

No. 1-11-2306

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MICHAEL J. BLUMENTHAL,)	APPEAL FROM THE
Plaintiff-Appellant,)	CIRCUIT COURT OF
)	COOK COUNTY
v.)	
)	
BEVERLY L. FLYNN and KEVIN F. FLYNN, Personal)	
Representatives of the Estate of Donald F. Flynn,)	
Defendants-Appellees.)	
)	
)	Nos. 04 L 10531
DOROTHY M. ZEMAN, Executrix of the Estate of)	06 L 00426
Edwin M. Zeman,)	(cons.)
Plaintiff-Appellant,)	
)	
v.)	
)	
BEVERLY L. FLYNN and KEVIN F. FLYNN, Personal)	HONORABLE
Representatives of the Estate of Donald F. Flynn,)	LEE PRESTON,
Defendant-Appellees.)	JUDGE PRESIDING.

JUSTICE STEELE delivered the judgment of the court.
Justices Neville and Sterba concurred in the judgment.

ORDER

¶ 1 *HELD:* Plaintiffs sued defendant to recover sums paid on agreements to purchase stock in a casino company. The trial judge granted summary judgment to

the defendant seller, ruling that the plaintiffs were barred from pursuing their claims under the statute of limitations contained in section 13(D) of the Illinois Securities Law (815 ILCS 5/13(D) (West 2000). The appellate court agreed and affirmed the judgment of the circuit court.

¶ 2 Plaintiffs, Michael L. Blumenthal and Dorothy M. Zeman, as executrix of the estate of Edwin M. Zeman, appeal an order of the circuit court of Cook County granting summary judgment to defendant Donald F. Flynn¹ in a breach of contract claim. The trial judge ruled plaintiffs were barred from pursuing their claims under the statute of limitations contained in section 13(D) of the Illinois Securities Law (Securities Law) (815 ILCS 5/13(D) (West 2000). We agree and affirm the judgment of the circuit court.

¶ 3 **BACKGROUND**

¶ 4 The record on appeal discloses the following facts. In 1999, Flynn entered into stock purchase agreements with 12 individuals, including Blumenthal and Edwin M. Zeman, agreeing to sell each of them shares in Emerald Casino, Inc. The language of these agreements were substantially identical to the one Blumenthal signed, with the identity of the purchaser, shares purchased, and amount paid differing:

¹ This court granted leave to substitute Beverly L. Flynn and Kevin F. Flynn, as co-personal representatives of the estate of Donald F. Flynn, as parties and to recaption the case on April 6, 2012. This order will continue to refer to Flynn as the defendant for the sake of simplicity.

¶ 5

"STOCK PURCHASE AGREEMENT

This stock purchase agreement (this 'Agreement') is entered into between Donald J. Flynn (the 'Seller') and Michael Blumenthal (the 'Purchaser').

Upon execution of this Agreement, (a) the Seller agrees to and will sell to the Purchaser, free and clear of all liens and encumbrances, and the Purchaser agrees to and will purchase from the Seller, 17.8214 shares of common stock (the 'Shares') of Emerald casino, Inc. (the 'Company'); and (b) as consideration for the Shares, the Purchaser shall pay to the Seller Three Hundred and Seventy-Five Thousand Dollars (\$375,000).

The Seller represents and warrants that as of the date of this Agreement, the aggregate number of shares of common stock that the Company has issued and outstanding, or has authorized the issuance of, is 6,952.85710.

This Agreement is subject to any required approval of the Illinois Gaming Board (the 'IGB') and the Shares will not be transferred to the Purchaser unless or until (a) the Purchaser promptly submits a Personal Disclosure Form 1 to the IGB; (b) the Purchaser executes the Company's Shareholders' Agreement in the form previously delivered to the Purchaser by the Seller; and (c) the IGB determines that the purchaser is an acceptable owner of the Company."

Edwin M. Zeman's agreement states that he agreed to purchase 86.91071 shares for \$1,875,000.

