2015 IL App (1st) 133141-U

SECOND DIVISION
June 16, 2015

No. 1-13-3141

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAMES BANKS, Plaintiff-Appellant, v. LUKE ANDREW CASSON; and ANDREOU & CASSON, LTD., Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County, No. 09 L 3559 Honorable John P. Kirby, Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Presiding Justice Simon and Justice Neville concurred in the judgment.

ORDER

¶ 1 *Held*: Dismissal pursuant to section 2-619 is affirmed where (1) breach of fiduciary duty claim was based on an unenforceable fee agreement and (2) fraud claim was barred by the limitations period and did not relate back to the original complaint.

¶ 2 Plaintiff, James Banks, appeals from the circuit court's order dismissing his claims for breach of fiduciary duty owed to a joint venturer (count II) and fraudulent misrepresentation (count III), pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2012)).[1]

[1] Only two of the five counts in Banks' fourth amended complaint are at issue in this appeal.

¶ 3 On appeal, Banks contends that the court erred in dismissing counts II and III of the fourth amended complaint. He argues that the claims "relate back to the original occurrence or transaction and did not violate the applicable statute of limitations," and that he sufficiently pled claims for breach of fiduciary duty and fraudulent misrepresentation. We affirm.

¶ 4 BACKGROUND

¶ 5 This case involves a dispute over the failure to pay a client referral fee in connection with the plaintiff's referral of certain clients to the defendants, Luke Casson, an attorney, and the law firm of Andreou & Casson (A&C) (collectively "defendants").

¶ 6 Banks and defendants were previously involved together in two lawsuits pending in the federal district court for the Northern District of Illinois: *Shales v. Local 330* (case No. 04 C 8348) and *Files v. City of Harvey* (case No. 05 C 4060). Banks represented certain claimants in each of the lawsuits, and asked Casson to provide legal assistance and representation related to these suits. In *Shales*, Banks retained defendants to represent him in a sanctions motion (the *Shales* sanctions matter). In *Files*, Banks referred certain of his clients to Casson for representation in the whistleblower/ retaliatory discharge claim (the *Files* case).

¶ 7 A. The Original Complaint

¶ 8 In March 2009, Banks filed a complaint against defendants, alleging a single count of legal malpractice related to the *Shales* sanctions matter. According to the allegations in this complaint, defendants committed several acts of negligence or carelessness during their representation of Banks and, as a result, he was sanctioned in the amount of $79,302.18.

¶ 9 B. The First Amended Complaint

¶ 10 In September 2011, Banks filed a first amended complaint, realleging his claim of legal malpractice and adding a new breach of contract claim based on the purported client referral

agreement in the *Files* case. Specifically, Banks alleged that the parties entered into a referral agreement when Casson agreed to represent Banks' clients in the whistleblower claim and to pay Banks a referral fee amounting to one-third of the legal fees for this claim. Banks claimed that defendants violated this referral agreement because they failed to pay him the referral fee after the whistleblower claim was settled.

¶ 11 C. The Second Amended Complaint

¶ 12 In August 2012, Banks filed a second amended complaint that included eight counts. He realleged his prior claims for legal malpractice and breach of contract, and added new claims for breach of fiduciary duty/constructive fraud, fraudulent misrepresentation, breach of fiduciary duty based on a joint venture, tortious interference with contract, tortious interference with business relationships, and unjust enrichment. In response, defendants filed an answer to the legal malpractice claim only and brought a motion to dismiss the remaining seven counts pursuant to section 2-615 (735 ILCS 5/2-615 (West 2010)) and section 2-619 of the Code. The circuit court subsequently entered a case management order allowing Banks to file a third amended complaint and allowing defendants "to determine whether to file a motion to dismiss or stand on [the] previous motion" at that time.

¶ 13 D. The Third Amended Complaint

¶ 14 In November 2012, Banks filed his third amended complaint, realleging his claims for legal malpractice and breach of contract claims and adding a general claim for breach of fiduciary duty. The remaining claims previously asserted in his second amended complaint were omitted. Defendants again filed an answer to the legal malpractice claim and moved to dismiss the claims for breach of contract and breach of fiduciary duty. The circuit court granted

defendants' section 2-615 motion to dismiss without prejudice, and granted leave for Banks to file a fourth amended complaint.

