

2012 IL App (2d) 110869-U
No. 2-11-0869
Order filed May 29, 2012

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
SECOND DISTRICT

| | | |
|------------------------------|---|-------------------------------|
| SOFTSCAPE, INC., |) | Appeal from the Circuit Court |
| |) | of Lake County. |
| Plaintiff-Appellant, |) | |
| |) | |
| v. |) | No. 11-L-53 |
| |) | |
| TAKEDA PHARMACEUTICALS NORTH |) | |
| AMERICA, INC., |) | Honorable |
| |) | Jorge L. Ortiz, |
| Defendant-Appellee. |) | Judge, Presiding. |

JUSTICE HUDSON delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

Held: The trial court properly dismissed plaintiff's complaint as time-barred: the parties' contract had a one-year limitations period, and plaintiff filed its complaint more than one year after defendant communicated to plaintiff that it would not pay additional fees that plaintiff asserted were owed.

¶ 1 Plaintiff, Softscape, Inc., provided computer software to defendant, Takeda Pharmaceuticals North America, Inc., pursuant to a written agreement. The agreement contemplated that defendant would purchase a given number of licenses for each program that plaintiff provided, and would also pay periodic maintenance fees. Plaintiff sued defendant, alleging that it owed additional licensing

and maintenance fees. Defendant moved to dismiss, contending that the complaint was filed more than one year after the dispute arose and was thus barred by the contract's one-year limitations period. The trial court granted the motion. Plaintiff appeals, contending that the court erred by finding that the dispute arose more than one year before it filed suit. We affirm.

¶ 2 In 2003, the parties signed an agreement by which plaintiff would provide defendant with various software. The agreement provided for a given number of licenses for each program. Additional licenses could be purchased at an added cost. The agreement also provided for maintenance fees based on the number of licenses used. The agreement further provided that any claim arising under it had to be brought within one year from the accrual of the cause of action.

¶ 3 Beginning in 2007, representatives of the parties exchanged e-mails about the possibility of defendant purchasing more licenses. Plaintiff characterizes this exchange as a proposal for the purchase of additional licenses. Defendant characterizes it as plaintiff's expressing its belief that defendant was using more licenses than it had paid for and demanding that defendant pay for additional licenses. In any event, in April 2009, defendant informed plaintiff that it was terminating the agreement effective July 2009. Plaintiff then conducted an audit of defendant's software usage that resulted in plaintiff, on July 22, 2009, sending defendant an invoice for \$169,012.72 for additional licenses and maintenance fees.

¶ 4 Defendant did not pay the invoice. On August 11, 2010, plaintiff filed a complaint in the circuit court of Cook County. Plaintiff voluntarily dismissed this complaint and, on January 11, 2011, refiled it in the circuit court of Lake County. See 735 ILCS 5/13-217 (West 2010).

¶ 5 Defendant moved to dismiss the complaint under section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2010)), arguing that it was barred by the agreement's one-

year limitations period. Defendant attached to the motion the affidavits of Kathleen Jaderberg and Jane Pleli.

¶ 6 Jaderberg's affidavit stated that defendant employed her as a consultant. "At least as early as May 2007," representatives of plaintiff informed her that defendant owed additional licensing fees for software usage because defendant had exceeded the number of users licensed to use plaintiff's software per the agreement. Defendant disputed these claims. The affidavit attached an e-mail exchange between Jaderberg and Bill Dockery, plaintiff's chief relationship officer. Jaderberg testified as follows:

"During 2007 and 2008, I advised representatives of Softscape, including Mr. Dockery, that Takeda disputed that it owed any additional licensing fees for additional users because Takeda had not exceeded the number of licensed users."

Pleli's affidavit was similar to Jaderberg's.

¶ 7 The trial court granted defendant's motion. In a memorandum opinion, the court found that there was a dispute, as described by Jaderberg and Pleli, as early as October 2007 or "at the very latest in 2008." The contractual limitations period was triggered at that time because that was when plaintiff demanded that defendant pay for additional software and defendant told plaintiff that it refused to pay. After the trial court denied its motion to reconsider, plaintiff timely appealed.

¶ 8 Plaintiff contends that the trial court erred by concluding that the parties were involved in a dispute as early as 2007 or 2008. Plaintiff contends that the limitations period did not begin to run until August 22, 2009, 30 days after it issued its invoice for the additional licensing and maintenance fees. In doing so, it notes that the agreement provided that invoices were to be paid within 30 days. Thus, according to plaintiff, defendant could not have manifested its refusal to pay for additional

licenses until 30 days after the invoice was issued. Plaintiff characterizes the parties' prior communications as essentially negotiations during which plaintiff offered various proposals for defendant to acquire additional licenses, which defendant never flatly rejected. Defendant responds that the Pleli and Jaderberg affidavits demonstrate that it clearly communicated to plaintiff sometime in 2007 or 2008 that it would not pay for additional licenses.

¶9 Initially, the parties agree that the one-year limitations period in their contract is enforceable and governs this dispute. See *Medrano v. Production Engineering Co.*, 332 Ill. App. 3d 562, 566 (2002) (contracting parties may agree to a reasonable shortened contractual limitations period to replace a statute of limitations). Moreover, both parties cite cases involving traditional statutes of limitations and thus implicitly agree that those cases provide the governing law. The parties further agree that plaintiff's Cook County complaint, filed August 11, 2010, stopped the limitations period and that the subsequent dismissal and refile in Lake County were proper under section 13-217 of the Code of Civil Procedure. See 735 ILCS 5/13-217 (West 2010). Thus, the question is whether plaintiff's cause of action accrued within one year before August 11, 2010.

