2016 IL App (1st) 152259-U

FOURTH DIVISION
December 22, 2016

No. 1-15-2259

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

PASTRY PARTNERS, INC., HOWARD GOULD, ANGELO DIMITROPOULOS, and JOHN TZORTZIS,	)	
	)	Appeal from the Circuit Court of
Plaintiffs-Appellants,	)	Cook County.
	)	
v.	)	No. 12 L 000403
	)	
RICHARD A. GREENSWAG and KAPLAN & GREENSWAG LLC,	)	
	)	Honorable Kathy M. Flanagan,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

ORDER

Held: The circuit court's order granting summary judgment to defendants is affirmed where the plaintiffs' claim was barred by the statute of limitations.

¶ 1 Plaintiffs Pastry Partners, Inc., Howard Gould, Angelo Dimitropolous, and John Tzortzis (collectively referred to as Pastry Partners), appeal from the circuit court's August 10, 2015, order granting summary judgment to defendants Richard A. Greenswag and Kaplan &

Greenswag LLC (collectively referred to as the Greenswag defendants) on Pastry Partners' claim for legal malpractice. On appeal, Pastry Partners assert that the circuit court erred in holding that its claim was barred by the two-year statute of limitations applicable to legal malpractice actions. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 In early 2003, Gould approached Richard Greenswag, who was a partner in the law firm of Kaplan & Greenswag LLC, regarding his interest in purchasing a bakery and the land upon which it stood. To purchase the bakery, Richard Greenswag formed Pastry Partners, Inc., and a separate company, Montrose Partners, Inc., to the purchase the land. Gould, Dimitropolous, and Tzortzis jointly owned the entities. Richard Greenswag negotiated an "asset purchase agreement" with the sellers, James and Helga Pearson. The asset purchase agreement was dated July 25, 2003. Section 4.8(a) of the asset purchase agreement provided:

> "The Seller does not now have and at the time of the Closing will not have any obligations, contingent or otherwise, under any collective bargaining agreement or other contract with a labor union (Buyer hereby acknowledging and agreeing *** that the original collective bargaining agreement relating to said union employees has expired *** and that Seller heretofore and will continue to make all payments and contributions required by the original collective bargaining agreement) *** including without limitation, any pension ***."

¶ 4 Additionally, section 7 contained an indemnification provision under which the Pearsons and Pastry Partners agreed to indemnify and hold each other harmless for any damages arising out of the non-compliance with the asset purchase agreement.

¶ 5 Pastry Partners alleged that it informed the Greenswag defendants before closing on the bakery sale that Pastry Partners did not want to purchase the bakery if any union issues or liabilities would remain. Gould testified in his deposition that he learned from the Pearsons before closing that the bakery had union employees, in addition to a collective bargaining agreement which was expiring. He believed the union would cease to exist after the closing.

¶ 6 Richard Greenswag testified in his deposition that he learned before the closing that the bakery had some union employees when Pearsons' counsel asked to insert a clause into the asset purchase agreement regarding union employees. Richard Greenswag testified that, as union law was not his area of expertise, he informed Gould that he was not comfortable dealing with union issues and that he should hire a union attorney. Richard Greenswag believed Gould was working with another attorney regarding union issues. He believed that nothing in the asset purchase agreement transferred any union pension liability from the Pearsons or the bakery onto Pastry Partners or the individual plaintiffs.

¶ 7 The purchase of the bakery closed in October 2003. As part of the purchase price, $250,000 was to be paid by a promissory note. Gould signed a promissory note and guaranty on October 16, 2003. Tzortzis and Dimitropolous also signed guarantees.

¶ 8 Gould testified that, within a few weeks after closing on the bakery sale, Pastry Partners hired attorney Eugene Boyle to address union issues, as he had handled prior negotiations with the union for the Pearsons. Gould testified that they tried to withdraw from the union by taking a vote, but their effort was unsuccessful. He testified that he would not have purchased the bakery had he known that the union would continue to exist.

¶ 9 Richard Greenswag testified that in December 2003, he received a call from Pearsons' counsel informing him that the sale of the bakery constituted a "withdrawal" from the union's

pension fund, and the union intended to assert a $200,000 to $300,000 Employee Retirement Income Security Act of 1974 (ERISA) pension withdrawal liability against the Pearsons. Pearsons' counsel sent Richard Greenswag a "post-closing agreement" document and advised that its purpose was to prevent the union from asserting the pension withdrawal liability. Pearsons' counsel threatened that if Pastry Partners did not sign the post-closing agreement, they would sue for indemnity.