¶ 15 E. The Fourth Amended Complaint

¶ 16 In April 2013, Banks filed the fourth amended complaint, the pleading at issue.[2] In this complaint, Banks alleged breach of an oral contract reduced to writing (count I), breach of fiduciary duty owed to a joint venturer (count II), fraudulent misrepresentation (count III), breach of fiduciary duty (count IV), and legal malpractice (count V). As support for his complaint, copies of the draft whistleblower client representation contracts that Banks had prepared and sent to Casson for review and approval (Banks draft contracts) were attached.

¶ 17 Count II

¶ 18 In count II, Banks alleged that he "represented all [*Files*] plaintiffs on all claims and was never fired by his clients." Banks further alleged that Casson agreed, as consideration for the referral of the whistleblower clients, to pay Banks "one[-]third of the fee for the work he had already performed, and as a referral fee," and that "the parties formed a joint venture" to represent the whistleblower clients in the *Files* case. Banks asserted that the draft client representation contract that he sent to defendants "explained the lawyers' fee splitting to the client and [ ] required the client's signature."

¶ 19 With respect to the relationship of the parties in the *Files* case, Banks claimed that "[t]he contract between two lawyers to handle a case together established a joint venture between BANKS and CASSON in which they became fiduciaries to each other and owed an obligation to each other not to engage in fraudulent acts ***."

[2] The actual pleading is mislabeled as plaintiff's "Fifth Amended Complaint."

¶ 20 Count III

¶ 21 In count III, Banks alleged that Casson had promised pay Banks one-third of the legal fee as a "referral" fee and to send the whistleblower clients a legal services agreement that referenced said referral arrangement. Banks further alleged that, instead of fulfilling this promise, Casson sent a legal services agreement that included no mention of Banks or the parties' referral arrangement. In doing so, Casson "knowingly and intentionally made fraudulent representations, misrepresentations and omissions of material fact in order to induce BANKS to enter into the subject agreement."

¶ 22 Banks claimed that, as a result of Casson's actions, he suffered "substantial economic harm" and was entitled to actual and punitive damages, recoverable costs, and *quantum meruit*.

¶ 23 F. Motion for Summary Judgment & Motion to Dismiss

¶ 24 In May 2013, defendants filed a motion for summary judgment on Banks' claims in the fourth amended complaint for breach of fiduciary duty (count IV) and legal malpractice (count V). Defendants also filed a separate section 2-619 motion to dismiss all claims except for the legal malpractice claim.

¶ 25 In their section 2-619 motion to dismiss, defendants argued that: (1) the claims for breach of fiduciary duty owed to a joint venturer (count II) and fraudulent misrepresentation (count III) were time-barred by the five-year statute of limitations; (2) these claims did not relate back to a timely-filed complaint; and (3) Banks could not recover under his joint venture theory because the referral provision in the Banks draft contracts was unenforceable.

¶ 26 Defendants attached to their motion e-mails between Casson and Banks from February 2006 wherein the parties alluded to the client representation contracts for the *Files* case. According to the e-mails, Casson asked if Banks had client representation contracts for the

whistleblower clients. Banks responded that he was "making some changes" to the contracts and asked Casson to "[l]et me know if you disagree after your review."

¶ 27 On February 24, 2006, Banks sent Casson an e-mail with draft client representation contracts for the whistleblower claim. These draft contracts were attached to the defendant's motion and contained a provision entitled "Consent to Referral," which stated:

> "The undersigned client(s) hereby consent(s) and acknowledge(s) that ANDREOU & CASSON, LTD. will participate jointly with J. GORDON BANKS in my representation and both are equally responsible for my representation. There will be NO ADDITIONAL FEE OR COST charged to me other than that set forth above, however, there will be a division of that fee between ROMERO & BANKS and the aforesaid attorney on a percentage basis of two thirds (2/3) to ANDREOU & CASSON, LTD. and one third (1/3) to J. GORDON BANKS."

¶ 28 Defendants asserted that the applicable statute of limitations began running on March 10, 2006, based on a letter Casson sent to the whistleblower clients. The March 10 letter, which was attached to defendants' motion, referred to an enclosed "copy of [the] new fee agreement" and indicates that a carbon copy was sent to Banks at the same time.

