



## Alerts

### Clients Also Have Responsibilities: Plaintiffs' Lack of Diligence Defeats Fraudulent Concealment Claim and Precludes Tolling of Statute of Repose

June 20, 2022

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*Brandolino v. Schlak*, 2022 WL 602474, Court No. 19 C 0102 (N.D. Ill. 2022, J. Lee)

#### Brief Summary

Three brothers—Bruce, Brad, and Brian Brandolino (plaintiffs)—held remainder interests in a piece of real property (Property) which their father sold to a bank in 2005. In 2019, plaintiffs sued the defendant attorney (defendant), alleging he committed legal malpractice while representing their father in that sale. Defendant's motion for summary judgment based on Illinois' six-year statute of repose (735 ILCS 5/13-214) was granted.

#### Complete Summary

In 1998, the Property was conveyed to plaintiffs' father as a life tenant, with plaintiffs as remaindermen. In 2005, plaintiffs' father decided to sell the Property, and offered each plaintiff \$100,000 in exchange for their help facilitating the transaction. He retained defendant to draft the necessary documents for the sale. Defendant never spoke to plaintiffs, who did not know his name or how to reach him until 2016.

On Dec. 22, 2005, plaintiffs met their father at a bank and signed the documents defendant had prepared. Defendant was not present, and plaintiffs' father only provided them with signature pages for the closing documents. When the transaction closed seven days later, defendant gave plaintiffs' father an envelope for each plaintiff containing copies of the closing documents and a check for \$100,000. However, plaintiffs only received the checks.

Plaintiffs' father passed away on Sept. 24, 2017. Plaintiffs then discovered the closing documents from the Property sale which occurred almost twelve years earlier. After reviewing the documents with an attorney, plaintiffs learned the \$100,000 they each received was not a mere gift for their help in facilitating the sale as they had previously thought. Rather, it was compensation for releasing their remainder interests in the Property. Plaintiffs believed they had been tricked into selling their interests for less than what it was worth. Thus, on Jan. 9, 2019, they sued defendant for legal malpractice. Defendant moved for

#### Attorneys

Terrence P. McAvoy

Matthew L. Pagano

#### Service Areas

Counselors for the Profession

Lawyers for the Profession®



summary judgment based on the argument that the suit was barred by Illinois' statute of repose.

The district court granted defendant's motion, explaining that such actions "may not be commenced in any event more than 6 years after the date on which the act or omission [giving rise to the claim] occurred." 735 ILCS 13-214.3(b)-(c). The statute of repose could have been tolled if plaintiffs had proven: (1) by clear and convincing evidence that defendant fraudulently concealed the cause of action from the plaintiff, or (2) they had a fiduciary relationship with defendant and his performance of his duties prevented them from discovering their cause of action. However, the court held that neither exception applied.

As to concealment, the court considered whether defendant acted affirmatively to conceal his alleged malpractice. Proving such affirmative acts would require plaintiffs to show that: (1) defendant committed acts or made representations he knew were false, (2) made them with the intent to deceive plaintiffs, and (3) plaintiffs detrimentally relied on such acts or representations. Plaintiffs argued here that: (a) defendant failed to inform them of his longstanding relationship with their father, (b) their father misled them about the nature of the interests they conveyed when they met at the bank to sign the closing documents, and (c) their father withheld copies of the closing documents. However, none of these arguments showed affirmative misconduct by defendant.

Without affirmative acts, the court considered whether plaintiffs could still prove fraudulent concealment by demonstrating that: (1) greater diligence would not have caused them to discover the fraud sooner, or (2) the trust and confidence they placed in defendant by virtue of their relationship prevented them from discovering the fraud sooner. Here too, the exception did not apply. The court held that plaintiffs could have discovered their cause of action through greater diligence. It was they—not defendant—who had a duty to inquire further when their father presented them with only the signature pages for the closing documents, and they did not read the documents before signing. Similarly, it was plaintiffs' responsibility to ask the title company for copies of the documents when they did not receive them with their checks.

Plaintiffs' relationship with defendant did not save them either. The court reasoned that plaintiffs could not have had a relationship with defendant that warranted placing their trust and confidence in him. Indeed, they did not even learn defendant's name until 2016. Plaintiffs argued defendant should have informed them of their rights and the conflict of interest that might arise between them and their father in selling the Property. However, because plaintiffs already used these facts as the basis for their legal malpractice claim, Illinois law forbade their use as the basis for a fraudulent concealment claim as well.

## Significance of Decision

This decision reminds us that clients—not just attorneys—have responsibilities in pursuing claims. In this case, it was not defendant who failed to deliver the closing documents to plaintiffs. He provided the documents to plaintiffs' father, and they were lost thereafter. Moreover, plaintiffs, not defendant, failed to inquire further when they did not receive or review the closing documents. This lack of diligence by plaintiffs—coupled with their exceedingly weak relationship with defendant and an absence of deceptive conduct on his part—prohibited tolling Illinois' statute of repose.