¶10 Because this matter comes to us on a section 2-619 dismissal, our review is *de novo*. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993). A claim may be dismissed pursuant to section 2-619(a)(9) if it "is barred by other affirmative matter avoiding the legal effect of or defeating [it]." 735 ILCS 5/2-619(a)(9) (West 2010).

¶11 One such affirmative matter is the running of the limitations period. A limitations period begins to run when facts exist that authorize one party to maintain an action against another. *Paschen Contractors, Inc. v. City of Kankakee*, 353 Ill. App. 3d 628, 637 (2004). In a contract action such as this one, a cause of action accrues, and a limitations period begins to run, when a creditor

may legally demand payment from a debtor. *Kozasa v. Guardian Electric Manufacturing Co.*, 99 Ill. App. 3d 669, 673 (1981). A contractual cause of action accrues at the time of a breach of contract, not when the party sustains damages. *Indiana Insurance Co. v. Machon & Machon, Inc.*, 324 Ill. App. 3d 300, 303 (2001). The rationale for this rule is to encourage parties to act quickly after a breach rather than allowing them to wait until the potential damages increase. *State Farm Fire & Casualty Co. v. John J. Rickoff Sheet Metal Co.*, 394 Ill. App. 3d 548, 565 (2009). That damages cannot be immediately ascertained does not postpone the accrual of a claim. *Indiana Insurance*, 324 Ill. App. 3d at 304.

¶ 12 Here, the Jaderberg and Pleli affidavits establish that, sometime in 2007, plaintiff began demanding additional amounts for licensing and maintenance fees. Sometime in 2007 or 2008, defendant communicated to plaintiff its refusal to pay for the additional licenses. Thus, the trial court properly concluded that the limitations period began to run in 2007 or 2008. In either case, this was more than one year before plaintiff filed its initial complaint in August 2010.

¶ 13 Plaintiff argues that defendant provided no “facts” in support of its assertion that it communicated its refusal to pay for additional licenses prior to 2009. However, Jaderberg’s statement that she “advised representatives of Softscape, including Mr. Dockery, that Takeda disputed that it owed any additional licensing fees” is a statement of fact. To be sure, the affidavit lacks specifics about how and when defendant’s position was communicated, but its communication is still a fact. As defendant points out, plaintiff never objected to the affidavits on the ground that they did not “set forth with particularity the facts upon which the *** defense [was] based.” See Ill. S. Ct. R. 191(a) (eff. July 1, 2002). Furthermore, plaintiff did not file a counteraffidavit, nor did it seek limited discovery to learn more details about the alleged communications. See Ill. S. Ct. R.

191(b) (eff. July 1, 2002) (authorizing limited discovery to respond to section 2-619 motion). Having failed to do any of these things, plaintiff cannot now complain that the trial court took Jaderberg's statement at face value.

¶ 14 Citing *Kranzler v. Saltzman*, 407 Ill. App. 3d 24 (2011), plaintiff argues that it could not have maintained an action before August 2009 (30 days after it sent its invoice) because a creditor may not sue until “the payments becomes [*sic*] due and remain unpaid.” In *Kranzler*, the plaintiff loaned the defendant money, which the defendant acknowledged by signing a “memo” stating that he would repay the loan with interest. The defendant made some intermittent payments but eventually stopped. More than 10 years after the defendant signed the memo, but within 10 years of the last payment, the plaintiff filed suit. On appeal, the court applied the 10-year limitations period for “other evidences of indebtedness in writing” (735 ILCS 5/13-206 (West 2008)). Noting that the statute specifically provided that “ ‘if any payment *** has been made *** then an action may be commenced thereon at any time within 10 years after the time of such payment,’ ” the court held that the action was timely. (Emphasis omitted.) *Kranzler*, 407 Ill. App. 3d at 30 (quoting 735 ILCS 5/13-206 (West 2008)).

¶ 15 *Kranzler* simply does not apply here, because the contract does not contain the language that extends the limitations period after the last payment has been made. We agree with defendant that, if we accepted plaintiff's position, a creditor could unilaterally decide when the limitations period began to run based on when it decided to send an invoice. Here, plaintiff knew by at least 2008 that defendant did not intend to pay for additional licenses, but waited approximately another year before sending an invoice.

¶ 16 Plaintiff argues that the parties could not truly have had a dispute prior to 2009 because they continued to work together. However, the limitations period begins to run “at the time of the breach of contract” (*Indiana Insurance Co.*, 324 Ill. App. 3d at 303), not when the parties’ relationship completely deteriorates. In *Paschen*, the plaintiff continued working under the contract while the parties disputed whether the defendant was required to pay for extra work. Although the court ultimately found that the complaint was timely, it clearly fixed the start of the limitations period at a time when the parties were still operating under the contract.

¶ 17 In summary, the trial court did not err in holding that the contractual limitations period began to run in 2008 when defendant informed plaintiff that it would not pay for additional licenses. Thus, plaintiff’s complaint, filed more than one year later, was untimely.

¶ 18 The judgment of the circuit court of Lake County is affirmed.

¶ 19 Affirmed.