¶ 29 Defendants attached copies of another e-mail exchange between Casson and Banks that occurred between February 17 and March 8, 2007. In this exchange, Banks asked Casson if the *Files* case had been settled and Casson responded that it had. Thereafter, Banks sent three e-mails on February 21, 22, and 23 asking about his referral fee, then another three e-mails on February 26 and March 6 and 8 asking Casson to contact him about the settlement.

¶ 30 In a response to the motion to dismiss, Banks argued that: (1) his claims were subject to a 10-year limitations period because they were based on a written agreement, *i.e.*, the Banks draft contracts, and that the limitations period did not begin to run until February 2007 when he requested his referral fee from Casson; (2) he and defendants had formed a joint venture and therefore Casson owed Banks a fiduciary duty to pay Banks his referral fee; (3) Casson committed fraud by representing that he would send the Banks draft contracts to the whistleblower clients when, in fact, he never did so; and (4) Casson entered into an attorney-client relationship when he agreed to represent Banks in the *Shales* sanctions matter and, therefore, had a duty to inform Banks that he had "appropriated" Banks's clients and did not intend to pay a referral fee.

¶ 31 Defendants filed a reply to which they attached the client representation contracts signed by the whistleblower clients on March 24, 2006 (the A&C contracts). The A&C contracts did not include the referral provision and stated that "[t]his retainer supersedes any prior retainers or agreements entered into in this case."

¶ 32 On September 25, 2013, the circuit court entered an order dismissing counts II and III pursuant to section 2-619. The court denied defendants' motion to dismiss counts I and IV and also denied defendants' motion for summary judgment. The court noted that the order was final and appealable pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) "as there is no just reason for delay." Defendant timely appealed.

¶ 33 ANALYSIS

¶ 34 Banks contends that the trial court erred in dismissing counts II and III of his fourth amended complaint pursuant to section 2-619 of the Code. He argues that dismissal was

improper because: (1) he stated a claim for breach of fiduciary duty; (2) he stated a claim for fraud; and (3) his claims are not barred by the statute of limitations.

¶ 35 Initially, we note that defendants' motion to dismiss Banks's fourth amended complaint was brought solely pursuant to section 2-619 of the Code.[3] Under section 2-619, the movant goes beyond the allegations of the complaint and asserts affirmative matters that would defeat the plaintiff's complaint. 735 ILCS 5/2-619; *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 485-86 (1994). In contrast, when a defendant files a motion pursuant to section 2-615, he attacks the legal sufficiency of the complaint, arguing that the complaint itself fails to sufficiently state the claim being presented. 735 ILCS 5/2-615; *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81 (2004).

¶ 36 Here, where Banks argues that he properly stated his claims for breach of fiduciary duty and fraud, such argument addresses the legal sufficiency of his claims and are proper only for a disposition under section 2-615. Neither side disputed the sufficiency of counts II or III during the proceedings in the circuit court. Furthermore, the court's dismissal of these two counts was entered solely pursuant to section 2-619. Therefore, we will only consider the arguments relevant to our analysis of the claims under section 2-619.

¶ 37 "A section 2-619 motion admits as true all well-pleaded facts, along with reasonable inferences that can be gleaned from those facts." *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008). It also "admits the legal sufficiency of the plaintiff's complaint but asserts a defense defeating the claim." *Ferris, Thompson & Zweig, Ltd. v. Esposito*, 2015 IL 117443, ¶ 14. The purpose of section 2-619 is to provide litigants with a way to dispose of issues of law and easily proven issues of fact relating to an affirmative matter early in the litigation. *Van Meter v.*

[3] The original record on appeal did not contain a copy of defendants' section 2-619 motion to dismiss Banks' fourth amended complaint. On the court's own motion, we requested that Banks supplement the record with a copy of the motion specifically to determine whether the motion was solely a section 2-619 motion or a combined motion pursuant to both sections 2-615 and 2-619.

Darien Park District, 207 Ill. 2d 359, 367 (2003). A court ruling on a section 2-619 motion to dismiss " 'must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party.' " *Id*. at 367-68 (quoting *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 189 (1997)). We review a circuit court's ruling on a section 2-619 motion *de novo*. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006).