¶ 6 On January 30, 2001, the IGB issued an initial decision to deny the Company a renewal of its license. On March 6, 2001, the IGB issued a complaint for disciplinary action intending to revoke the Company's license, as well as a notice of denial to the Company. One of IGB's

asserted grounds for revocation was the failure of the Company's officers and directors to obtain IGB pre-approval for the transfer of ownership represented by the sale of shares held by Flynn. The IGB ultimately revoked the Company's license in 2005.

¶ 7 Nine of Flynn's stock purchasers filed three lawsuits against Flynn in the circuit court of Cook County. These suits were ultimately consolidated by the circuit court. Blumenthal filed suit on September 16, 2004. Zeman was one of the plaintiffs named in a suit filed on January 13, 2006. A third lawsuit, filed by Joseph Scarpelli on September 1, 2006, was dismissed pursuant to a settlement agreement in December 2009, and is not part of this appeal. The claims filed by Zeman's coplaintiffs were also dismissed pursuant to a settlement agreement and are also not at issue in this appeal.

¶ 8 The initial Blumenthal complaint alleged breach of contract or, in the alternative, sought rescission of the Agreement with Flynn. The initial Zeman complaint contained similar counts, but added counts alleging that the purchasers were deceived and defrauded into making the purchase by Flynn's knowing and reckless misrepresentations to them. On January 17, 2006, Blumenthal amended his complaint to add allegations of fraud and deceit similar to those in the Zeman complaint.

¶ 9 On July 12, 2006, the circuit court granted Flynn's motion to dismiss Blumenthal's fraud claim for failure to plead with particularity. On April 27, 2009, the circuit court granted a similar dismissal of Zeman's fraud claims. On August 18, 2008, the circuit court granted Flynn's motion to dismiss Zeman's claims for rescission based on the ground of election of remedies. However, at that time, the circuit court also denied Flynn's motion to dismiss based on the three-year statute

of limitations contained in section 13(D) of the Securities Law (815 ILCS 5/13(D) (West 2000)), ruling a factual question existed regarding the start of the limitations period.

¶ 10 On February 22, 2010, Flynn moved for summary judgment on Zeman's remaining breach of contract claim, again asserting the statute of limitations barred recovery. The next day, Flynn moved for summary judgment on Blumenthal's contract claims. In support of these motions, Flynn submitted documents showing that after signing their purchase agreements, plaintiffs received annual Schedule K-1 forms setting forth their *pro rata* share of the Company's profits or losses. Flynn also submitted minutes of the Company's annual shareholder meetings, including the March 6, 2001, meeting, where the minutes reflect Blumenthal and Edwin Zeman attended, the IGB actions against the Company were discussed, and copies of the IGB complaint for disciplinary action were made available to shareholders.

¶ 11 On June 24, 2010, following briefing and argument on the motions, the circuit court entered a memorandum opinion and order granting summary judgment in favor of Flynn. The trial judge ruled that section 13(D) of the Securities Law applied to these lawsuits and that Blumenthal and Edwin M. Zeman knew or should have known of their claims against Flynn by March 6, 2001, rendering their complaints untimely. On July 19, 2010, plaintiffs filed a joint motion for reconsideration. On September 14, 2010, Flynn filed a response to the motion. On June 21, 2011, plaintiffs filed a reply brief. On August 1, 2011, the trial judge denied the joint motion. On August 8, 2011, plaintiffs filed a timely notice of appeal to this court.

¶ 12

DISCUSSION

¶ 13 On appeal, plaintiffs argue that the trial judge erred in granting summary judgment to Flynn. Summary judgment is appropriate when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). The purpose of summary judgment is not to try a question of fact, but to determine whether a genuine issue of triable fact exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). In determining whether a question of fact exists, "a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Summary judgment is "a drastic means of disposing of litigation" and thus should only be awarded when the moving party's right to judgment as a matter of law is "clear and free from doubt." *Id.* We review grants of summary judgment *de novo*. *Id.*

¶ 14 In this case, the trial judge ruled plaintiffs' contract claims were time-barred by the statute of limitations found in section 13(D) of the Securities Law:

"No action shall be brought for relief under this Section or upon or because of any of the matters for which relief is granted by this Section after 3 years from the date of sale; provided, that if the party bringing the action neither knew nor in the exercise of reasonable diligence should have known of any alleged violation of subsection E, F, G, H, I or J of Section 12 of this Act which is the basis for the action, the 3 year period provided herein shall begin to run upon the earlier of:

(1) the date upon which the party bringing the action has actual knowledge of the alleged violation of this Act; or

(2) the date upon which the party bringing the action has notice of facts which in the exercise of reasonable diligence would lead to actual knowledge of the alleged violation of this Act; but in no event shall the period of limitation so extended be more than 2 years beyond the expiration of the 3 year period otherwise applicable." 815 ILCS 5/13(D) (West 2000).