¶ 10 Pastry Partners alleged that the Greenswag defendants advised Gould that the post-closing agreement would "sort out the union issue" and it would "not place any liability onto the Plaintiffs with respect to the union issues." However, Richard Greenswag testified that he met with Gould regarding the post-closing agreement and advised Gould that he was unsure whether he should sign the post-closing agreement, that the potential union obligation was in the $200,000 to $300,000 range, and that Gould or Pastry Partners may be assuming primary liability for it. Richard Greenswag testified that Gould told him that he knew about the liability but Gould believed the union relationship would be dissolved and the liability would go away, or he would sue the Pearsons and try to offset the amount against the note. Richard Greenswag testified that he told Gould that this was not "a slam dunk" argument and that he "wouldn't rely on that."

¶ 11 Gould and the Pearsons executed the post-closing agreement, which was retroactive to the date of the closing. The post-closing agreement provided that in the event the Pearsons had to pay the withdrawal liability "or incurs any liability pursuant to this Agreement *** said Liabilities shall be subject to Section 7.2 of the Purchase Agreement." Section 7.2 was the indemnification provision.

¶ 12 On February 2, 2004, the union pension fund sent a letter advising that the sale of the bakery did not qualify for an exemption from the pension withdrawal liability, and that the amount of $205,180 was due in monthly installments of $3,462. Gould testified that Pastry Partners made the payments for the union withdrawal liability from March 30, 2005, until May 31, 2005, despite Pastry Partners' belief that the liability belonged to the Pearsons. He testified that the Pearsons indicated they would offset the payments against the amount due under the promissory note. Gould testified that Pastry Partners discontinued making payments on the withdrawal liability when it "found out definitively that the union said it was not our withdrawal liability."

¶ 13 In addition to the pension withdrawal liability payments that Pastry Partners made, Gould testified that, from 2003 to 2005, Pastry Partners also made payments into a health and welfare fund for the union employees. Gould testified that they were initially unsure whose obligation this was and made the payments "in the spirit of keeping everything moving forward and not interrupting the business." These payments were not offset against the promissory note.

¶ 14 Gould testified that on May 18, 2005, he met with Richard Greenswag discussed his due diligence involving the post-closing agreement. Gould took notes about the meeting, which stated that Richard Greenswag:

> "expressed and acknowledged that he did give poor legal advice on the issue regarding him advising me to sign the document. He stated if he was to do it all over again, he would have protected us more and would have done more due diligence regarding the consequences of me signing the document. He said he understands that we would have had a much stronger case if I did not sign it. He also said he understands if we were to change attorneys because we

> have lost confidence in him ***. He would have done more due diligence and asked more questions."

¶ 15 Richard Greenswag testified that he did not tell Gould that he had done anything wrong; rather, he told Gould that he felt Gould had lost confidence in him and he offered to resign.

¶ 16 On May 19, 2005, Pastry Partners sent Richard Greenswag a letter informing him that it was terminating the attorney-client relationship for Pastry Partners and Montrose Partners.

¶ 17 Pastry Partners retained new counsel, who sent a letter to Pearsons' counsel over one year later, on July 28, 2006, stating that Pastry Partners

> "shall not be making further payments regarding the [promissory note] *** due to [Pearsons'] material misrepresentations and breach of contract ***. Furthermore, [Pearsons] failed to disclose their pension withdrawal liability and subsequently attempted to illegally transfer pension liability to Buyer ***. Based on the [Pearsons'] deceptive attempt in illegally transferring the pension withdraw [*sic*] liability, Buyer was forced to make liability payments totaling $18,886.00."