¶ 38 A. Section 2-619(a)(9) Motion to Dismiss

¶ 39 Section 2-619(a)(9) permits a defendant to file a motion to dismiss where the claim asserted against the defendant "is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9). An "affirmative matter" is a matter that completely negates a cause of action or "refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." *Cwikla v. Sheir*, 345 Ill. App. 3d 23, 29 (1st Dist. 2003) (quoting *Nickum*, 159 Ill. 2d at 486). When a cause of action is dismissed pursuant to section 2-619(a)(9), the questions on appeal are whether a genuine issue of material fact exists and whether the defendant is entitled to judgment as a matter of law. *Cwikla*, 345 Ill. App. 3d at 30 (citing *Nickum*, 159 Ill. 2d at 494).

¶ 40 1. Dismissal of Count II

¶ 41 Banks first contends that the parties entered into a joint venture by virtue of the referral provision in the Banks draft contracts, that the joint venture gave rise to a fiduciary duty, and that Casson breached this duty to Banks by refusing to pay the referral fee. In response, defendants argue that the referral provision is not enforceable in the first instance because it violates Rule 1.5 of the Illinois Rules of Professional Conduct. See Ill. R. Prof. Conduct (1990) R. 1.5 (eff. Aug. 1, 1990).

¶ 42 "Rule 1.5 governs the propriety of attorney-fee agreements. The provisions of Rule 1.5 'operate with the force and effect of law.' " *Donald W. Fohrman & Associates, Ltd. v. Mark D. Alberts, P.C.*, 2014 IL App (1st) 123351, ¶ 33 (quoting *Romanek v. Connelly*, 324 Ill. App. 3d 393, 399 (1st Dist. 2001)). Rule 1.5(f)[4] specifically provides:

> "[A] lawyer shall not divide a fee for legal services with another lawyer who is not in the same firm, unless the client consents to employment of the other lawyer by signing a writing which discloses:
>
> (1) that a division of fees will be made;
>
> (2) the basis upon which the division will be made, including the economic benefit to be received by the other lawyer as a result of the division; and
>
> (3) the responsibility to be assumed by the other lawyer for performance of the legal services in question." Ill. R. Prof. Conduct (1990) R. 1.5(f) (eff. Jan. 1, 1990).

¶ 43 This court has noted that Rule 1.5 " 'embod[ies] this state's public policy of placing the rights of clients above and beyond any lawyers' remedies in seeking to enforce fee-sharing arrangements.' " *Fohrman*, 2014 IL App (1st) 123351, ¶ 35 (quoting *Romanek*, 324 Ill. App. 3d at 399). Thus, where a referral fee contract between lawyers violates Rule 1.5, it is against public policy and is unenforceable. *Fohrman*, 2014 IL App (1st) 123351, ¶ 33 (citing *Richards v. SSM Health Care, Inc.*, 311 Ill. App. 3d 560, 564 (2000)); see also *Holstein v. Grossman*, 246 Ill.

[4] In 2010, Rule 1.5(f) (Ill. R. Prof. Conduct (1990) R. 1.5(f) (eff. Aug. 1, 1990)) was recodified as Rule 1.5(e) (Ill. R. Prof. Conduct (2010) R. 1.5(e) (eff. Jan. 1, 2010)). Because the alleged referral agreement was created prior to 2010, we will rely on the 1990 version of Rule 1.5.

App. 3d 719 (1st Dist. 1993) (finding that, under a prior version of Rule 1.5, an unsigned referral fee agreement was unenforceable because a client's right to a lawyer of their choosing "must be preserved, and the signed writing requirement guarantees this result").

¶ 44 It is undisputed that the whistleblower clients never signed the Banks draft contracts or any contract which included the referral provision. Furthermore, nothing in the record indicates that the clients otherwise consented to a fee-splitting arrangement or were even aware of the proposed arrangement. Therefore, pursuant to Rule 1.5, Banks is not entitled to share in the legal fees related to the whistleblower claim. The alleged agreement between Banks and defendants is unenforceable and Banks may not recover based on the unenforceable agreement. *Fohrman*, 2014 IL App (1st) 123351, ¶ 44.

