

STATE OF MICHIGAN
COURT OF APPEALS

NICHOLAS FARANSO, RALPH FARANSO,
OMNI FOOD & BEVERAGE, INC., and
FARANSO ENTERPRISES, INC.,

UNPUBLISHED
July 5, 1996

Plaintiffs-Appellants/
Cross-Appellees,

v

No. 172663
LC No. 93-321664

GENE J. ESSHAKI, NORBERT T. MADISON,
JR., and ABBOTT, NICHOLSON, QUILTER,
ESSHAKI & YOUNGBLOOD, PC,

Defendants-Appellees/
Cross-Appellants.

Before: Murphy, P.J., and Markman and K.V. Fink,* JJ.

PER CURIAM.

Plaintiffs appeal by leave granted an order denying their motion for rehearing of an order granting in part defendants' motion for summary disposition. Defendants cross-appeal. We affirm in part and reverse in part.

On July 30, 1993, plaintiffs filed a complaint against defendants alleging that plaintiffs retained defendants to file an appeal of a City of Detroit property tax assessment on certain commercial property and that defendants failed to timely file the appeal. Because of defendants' failure to timely file the appeal, the appeal was refused. The complaint contained claims for legal malpractice, fraud, and intentional infliction of emotional distress. On September 22, 1993, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(7) [claim barred by statute of limitations]. The trial court granted defendants' motion for summary disposition of plaintiff's legal malpractice and intentional infliction of emotional distress claims, but denied the motion as to the fraud claim. The trial court did not articulate on what basis summary disposition was appropriate. On January 21, 1994, plaintiffs moved

* Circuit judge, sitting on the Court of Appeals by assignment.

for reconsideration and/or rehearing, arguing in part that plaintiffs' claim for fraudulent concealment barred the defense of the statute of limitations. The trial court denied the motion.

Plaintiffs contend that the trial court erred in granting summary disposition of its legal malpractice claim based on plaintiffs' failure to file the complaint within the statute of limitations. We agree.

The trial court appears to have granted summary disposition of plaintiffs' malpractice claim based on MCR 2.116(C)(7). A motion under MCR 2.116(C)(7) may be supported by affidavits, admissions, or other documentary evidence and, if submitted, must be considered by the court. *Home Insurance Co v Detroit Fire Extinguisher Co, Inc*, 212 Mich App 522, 527; 538 NW2d 424 (1995). We must take the well-pleaded allegations in the pleadings and the factual support submitted by the nonmoving party as true. *Id.* The motion should not be granted unless no factual development could provide a basis for recovery. *Gracey v Wayne Co Clerk*, 213 Mich App 412, 415; 540 NW2d 710 (1995).

A legal malpractice action generally must be brought within two years of the date the attorney discontinues serving the plaintiff or within six months after the plaintiff discovers or should have discovered the claim, whichever is later. MCL 600.5805(4); MSA 27A.5805(4); MCL 600.5838(2); MSA 27A.5838(2); *Brownell v Garber*, 199 Mich App 519, 523; 503 NW2d 81 (1993). However, if the defendant fraudulently conceals the existence of a cause of action, the cause of action is subject to the special two-year statute of limitation in MCL 600.5855; MSA 27A.5855, which 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.

Generally, for fraudulent concealment to postpone the running of a statute of limitation period, the fraud must be manifested by an affirmative act or misrepresentation. *Brownell, supra*, 527. However, when the parties are in a fiduciary relationship, such as an attorney-client relationship, the plaintiff is not required to allege an affirmative act or misrepresentation. *Id.*, 527-528.

In plaintiffs' amended complaint, plaintiffs alleged that defendants fraudulently concealed the existence of their legal malpractice, fraudulently concealed from plaintiffs the consequences of their failure to file a timely appeal, falsely represented to plaintiffs that they were pursuing other alternatives to reduce the tax assessment, falsely represented that they were taking care of reducing the tax assessments, and failed to timely pursue other alternatives. Plaintiffs also submitted the affidavit of Nicholas Faranso in which he stated that he did not discover that he had a legal malpractice claim until July, 1992, and the affidavit of Randall P. Whately, in which he stated that plaintiff Nicholas Faranso did

not understand that plaintiffs had lost the right to appeal the tax assessment until July, 1992. Accepting these allegations as true, which we must, defendants fraudulently concealed their malpractice and plaintiffs did not discover the malpractice until July, 1992. Thus, plaintiffs complaint, which was filed on July 30, 1993, was filed within the special two-year special statute of limitation for fraudulent concealment. Accordingly, accepting plaintiffs' well-pleaded allegations as true, plaintiffs' malpractice claim is not barred by the statute of limitations, and it therefore cannot be said that no factual development could provide a basis for recovery. The trial court therefore erred in granting defendants' motion for summary disposition of plaintiffs' legal malpractice claim based on MCR 2.116(C)(7).

Defendants argue that plaintiffs' complaint does not allege facts that constitute fraudulent concealment. We disagree. As noted above, when the parties are in a fiduciary relationship, such as an attorney-client relationship, the plaintiff need not show an affirmative act or misrepresentation for fraudulent concealment to postpone the running of the statute of limitation. *Id.* Therefore, plaintiffs were not required to plead an affirmative act or misrepresentation. Nevertheless, in their amended complaint, plaintiffs alleged the following regarding fraudulent concealment:

21. Defendants breached this [fiduciary] duty by: fraudulently concealing the existence of their legal malpractice (failing to timely perfect the assessment appeals) by fraudulently concealing from Plaintiffs the consequences of Defendants' failure to timely appeal; falsely representing to Plaintiffs that Defendants were pursuing other viable alternatives or avenues in reducing the tax assessments; falsely representing to Plaintiffs that the reduction of the tax assessments was being taken care of; and failing to otherwise timely pursue the existence of viable alternatives.

We conclude that plaintiffs' amended complaint was sufficient to allege fraudulent concealment. Accordingly, we find defendants' argument to be without merit.

Defendants also argue that plaintiffs failed to state a claim for fraud because plaintiff has not alleged any specific misrepresentation of fact and plaintiffs cannot establish reliance or proximate cause. The elements of fraud are:

“(1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. . . .” [Brownell, *supra*, 533, quoting *Scott v Harper Recreation, Inc*, 192 Mich App 137, 144; 480 NW2d 270 (1991), reversed on other grounds 444 Mich 441 (1993).]

Defendants challenge the sufficiency of the pleadings of elements 1, 5, and 6. Because we addressed the sufficiency of the first element in defendants' previous issue, we will not address it again here.

A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the pleadings alone. *Jackson v Oliver*, 204 Mich App 122, 125; 514 NW2d 195 (1994). All factual allegations in support of the claim are accepted as true. *Id.* Plaintiffs alleged the following in their amended complaint:

22. Plaintiffs relied on Defendants' advice and statements to their damage as set forth.

23. As a direct and proximate result of Defendants' fraudulent concealment Plaintiffs lost their right to appeal the tax assessments and Plaintiffs unnecessarily incurred and were obligated to pay greatly increased and over-assessed taxes for 1989 and 1990 on the property.

In light of the foregoing, we conclude that plaintiffs adequately pleaded the elements of reliance and causation. Accordingly, we conclude that defendants' argument is without merit.

Affirmed in part and reversed in part.

/s/ William B. Murphy

/s/ Karl V. Fink