¶ 18 A. The Pearson Litigation

¶ 19 The Pearsons filed a lawsuit against Pastry Partners, Inc., Gould, Dimitropolous, and Tzortzis on August 3, 2006, for breach of contract on the promissory note and for damages related to Pastry Partners' failure to pay on the pension withdrawal liability.[1] Pastry Partners filed a counterclaim for breach of contract and fraud in the inducement alleging that it had agreed to pay pension obligations, which were the contractual obligations of the Pearsons under the asset

[1] We note that, prior to filing the lawsuit against Pastry Partners, the Pearsons also filed a legal malpractice lawsuit against the attorneys who represented them in the bakery transaction, but their legal malpractice claim was stayed pending the outcome of the Pearsons' claims against Pastry Partners.

purchase agreement, and the Pearsons had represented that Pastry Partners would recoup these payments once the union issue was "straightened out" through offsets against the promissory note. Pastry Partners alleged that it learned in July 2006 that the Pearsons were not complying and were attempting to shift the withdrawal liability obligation onto Pastry Partners, and therefore Pastry Partners ceased making payments on the note. Gould averred in an attached affidavit that had he "known of the existence of any union withdrawal liability relating to the pension fund, this would have been a deal breaker that would pass to myself and my partners, I would have not purchased the bakery," and that he believed the Pearsons needed the post-closing agreement so that the Pearsons "could resolve the labor union issue, but not to my or my partners' detriment."

¶ 20 On August 4, 2008, while the Pearson lawsuit was pending, Pastry Partners filed a third party complaint for contribution against the Greenswag defendants, alleging legal malpractice in the handling of the purchase of the bakery and the post-closing agreement. Pastry Partners asserted that in the event it was found liable for any amounts related to the union withdrawal liability and promissory note, it would be entitled to contribution and indemnification from the Greenswag defendants.

¶ 21 On November 7, 2008, the Greenswag defendants filed a motion to dismiss, asserting several bases for dismissal, including that the claim was time barred because Pastry Partners knew of the injury more than two years before filing suit. Greenswag alternatively asserted that Pastry Partners' claim was premature because it had not yet suffered actual damages and any harm was speculative. The motion to dismiss was entered and continued.

¶ 22 Approximately one year later, in November 2009, the trial court stayed the third party complaint "until further order of the court." The Greenswag defendants never requested a stay.

The trial court entered another order on June 21, 2011, which provided that the contribution claim was stayed pending completion of the Pearson lawsuit.

¶ 23 The Pearson lawsuit went to a jury trial. On September 14, 2011, the jury found for the Pearsons as to both of their counts. On November 15, 2011, the Honorable Elizabeth M. Budzinski entered a final judgment order for: (1) $493,704.66 against Pastry Partners, Gould, Dimitropolous, and Tzortzis, jointly and severally, for the amount of the jury verdict, attorney fees, and costs relating to the breach of the promissory note; and (2) $228,960.49 against Pastry Partners for damages related to the pension withdrawal liability. Pastry Partners later paid the Pearsons $505,000 to settle.

¶ 24 After judgment was entered in the Pearson lawsuit, the trial court lifted the stay and severed the contribution claim, which was renumbered and reassigned. That claim was ultimately dismissed for want of prosecution.

¶ 25 B. The Current Case - Pastry Partners' Legal Malpractice Claim

¶ 26 Approximately one year after the dismissal for want of prosecution, Pastry Partners filed the current lawsuit on January 11, 2012, although the complaint was still initially titled "Third Party Complaint at Law." Pastry Partners subsequently filed a second amended complaint on February 11, 2013. In count I, Pastry Partners alleged legal malpractice by the Greenswag defendants with respect to the purchase of the bakery.[2] Pastry Partners alleged in its second amended complaint that it informed the Greenswag defendants before purchasing the bakery that it "did not want to purchase the bakery if it had involved any issues dealing with any unions issues or liabilities." Further, it alleged that after the closing, it "learned that there was, in fact, a

[2] Counts II and III were against the attorney and law firm which represented Pastry Partners in the Pearson lawsuit following the trial. Pastry Partners later voluntarily dismissed one count against these defendants and settled the other count, and they were dismissed from the litigation.

labor union issue, as the Bakery and Confectionary Union contacted the Plaintiffs and informed them that the sale of the bakery constituted a 'withdrawal' from the union's pension fund, and demanded that certain 'withdrawal payments' be made." It alleged that after closing, the Greenswag defendants advised that the post-closing agreement would "sort out the union issue" and "would not place any liability onto the Plaintiffs with respect to the union issues." However, Pastry Partners continued to receive documents from the union, and the Pearsons made demands for payments on the note and "payment of $205,180.00 that represented the amount owed for the withdrawal from the union." Pastry Partners alleged that the Greenswag defendants committed legal malpractice "concerning the purchase of the bakery" in that they carelessly and negligently performed due diligence regarding these union liabilities and carelessly and negligently advised them to sign the post-closing agreement without advising them of its ramifications. Pastry Partners alleged that, as a result of the alleged negligence, it sustained damages which included the adverse judgments in the Pearson case and consequential damages related to retaining attorney fees.