¶ 45 Banks maintains that the parties undertook a joint venture giving rise to a fiduciary duty. A joint venture is an association of two or more persons to carry out a single enterprise for profit. *Holstein*, 246 Ill. App. 3d at 737. Banks cites *Larry Karchmar, Ltd. v. Nevoral*, 302 Ill. App. 3d 951, 956 (1st Dist. 1999), for the proposition that "[a]n agreement between two attorneys to share fees creates a joint venture and therefore a fiduciary duty of honesty and good faith to disclose to each other all matters affecting their joint representation." We find Banks's reliance on *Karchmar* unavailing.

¶ 46 In his fourth amended complaint, Banks alleged that a joint venture exists because of the *proposed* re*ferral* provision in the Banks draft contracts. As discussed above, the referral provision in the Banks draft contract violates Rule 1.5(f) and is unenforceable; *ipso facto*, there can be no joint venture based on the referral provision. This is in contrast to the referral fee agreement in *Karchmar*, which was presumably valid and enforceable. *Id*. at 959 fn.4. The

referral fee provision in the Banks draft contract is not a valid agreement between two attorneys to share fees and is therefore insufficient to support the existence of a joint venture.

¶ 47 In the absence of a formal agreement, a joint venture may be inferred from circumstances showing that the parties intended to enter into a joint venture. *Daniels v. Corrigan*, 382 Ill. App. 3d 66, 80 (2008). Here, Banks alleged no other facts in his complaint to support an inference that defendants intended to enter into a joint venture with him without formally memorializing their agreement. A joint venture cannot exist solely based on an unenforceable contract. Thus, defendants are entitled to judgment as a matter of law and the circuit court properly dismissed Banks' claim for breach of fiduciary duty owed to a joint venturer pursuant to section 2-619.[5]

¶ 48 We acknowledge that in *Holstein*, the court observed that "breach of fiduciary duty actions are not contract actions" and concluded that an unenforceable agreement did not "necessitate[ ] that the parties['] joint-venture agreement be held unenforceable on public policy grounds." *Holstein*, 246 Ill. App. 3d at 740. However, *Holstein* is procedurally distinguishable from the present case because it involved a summary judgment motion as opposed to a section 2-619 motion to dismiss. *Holstein* is also factually distinguishable from the present case because there, the circuit court found a genuine issue of fact as to whether the parties' relationship could be considered a joint venture. *Id*. at 739. The court explained that: (1) a jury could find that the

[5] Moreover, as defendants point out, even if we were to find that a joint venture existed despite the unenforceable agreement, Banks' claim still would fail pursuant to section 2-619(a)(9) because Banks breached his own fiduciary duty to the whistleblower clients by not disclosing the proposed fee-sharing arrangement. See *Holstein*, 246 Ill. App. 3d at 743 (citing *Schniederjon v. Krupa*, 162 Ill. App. 3d 192, 195 (1987)) (finding, in a supplemental opinion filed upon denial of rehearing, that an attorney has a fiduciary duty to disclose fee-sharing agreements to his clients). Banks alleges that he represented "all [*Files*] plaintiffs on all claims and was never fired by his clients" and he therefore had a continuing attorney-client relationship with the whistleblower clients. However, even interpreting all pleadings and supporting documents in the light most favorable to him, Banks never alleged any facts to suggest that he informed the *Files* clients of the alleged referral agreement. One who violates his own fiduciary duty to his clients is barred from recovery. *Holstein*, 246 Ill. App. 3d at 743; *Fohrman*, 2014 IL App (1st) 123351, ¶ 55.

parties had entered " 'some' " enterprise, based on documentary evidence in which the defendants thanked the plaintiff for the referral of 10 cases; and (2) a jury could find that the enterprise was a joint venture, because the plaintiff contributed clients, the defendants contributed legal services, and the parties had contemplated a fee split. *Id*. Unlike the alleged relationship in *Holstein*, which consisted of extended collaboration between the parties, the sole basis for a joint venture in this case is an unenforceable referral fee provision in a draft contract that the parties never executed. We find the distinction compelling. The *Holstein* court's conclusion therefore does not affect our finding.

¶ 49 Banks also argues that Casson entered into an attorney-client relationship with him when Casson agreed to represent him in the *Shales* sanctions matter, further obligating Casson to inform Banks that Casson did not intend to pay a referral fee. Banks maintains that Casson's failure to so inform him created a potential conflict of interest in violation of Rules 1.4 and 1.7 of the Illinois Rules of Professional Conduct, which govern "Communication" and "Conflict of Interest: Current Clients," respectively. See Ill. R. Prof. Conduct (2010) R. 1.4, 1.7. However, Banks has failed to cite any case law in support of his argument and we therefore find Banks has forfeited this argument. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (the argument section of an appellant's brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities *** relied on"); see also *In re Marriage of Johnson*, 2011 IL App (1st) 102826, ¶ 25 (noting it is "well settled that *** bare contentions that fail to cite any authority do not merit consideration on appeal").