Plaintiffs raise three arguments in support of their assertion that the trial judge erred. We address these arguments in turn.

¶ 15 I. The Applicability of the Securities Law

¶ 16 First, plaintiffs argue that the statute of limitations found in the Securities Law does not apply to their common law breach of contract claims. In *Trogenza v. Lehman Brothers, Inc.*, 287 Ill. App. 3d 108 (1997), this court addressed common law causes of action for breach of fiduciary duty, fraud, and negligent misrepresentation brought by a stock purchaser against the seller of that stock. Despite the fact that the plaintiff did not plead the Illinois Securities Law and disclaimed any reliance upon the law, the *Trogenza* court reasoned that the plaintiff's claims were nevertheless "reliant upon *** matters for which relief is granted" by the Securities Law." *Id.* at 110. We therefore ruled that "the three-year statute under the Illinois Securities Law, rather than the five-year limitations period under [section] 13–205 of the Code of Civil Procedure, applies to plaintiff's cause of action." *Id.*

¶ 17 Plaintiffs here rely on *Carpenter v. Exelon Enterprises Co., LLC*, 399 Ill. App. 3d 330 (2010), in which this court ruled that "Section 13 simply does not concern retroactive common law damages claims for breach of fiduciary duty brought by sellers of securities in general, or minority shareholders in particular." *Id.* at 341. However, the instant plaintiffs are purchasers, not sellers, of securities. Plaintiffs also cite *Fujisawa Pharmaceutical Co., Ltd. v. Kapoor*, 16 F. Supp. 2d 941 (N.D. Ill. 1998), in which a federal district court ruled that because "the basis of [plaintiff's] breach of warranty claim is a contract rather than a 'matter' for which relief is granted under the Illinois Securities Law," the claim was governed by the ten-year statute of limitations for breach of contract, adding that "it is unclear, at best, how the breach of a stock purchase agreement would constitute a violation of the Illinois Securities Law." *Id.* at 951. Notably, the defendant in *Kapoor* made no attempt to address the argument. *Id.*

¶ 18 As the federal district court observed in *Mowbray v. Waste Management Holdings, Inc.*, 90 F. Supp. 2d 135 (D. Mass. 2000):

"While *Trogenza* does support the concept that a claim, although not brought under the Illinois Securities Law, can be barred by the statute of limitations contained in that statute, it does not follow that a breach of contract claim is barred by that statute as well.

See *id.* Essentially, [defendant] must proffer some evidence that the *** claim is one that is covered by the law. " *Id.* at 137.

In short, the statute of limitations found in section 13(D) of the Securities Law does not categorically apply to certain types of common law actions. Rather, the issue is whether the claims involved in a particular case seek relief under section 13, or upon or because of any of the

matters for which relief is granted by section 13 and the specified provisions of Section 12 of the Securities Law. *Tregenza*, 287 Ill. App. 3d at 110. In this way, plaintiffs are precluded from engaging in artful pleading to disguise a claim of securities fraud as a breach of contract claim and thereby circumvent the Securities Law. See *Felton v. Morgan Stanley Dean Witter & Co.*, 429 F. Supp. 2d 684, 693 (S.D.N.Y. 2006) (applying federal securities law).²

¶ 19 In this case, plaintiffs filed complaints alleging their purchases of securities were induced by fraud, deceit and misrepresentation by Flynn and his agent. Although plaintiffs' fraud claims were dismissed for failure to plead with particularity, abandoned or dismissed pleadings may be considered evidentiary admissions against plaintiffs' interests. See *B. Kreisman & Co. v. First Arlington National Bank of Arlington Heights*, 91 Ill. App. 3d 847, 850 (1980); *Kristensen v. Gerhardt F. Meyne Co.*, 104 Ill. App. 3d 1075, 1081 (1982); *Stevenson v. Avery Coal & Mining Co.*, 143 Ill. App. 397, 401 (1908). Thus, we conclude that the trial court did not err in concluding that plaintiffs actually sought relief "because of any of the matters for which relief is granted" by the Securities Law. See 815 ILCS 5/13(D) (West 2000).