¶ 27 The Greenswag defendants filed an answer and raised several affirmative defenses, including that the action was barred by the statute of limitations. Pastry Partners filed an answer to the affirmative defenses. The parties conducted several discovery depositions, including depositions of Gould, Tzortzis, Dimitropoulos, and Richard Greenswag. In addition, the Greenswag defendants filed a third party complaint for contribution against the lawyer and law firm which had represented Pastry Partners in the trial of the Pearson case.

¶ 28 On May 13, 2015, the Greenswag defendants moved for summary judgment pursuant to section 5/2-1005 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-1005 (West 2008)) on the legal malpractice claim. They asserted that (1) Pastry Partners' claim was barred by

the two-year statute of limitations applicable to legal malpractice claims, (2) alternatively, Gould, Dimitropolous, and Tzortzis admitted in their depositions they had no attorney-client relationship with Richard Greenswag and therefore could not bring a legal malpractice claim against him, and (3) Richard Greenswag could not have breached any duty or proximately caused any damages related to the breach of the promissory note as there were no allegations or proof that he ever advised Pastry Partners to stop paying the note.

¶ 29 With respect to the statute of limitations argument, the Greenswag defendants asserted that Pastry Partners did not file any kind of claim against them until August 4, 2008, when it filed the third party claim for contribution in the Pearson litigation. The Greenswag defendants asserted that there were three different dates by which Pastry Partners knew it had been damaged, thereby triggering the statute of limitations on their legal malpractice claim. First, Greenswag asserted that Pastry Partners knew it had been injured as early as February 2, 2004, when the union sent a letter stating that the bakery did not qualify for an exemption from pension withdrawal liability. The Greenswag defendants reasoned that Pastry Partners knew it was injured by that point because Gould testified that they would not have purchased the bakery had they known that the union liability would continue to exist after the closing, and Pastry Partners knew that it had not received a bakery free of union issues and had a duty to inquire as to whether Greenswag had committed malpractice.

¶ 30 Second, the Greenswag defendants asserted that Pastry Partners knew of the injury by May 18, 2005, when, according to Gould's testimony, Richard Greenswag met with Gould and admitted to Gould that he had mishandled the bakery transaction, provided poor legal advice, and should have done more due diligence.

¶ 31 Third, the Greenswag defendants argued that, at the latest, Pastry Partners knew of the injury as of July 28, 2006, when it became clear that the Pearsons would not repay Pastry Partners for the withdrawal liability payments. The Greenswag defendants asserted that, according to Gould's testimony, Pastry Partners made payments toward the union withdrawal liability from March 30, 2005, to May 31, 2005, under the assumption that it was the Pearsons' obligation and that the payments would be offset against the promissory note. However, on July 28, 2006, Pastry Partners' new attorney sent a letter to the Pearsons' counsel stating that Pastry Partners would make no further payments on the promissory note because of the Pearsons' "material misrepresentations and breach of contract," their failure to disclose the union withdraw liability, and their attempt to illegally transfer the liability to Pastry Partners. Thus, Pastry Partners knew by July 28, 2006, that the Pearsons would not reimburse it or provide an offset on the promissory note.

¶ 32 In opposition to the motion for summary judgment, Pastry Partners argued that its damages were not incurred until November 15, 2011, when a final judgment order was entered in the Pearson lawsuit following the jury trial, and Pastry Partners timely filed the instant legal malpractice lawsuit a few months later. Pastry Partners also asserted that equitable tolling applied to bar the Greenswag defendants from asserting that the malpractice claim was not timely because the Greenswag defendants actively misled Pastry Partners when they argued in their motion to dismiss filed in the Pearson litigation that Pastry Partners' damages were merely speculative. Pastry Partners further argued that equitable estoppel applied because Pastry Partners and the trial court in the Pearson litigation relied on the Greenswag defendants' position (that the claim was not yet ripe) to their detriment. Similarly, Pastry Partners asserted that judicial estoppel applied because the Greenswag defendants advanced two factually inconsistent

positions regarding damages in separate judicial proceedings, and the court in the Pearson litigation stayed the third party contribution claim until the Pearsons' lawsuit was completed based on the alleged lack of damages.