¶ 50 Finally, we reject Banks's argument that the referral agreement should be enforced because of defendants' alleged dishonest conduct. Instead, we choose to uphold the requirement of strict compliance with Rule 1.5(f) in favor of following public policy considerations.

Fohrman, 2014 IL App (1st) 123351, ¶ 49; *Paul B. Episcope, Ltd. v. Law Offices of Campbell & Di Vincenzo*, 373 Ill. App. 3d 384, 396 (2007); *Holstein*, 246 Ill. App. 3d at 736-37. In doing so, we are not excusing any misrepresentation or dishonesty that may occur in relationships between attorneys; we are simply upholding "the Rules' interest in protecting clients above the interests of attorneys in recovering fees." *Fohrman*, 2014 IL App (1st) 123351, ¶ 49.

¶ 51 2. Dismissal of Count III

¶ 52 Regarding the circuit court's dismissal of the fraud claim, Banks argues that he properly pleaded the claim in his fourth amended complaint. In response, defendants argue that Banks failed to state a claim of fraud in his complaint. We will not address the merits of the parties' arguments regarding the sufficiency of the claim because we are reviewing the dismissal under section 2-619, not section 2-615. *Ferris*, 2015 IL 117443, ¶ 14.

¶ 53 B. Section 2-619(a)(5) Motion to Dismiss

¶ 54 Banks next contends that he filed his claims of breach of fiduciary duty to a joint venturer and fraudulent misrepresentation within the applicable 10-year limitations period. In the alternative, Banks appears to argue that even if the applicable limitations period is five years, his claims still are not time-barred because they relate back to his original complaint, which was filed within the applicable time period.

¶ 55 Section 2-619(a)(5) of the Code provides that an action may be dismissed if it was not commenced within the time limited by law. 735 ILCS 5/2-619(a)(5) (West 2010). Where the grounds for dismissal do not appear on the face of the pleading being attacked, "the motion shall be supported by affidavit." 735 ILCS 5/2-619(a) (West 2010).

¶ 56 1. Dismissal of Count II

¶ 57 Although Banks argues that his breach of fiduciary duty claim was timely filed, in light of our conclusion above that the circuit court properly dismissed the claim pursuant to section 2-619(a)(9), we need not consider whether the circuit court also properly dismissed it under section 2-619(a)(5).

¶ 58 2. Dismissal of Count III

¶ 59 In order to determine whether Banks timely filed his fraud claim, we must first determine the applicable statute of limitations. Banks argues that the ten-year limitations period for claims based on written contracts applies to count III because his fraud claim is based on the written Banks draft contracts.[6] In response, defendants assert that Banks's fraud claim is subject to a five-year limitation period.

¶ 60 Section 13-205 of the Code provides that "actions on unwritten contracts, expressed or implied, *** and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued." 735 ILCS 5/13-205 (West 2010). In contrast, section 13-206 provides that actions on written contracts "shall be commenced within 10 years next after the cause of action accrued." 735 ILCS 5/13-206 (West 2010).

¶ 61 In determining the applicable limitations period, our supreme court has held that " 'it is the nature of the plaintiff's injury rather than the nature of the facts from which the claim arises which should determine what limitations period should apply.' " *Armstrong v. Guigler*, 174 Ill. 2d 281, 286 (1996) (quoting *Mitchell v. White Motor Co.*, 58 Ill. 2d 159, 162 (1974)). Therefore, even where the allegations supporting a tort claim are based on the breach of a contract, the

[6] Banks also appears to argue that the written agreement in which he retained Casson to represent him in the *Shales* sanctions matter brings his fraud claim within the purview of the ten-year limitations period for actions based on written contracts. However, as Banks' fraud claim is based on Casson's alleged misrepresentation that Banks would receive a one-third referral fee from the *Files* case, we find that any agreement between Banks and Casson as to the *Shales* sanctions matter is irrelevant to Banks' fraud claim.

claim is not necessarily subject to the ten-year limitations period applicable to actions based on written contracts. *Armstrong*, 174 Ill. 2d at 287. An action can properly be characterized as "an action on a written contract" as required by section 13-206 only when that action arises from a breach of a contractual obligation. *Armstrong*, 174 Ill. 2d at 291.