² Plaintiffs argue in passing that the trial judge previously rejected this argument in denying Flynn's motion to dismiss. Plaintiffs provide no specific citation for this argument and our review of the trial judge's ruling on Flynn's motion to dismiss reveals the trial judge believed the statute of limitations legally applied, but denied the motion based on Flynn's failure to provide supporting material at that stage of the litigation. In either event, our standard of review on appeal is *de novo*. *Williams*, 228 Ill. 2d at 417.

¶ 20

II. The Running of the Statute of Limitations

¶ 21 Plaintiffs next argue that the statute of limitations could not have begun to run in March 2001, because no breach of contract had occurred at that time. The trial judge applied the part of the Securities Law starting the limitations period on "the date upon which the party bringing the action has notice of facts which in the exercise of reasonable diligence would lead to actual knowledge of the alleged violation of this Act." 815 ILCS 5/13(D) (West 2000). The fundamental rule of statutory interpretation is to ascertain and give effect to the legislature's intent. *Krautsack v. Anderson*, 223 Ill. 2d 541, 552 (2006). The best indication of the legislature's intent is the statutory language, given its plain and ordinary meaning. *People v. Jamison*, 229 Ill. 2d 184, 188 (2008). Where statutory provisions are clear and unambiguous, the plain language as written must be given effect, without reading into it exceptions, limitations, or conditions that the legislature did not express. *Taylor v. Pekin Insurance Co.*, 231 Ill. 2d 390, 395 (2008). Under the plain language of section 13(D) of the Securities Law, actual knowledge of the alleged violation commences the limitations period, not the existence of a breach of contract.

¶ 22 Plaintiffs also argue that the statute of limitations could not have begun to run in March 2001, because their shares were never delivered, and thus, no "sale" under the Securities Law was completed. However, plaintiffs concede the term "sale," as used in the Securities Law, encompasses not only transactions that fall within the common legal understanding of that term, but also is much broader. *Benjamin v. Cablevision Programming Investments*, 114 Ill. 2d 150, 159 (1986). The statutory definition of a "sale" in this context "shall include every contract of

sale." 815 ILCS 5/2.5 (West 2000). Our case law states that " every step toward the completion of a sale would be a sale" under the Securities Law. *Silverman v. Chicago Ramada Inn, Inc.*, 63 Ill. App. 2d 96, 101 (1965) (quoted approvingly in *Benjamin*, 114 Ill. 2d at 161-62).

¶ 23 In *Silverman*, this court held the buyer of securities under an installment contract had three years to exercise his right of rescission, not only from the date the right first accrued but from the date the sale was completed by the acquisition of legal title to the securities purchased. *Silverman*, 63 Ill. App. 2d at 101-02. In this case, it does not follow that Flynn's failure to deliver the securities prevents the limitations period from running. *Silverman* itself recognizes that a transfer of title is not required to have a "sale" under the Securities Law, noting the defendants were correct in their contention that the first transaction was actionable, but "wrong in their contention that it is the only one which is actionable." *Id.* at 101. Moreover, this case does not involve an installment contract, but the sort of "one-shot" agreement under which the seller was obliged to transfer the stock upon the satisfaction of certain conditions. See, e.g., *Adams v. Cavanagh Communities Corp.*, 847 F. Supp. 1390, 1403 (N.D. Ill. 1994) (and cases discussed therein). Here, the lack of a transfer of shares merely requires the court to look to the date upon which the party bringing the action has notice of facts which in the exercise of reasonable diligence would lead to actual knowledge of the alleged violation of the Securities Law, as determined by the prior existence of a "sale" under the broad language of the statute.

