in this action, we decline to address plaintiffs’ alternate argument regarding when the discontinuance of services occurred, MCL 600.5805(6), as our analysis on the first issue is dispositive.

plaintiffs do not even use the phrase fraudulent concealment in connection with defendants. They do not assert that Fitzgerald and defendant engaged in fraudulent concealment regarding Jeffrey Fanto's conflict of interest in the Vallecorsa loan transaction.

Nor do plaintiffs' remaining conflict of interest arguments support a finding of fraudulent concealment. While plaintiffs attempt to characterize conflicts of interest as proof of fraudulent concealment, such allegations "amount only to the type of conduct plaintiffs would have been required to prove in establishing their underlying" claim. *McCluskey v Womack*, 188 Mich App 465, 472; 470 NW2d 443 (1991). Furthermore, "[n]o fraudulent concealment can be said to occur where an attorney is unaware of his malpractice. It would be illogical to hold that attorneys who fail to appreciate that they have breached the standard of care have a duty to disclose such a breach notwithstanding their ignorance thereof." *Brownell*, 199 Mich App at 528-529. Because plaintiffs' allegations amount to nothing more than a claim that Fitzgerald and defendant breached the standard of care, their claim of fraudulent concealment fails.⁶

II. CONCLUSION

Because the statute of limitations barred this action, and plaintiffs have not demonstrated fraudulent concealment, summary disposition is proper. We affirm.

/s/ Michael J. Riordan
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot

⁶ To the extent that the trial court based its ruling on different reasons, "this Court may affirm a trial court's grant of summary disposition for reasons different than relied on by the trial court." *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 86; 592 NW2d 112 (1999). We also note that plaintiffs do not raise an argument based on successor liability, nor is Dakmak Peurach a defendant in this case. Thus, any claim relating to successor liability is not an issue in this appeal. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).