¶ 62 Here, the only written contracts on which Banks can reasonably base his fraud claim are the Banks draft contracts. However, the Banks draft contracts were never signed by the whistleblower clients, nor was there an allegation that these clients had agreed to the referral provision in the contracts. Therefore, the Banks draft contracts are insufficient to qualify as the "written contract" required for a 10-year limitations period. In addition, Banks's fraud claim does not arise from a breach of an obligation in the Banks draft contracts; rather, Banks's claim is based on Casson's alleged misrepresentation that Casson would have the whistleblower clients sign the Banks draft contracts when, in fact, Casson had them sign the A&C contracts. Banks's fraud claim is not an action on a written contract and therefore falls under the five-year limitations period pursuant to section 13-205.

¶ 63 Next, we must determine the date on which Banks's fraud claim accrued. "A cause of action 'accrues' when facts exist that authorize the bringing of a cause of action." *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 20. However, because a mechanical application of the statute of limitations may result in the limitations period expiring before a plaintiff even knows of his cause of action, our courts have adopted "the discovery rule." *Id*. The discovery rule postpones the beginning of the limitations period "until the injured party knows or reasonably should know" of the injury. *Id*. At that time, the plaintiff has the burden to inquire further into the possible existence of a cause of action. *Id*. In addition, "the limitations period commences when

the plaintiff is injured, rather than when the plaintiff realizes the consequences" or the full extent of his injury. *Id*. ¶ 22.

¶ 64 Generally, the question of when a plaintiff knew or reasonably should have known of his injury is a question of fact. *Id*. ¶ 21. However, where the facts are undisputed and show that only one conclusion can be drawn, the question becomes one of law for the court. *Id*. (citing *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 171 (1981)). The defendant has the initial burden of going forward on a motion to dismiss. *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 37. (citing *Van Meter*, 207 Ill. 2d at 377). However, when the defendant carries the initial burden, the burden then shifts to the plaintiff who must establish either that the affirmative matter is unfounded or that it requires the resolution of an essential element of material fact before it is proved. *Reynolds*, 2013 IL App (4th) 120139, ¶ 37. (citing *Van Meter*, 207 Ill. 2d at 377).

¶ 65 Here, defendants carried their initial burden by presenting an accrual date of March 10, 2006, supported by the record. Specifically, defendants argue that Banks reasonably should have known of his potential cause of action on March 10, 2006, because Casson sent him a copy of the March 10, 2006 letter along with a copy of the A&C contract. Defendants' assertion is supported by the March 10 letter,[7] in which Casson specifically indicated that a copy of the A&C contract had been included with the letter. Furthermore, Banks has failed to establish that the affirmative matter is unfounded or requires a resolution of an essential element of material fact. Banks does

[7] Although section 2-619(a) states that if the grounds for dismissal do not appear on the face of the complaint, "the motion shall be supported by affidavit" (735 ILCS 5/2-619(a) (West 2010)), plaintiff has never challenged the sufficiency of defendants' affirmative matter, *i.e.*, the March 10, 2006 letter, which defendants rely upon to support their argument that plaintiff's fraud claim is barred by the statute of limitations. Additionally, "Illinois courts have never required affidavits where more conclusive and appropriate evidence exists." *Wanandi v. Black*, 2014 IL App (2d) 130948, ¶¶ 25-30. Accordingly, we shall consider the March 10, 2006 letter.

not dispute the assertion that he received the March 10, 2006 letter and a copy of the A&C contract at that time, nor does Banks dispute that he was aware that Casson was not going to give him the referral fee as of March 10, 2006. The only alternative accrual date Banks ever offered was presented in his response to defendants' motion to dismiss, where he suggested that the statute began to run when he requested his referral fee from Casson in February 2007. However, based on the record before us, we conclude that Banks reasonably should have known of his injury and that it was wrongfully caused in March 2006. When Banks, an attorney, saw the A&C contract that was sent to the whistleblower clients, and saw that it did not include the referral provision, as a matter of law he reasonably should have known that the referral agreement between himself and Casson would be unenforceable pursuant to Rule 1.5(f). See *O'Hara v. Ahlgren, Blumenfeld & Kempster*, 158 Ill. App. 3d 562, 568 (1987) (observing that it is "well settled that lawyers are presumed to know the law"). Accordingly, the statute of limitations began to run in March 2006.