¶ 33 As to the Greenswag defendants' remaining contentions in the motion for summary judgment, Pastry Partners argued that a question of fact existed as to who Richard Greenswag's clients were and whether they had standing to sue as Richard Greenswag was retained by Gould and Tzortzis before Pastry Partners existed in order to create that entity and purchase the bakery. Pastry Partners also maintained that a question of material fact existed as to what extent Richard Greenswag was involved in the decision not to continue paying on the promissory note as Richard Greenswag's representation encompassed all aspects of the transaction and due diligence.

¶ 34 In the Greenswag defendants' reply, they asserted that the motion to dismiss in the Pearson litigation was never fully briefed, argued, or decided. They argued that the statute of limitations argument was raised in the motion to dismiss in the Pearson litigation and was properly pleaded as an affirmative defense in the present case.

¶ 35 The trial court entered an order August 10, 2015, granting the Greenswag defendants' motion for summary judgment. The court held that the legal malpractice claim was time barred. It found that the record evidence:

> "shows that the Plaintiffs were clearly aware that they suffered an injury as a result of the Defendants' negligence well before two years prior to the filing of the instant action and the first malpractice claims filed in the Third-Party action on August 4, 2008. Further, the Plaintiffs' attempts to counter this with arguments of equitable tolling, equitable estoppel, and judicial estoppel are

> unavailing as they have failed to establish the application of those doctrines to the facts here."

¶ 36 In addition, the court held that the individual plaintiffs testified that they did not have an attorney-client relationship with Richard Greenswag and they therefore had no standing to pursue a legal malpractice claim. However, the court found the standing issue was moot because of the untimeliness of the claim. It also found there was a question of fact regarding Richard Greenswag's duty of care with respect to the promissory note, but similarly held that this issue was moot given the statute of limitations ruling. Pastry Partners appealed.

¶ 37 II. ANALYSIS

¶ 38 A. Standard of Review

¶ 39 "[S]ummary judgment is proper only where 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." *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49 (citing 735 ILCS 5/2–1005(c) (West 2000)). We review the circuit court's decision *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). "The purpose of summary judgment is not to try a question of fact but to determine whether one exists. [Citation.] If only one conclusion can be drawn from the undisputed facts, then the timeliness of the plaintiff's complaint becomes a question of law for the trial court to determine." *Golla v. General Motors Corp.*, 167 Ill. 2d 353, 358-59 (1995).

¶ 40 B. Statute of Limitations

¶ 41 In order to establish a claim of legal malpractice, a plaintiff must prove the following elements: "(1) an attorney-client relationship that establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause

establishing that 'but for' the attorney's malpractice, plaintiff would have prevailed in the underlying action; and (4) actual damages." *Preferred Personnel Services, Inc. v. Meltzer, Purtill & Stelle, LLC*, 387 Ill. App. 3d 933, 939 (2009).

¶ 42 Legal malpractice claims are subject to a two-year statute of limitations. A party must bring a legal malpractice action within two years from the time he or she "knew or reasonably should have known of the injury for which damages are sought." *Preferred Personnel Services*, 387 Ill. App. 3d at 940 (citing 735 ILCS 5/13-214.3(b) (West 2000)). "A person knows or reasonably should know an injury is 'wrongfully caused' when he or she possesses sufficient information concerning an injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved." *Carlson v. Fish*, 2015 IL App (1st) 140526, ¶ 23.

¶ 43 Here, Pastry Partners asserts that the very existence of damages was not ascertainable and the statute of limitations did not begin to run until the jury reached a verdict in the Pearson litigation. Pastry Partners contend that it would not have a valid malpractice claim had it prevailed in the Pearson litigation because no damages existed until the jury's verdict.

¶ 44 As our supreme court has explained, "[t]he injury in a legal malpractice action is not a personal injury [citation] nor is it the attorney's negligent act itself [citation]. Rather, it is a pecuniary injury to an intangible property interest caused by the lawyer's negligent act or omission. [Citations.] For purposes of a legal malpractice action, a client is not considered to be injured unless and until he has suffered a loss for which he may seek monetary damages." *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 306–07 (2005). "It is the realized injury to the client, not the attorney's misapplication of his legal expertise, that marks the point for measuring compliance with a statute of limitations." (Internal quotation marks omitted). *Preferred Personnel Services*, 387 Ill. App. 3d at 940.