¶ 24 The remainder of plaintiffs' argument is concerned with discussing the "discovery" rule in various other situations, despite the statutory language clearly setting forth that the limitations period here begins to run on "the date upon which the party bringing the action has notice of facts

which in the exercise of reasonable diligence would lead to actual knowledge of the alleged violation of this Act." 815 ILCS 5/13(D) (West 2000). Here, the uncontroverted evidence showed that Blumenthal and Edwin M. Zeman attended a Company shareholders' meeting at which the IGB disciplinary action was discussed and copies of the IGB complaint for disciplinary action were made available. One of IGB's asserted grounds for revocation was the failure of the Company's officers and directors to obtain IGB pre-approval for the transfer of ownership represented by the sale of shares held by Flynn. Thus, no later than March 6, 2001, Blumenthal and Edwin M. Zeman had notice of facts which in the exercise of reasonable diligence, would lead to actual knowledge of Flynn's acts and omissions tending to work a fraud or deceit upon them in the sale of the securities. Accordingly, we conclude that the trial judge did not err in granting summary judgment to Flynn in this case.³

¶ 25

III. The Motion for Reconsideration

¶ 26 Lastly, we briefly address the trial judge's denial of plaintiffs' joint motion for reconsideration, although plaintiffs do not address it specifically themselves. The decision to grant or deny a motion for reconsideration lies within the discretion of the circuit court, and will

³ In their reply brief, plaintiffs argue that Flynn waived the statute of limitations or that the statute of limitations was tolled in this case. Flynn correctly notes that plaintiff forfeited these arguments by failing to raise and argue them in their initial brief. See *County of Cook v. Illinois Labor Relations Board*, 2012 IL App (1st) 111514, ¶ 24 (citing Ill. S. Ct. R. 314(g) (eff. July 1, 2008)).

not be reversed absent an abuse of that discretion. *Landeros v. Equity Property and Development*, 321 Ill. App. 3d 57, 65 (2001). The purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence, changes in the law, or errors in the court's previous application of existing law. *Id.* "Newly discovered" evidence is evidence that was not available prior to the hearing on the motion for summary judgment. *Id.* "Trial courts should not allow a litigant to stand mute, lose a motion, and then frantically gather evidentiary material to show that the court erred in its ruling." *Id.* (quoting *Gardner v. Navistar International Transportation Corp.*, 213 Ill. App. 3d 242, 248 (1991)).

¶ 27 In this case, the trial judge found that plaintiffs relied on affidavits and depositions that were not presented in response to Flynn's motions for summary judgment to preclude summary judgment. The trial judge also noted that the late-submitted materials did not create a genuine issue of material fact. Insofar as plaintiffs relied on material not presented to the circuit court prior to the entry of summary judgment, we need not consider the judge's *dicta* regarding the import of said material to conclude that there was no abuse of discretion on this point. Plaintiffs also submitted *Merck & Co., Inc. v. Reynolds*, ___ U.S. ___, 130 S. Ct. 1784 (2010), as supplemental authority, but the trial judge correctly observed that the language of the statute of limitations at issue in that case differs significantly from the language of our Securities Law. Compare *id.* at 1790 (running two years "after the discovery of the facts constituting the violation") with 815 ILCS 5/13(D) (West 2000) (running three years from "the date upon which the party bringing the action has notice of facts which in the exercise of reasonable diligence

would lead to actual knowledge of the alleged violation"). Thus, we conclude that the circuit court did not abuse its discretion in denying the joint motion for reconsideration.

¶ 28

CONCLUSION

¶ 29 In short, we conclude that the trial judge did not err in granting summary judgment to Flynn in this case. The trial court did not err in concluding that plaintiffs actually sought relief "because of any of the matters for which relief is granted" by the Securities Law. 815 ILCS 5/13(D) (West 2000). There was no genuine issue of material fact regarding the date upon which the parties bringing the action had "notice of facts which in the exercise of reasonable diligence would lead to actual knowledge of the alleged violation" to preclude summary judgment. *Id.* Lastly, the circuit court did not abuse its discretion in denying the joint motion for reconsideration. For all of the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 30 Affirmed.