¶ 66 Based on our conclusion that the limitations period began in March 2006, Banks was required to file his claim of fraud within five years of that, or by March 2011. Banks filed his fourth-amended complaint in April 2013. However, Banks argues that his fraud claim is not time-barred because it relates back to his original complaint.

¶ 67 Section 2-616(b) of the Code allows a party to file a cause of action in an amended pleading after the limitations period has lapsed if: (1) the original pleading was timely filed; and (2) if the new cause of action "grew out of the same transaction or occurrence set up in the original pleading." 735 ILCS 5/2-616(b) (West 2010). The rationale behind the relation-back doctrine is that if the amended pleading implicated the same transaction or occurrence as the timely-filed pleading, the defendant is not prejudiced by the amended pleading because his

attention had been directed to the facts that form the basis of the claim asserted against him in a timely fashion. *American Airlines, Inc. v. Department of Revenue*, 402 Ill. App. 3d 579, 601 (1st Dist. 2009) (citing *Porter*, 227 Ill. 2d at 355). Therefore, under Illinois law, relation back is appropriate where a party seeks to add a new legal theory to a set of facts that were previously alleged, but inappropriate where that party raises an entirely new and distinct claim for relief based on a completely different set of facts. *Porter*, 227 Ill. 2d at 358-59. New factual additions relate back when the new claim has a " 'sufficiently close relationship' " to the original claim in both the "temporal proximity and in the general character of the sets of factual allegations and where the facts are all part of the events leading up to the originally alleged injury." *Id*. at 359 (quoting *In re Olympia Brewing Co. Securities Litigation*, 612 F.Supp. 1370, 1371-72 (N.D. Ill. 1985)). However, an amendment does not relate back to a timely-filed pleading where the two sets of facts are different in character or where the two sets of facts lead to arguably different injuries. *Porter*, 227 Ill. 2d at 359.

¶ 68 In the present case, the record shows that Banks's fraud claim does not relate back to a timely-filed complaint. Banks filed only one pleading prior to the expiration of the five-year limitations period, his original complaint filed in March 2009, in which he alleged only one cause of action—legal malpractice—solely based on defendants' representation of Banks in the *Shales* sanctions matter. This set of facts is completely different in character than the facts he alleged as a basis for his present fraud claim, which included Casson allegedly promising both that he would pay Banks a one-third referral fee from the *Files* whistleblower claim and that he would have the whistleblower clients sign the Banks draft contracts. The transaction involved in defendants' representation of Banks in the *Shales* sanctions matter resulted from facts independent of those in the *Files* matter. Furthermore, the two sets of facts pleaded by Banks led

to remarkably different injuries. In his original complaint, Banks alleged that as a result of defendants' careless and negligent legal representation of him in the *Shales* sanctions matter, he was sanctioned in the amount of $79,302.18. In contrast, in count III of his fourth amended complaint, Banks alleged that as a result of Casson's fraudulent misrepresentation, he suffered the loss of his one-third referral fee from the whistleblower clients, costs associated with the *Files* case, and not getting *quantum meruit* for his work on the *Files* whistleblower claim.

¶ 69 Notably, Banks did not allege any causes of action based on the *Files* case until he filed his first amended complaint in September 2011, six months after the limitations period lapsed, and did not allege fraud as a cause of action until he filed his second amended complaint in August 2012, more than a year after the limitations period lapsed. Because Banks alleged two different causes of action resulting in different injuries based on two completely separate sets of facts, the relation-back doctrine does not apply and therefore, Banks's fraud claim was time-barred by the statute of limitations. Accordingly, the circuit court properly dismissed count III of Banks's fourth amended complaint.

¶ 70 CONCLUSION

¶ 71 For the foregoing reasons, we affirm the circuit court's decision to grant defendants' section 2-619 motion to dismiss counts II and III of Banks's fourth amended complaint.

¶ 72 Affirmed.