"Where the mere possibility of harm exists or damages are otherwise speculative, actual damages are absent and no cause of action for malpractice yet exists. [Citation.] Damages are considered to be speculative, however, only if their existence itself is uncertain, not if the amount is uncertain or yet to be fully determined." *Northern Illinois Emergency Physicians*, 216 Ill. 2d at 307. Stated another way, "[w]hen uncertainty exists as to the very fact of damages, as opposed to the amount of damages, damages are speculative, and no cause of action for malpractice can be said to exist." *Preferred Personnel Services*, 387 Ill. App. 3d at 939. A plaintiff's "identification of one wrongful cause of his injuries initiate[d] his limitations period as to all other causes, particularly when *** those claims are inseparable." *Carlson*, 2015 IL App (1st) 140526, ¶ 39.

¶ 45 Here, the undisputed evidence indicates that Pastry Partners encountered union issues shortly after closing on the bakery purchase, despite its belief that any union issues would disappear following closing. It also is undisputed that the union sent a letter on February 2, 2004, advising that the sale of the bakery did not qualify for an exemption from the pension withdrawal liability, and, consequently, monthly payments of $3,462 were due. It is similarly undisputed that Pastry Partners began making payments on the pension withdrawal liability in March 30, 2005, until May 31, 2005. It also made contributions to a health and welfare fund from 2003 to 2005. Additionally, according to Gould's own testimony, he was aware of the possibility that Richard Greenswag had provided negligent professional assistance in the bakery transaction as of May 18, 2005, when Richard Greenswag allegedly informed Gould that he should have performed more due diligence and protected Gould and the other plaintiffs more. At that point, Pastry Partners clearly had knowledge that it had been wrongfully injured; it had not received a bakery free from union issues; it was making payments for the pension obligations, and its attorney had purportedly admitted his negligence. Further, as of July 28, 2006, Pastry Partners knew

definitively that the Pearsons would not be repaying them for the pension withdrawal liability payments it had been making. However, even this latest date, July 28, 2006, was still more than two years before Pastry Partners filed the first of any claim against the Greenswag defendants, that is, the contribution claim in the Pearsons litigation filed on August 4, 2008.

¶ 46 Pastry Partners argues that its claim was not ripe until the Pearson lawsuit concluded. However, well before judgment was entered against them following the jury trial in the Pearson litigation, Pastry Partners knew of the union pension withdrawal obligation and, in fact, began making payments. As such, Pastry Partners had suffered a "pecuniary injury to an intangible property interest" for which they could seek monetary damages. *Northern Illinois Emergency Physicians*, 216 Ill. 2d at 306-07. Although the total amount of damages was uncertain at that point, the existence of damages was no longer merely speculative. *Id.* "There is no requirement that a plaintiff must discover the full extent of her injuries before the statute of limitations begins to run." *Golla v. General Motors Corp.*, 167 Ill. 2d 353, 367 (1995). If Pastry Partners had timely filed suit, it could have later amended their timely complaint to include additional damages that occurred later, even after the two-year filing period lapsed. *Id.* at 371. Pastry Partners was aware that it had suffered an injury wrongfully caused by the Greenswag defendants' negligence before two years prior to filing the third party contribution claim in the Pearsons litigation or the malpractice claim in the current case. The date of the judgment in the Pearson litigation served merely to confirm the amount of damages. Accordingly, we agree with the trial court that the malpractice claim accrued against the Greenswag defendants more than two years before Pastry Partners filed its initial claim against them. It was therefore barred by the statute of limitations.

¶ 47 Pastry Partners encourages this court to follow the adverse result rule set forth in *Lucey v. Law Offices of Pretzel & Stouffer*, 301 Ill. App. 3d 349 (1998). In *Lucey*, the plaintiff sought

advice from the defendant law firm regarding whether he could solicit clients from his current employer before resigning to start his own company. *Id.* at 351. After following the defendant law firm's advice, the plaintiff was sued by the former employer. *Id.* at 352. The defendant law firm initially represented the plaintiff and assured him that he had a valid defense, but the plaintiff eventually hired other counsel. *Id.* While the lawsuit by the former employer was pending, the plaintiff filed suit against the defendant law firm for malpractice. *Id.* The trial court dismissed the malpractice complaint upon finding that it was premature because the plaintiff had not yet sustained damages, as the underlying lawsuit by the former employer remained pending. *Id.* The *Lucey* court held that the legal malpractice action did not accrue until the former employer's lawsuit against the plaintiff concluded. *Id.* at 355. Since it was possible the plaintiff could prevail against the former employer, the damages were "entirely speculative until a judgment is entered against the former client or he is forced to settle." *Id.* The *Lucey* court observed that "a cause of action for legal malpractice will rarely accrue prior to the entry of an adverse judgment, settlement, or dismissal of the underlying action in which plaintiff has become entangled due to the purportedly negligent advice of his attorney." *Id.* at 356. The court reasoned that requiring a client to bring a provisional malpractice suit would undermine judicial economy and the attorney-client relationship. *Id.* at 357. Thus, the trial court correctly dismissed the malpractice claim as premature; the plaintiff would not sustain any "actual damages" unless and until the former employer's lawsuit was resolved adversely to him. *Id.* at 357-59.

¶ 48 The adverse result rule followed in *Lucey*, that is, a cause of action for legal malpractice generally accrues only upon entry of an adverse judgment in the underlying action, is inapplicable here. In *Lucey*, the plaintiff had not suffered any monetary loss as a result of following his attorney's advice; damages were purely speculative while the lawsuit by the

employer remained pending against the plaintiff employee. *Id.* at 353-59. In contrast to *Lucey*, the damages here arose in the context of a transaction (the selling of the bakery) before any litigation commenced. Pastry Partners suffered loss as a result of the allegedly negligent legal advice, *i.e.*, "a pecuniary injury to an intangible property interest caused by the lawyer's negligent act or omission" (*Northern Illinois Emergency Physicians*, 216 Ill. 2d at 306), when the bakery transaction resulted in Pastry Partners' liability for union obligations, which it then paid. As this court has observed, "[a] legal malpractice claim can accrue before the client suffers a final, adverse judgment in the underlying action where it is 'plainly obvious, prior to any adverse ruling against the plaintiff, that he has been injured as the result of professional negligence' or where an attorney's neglect is a direct cause of the legal expense incurred by the plaintiff." *Estate of Bass ex rel. Bass v. Katten*, 375 Ill. App. 3d 62, 70 (2007) (quoting *Lucey*, 301 Ill.App.3d at 355). Pastry Partners actually discovered the alleged negligence by its attorney stemming from the bakery sale transaction and incurred damages before the Pearson litigation concluded. Pastry Partners was informed of the pension withdrawal liability obligation in the February 2004 letter, and Pastry Partners paid the obligation from March to May 2005, in addition to paying for other union health and welfare fund obligations from 2003 to 2005. Additionally, according to Gould, Richard Greenswag admitted to him on May 18, 2005, that he should have performed more due diligence and protected them more in the bakery transaction. Considering this purported admission, the legal malpractice claim accrued before the final judgment was entered in the Pearsons litigation as it was "plainly obvious" that Pastry Partners had been injured by the Greenswag defendants' representation.

¶ 49 The current case more closely resembles the circumstances present in *Janousek v. Katten Muchin Rosenman LLP*, 2015 IL App (1st) 142989. In *Janousek*, the plaintiff filed suit for

breach of fiduciary duty against his former business associates with whom he had formed a limited liability company. *Id.* ¶ 5. The law firm which assisted in forming the company also represented the defendant business associates in the litigation. *Id.* Almost three years later, the plaintiff brought a claim against the law firm asserting that it aided the business associates in breaching their fiduciary duties toward him. *Id.* ¶ 6. The appellate court held that the statute of limitations on the claim against the law firm began to run when the plaintiff knew he had been wrongfully injured, even though he may not yet have known that the defendant law firm's representation was partly responsible or that its conduct gave rise to a cause of action. *Id.* ¶ 21. The plaintiff knew he had been wrongfully injured no later than the date on which he filed the complaint against the business associates, and any injury he suffered, such as lost profits, directly resulted from this breach. *Id.* ¶ 15. Although the plaintiff did not discover the law firm's role in the breach until discovery occurred in the lawsuit against the business partners, the court found the law firm's involvement was knowable and of public record. *Id.* ¶¶ 18-20. The court reasoned that knowledge that an injury was wrongfully caused does not also mean that the plaintiff must have knowledge of a specific defendant's negligence or knowledge of the existence of a cause of action before the statute of limitations begins to run. *Id.* ¶ 21. Thus, the plaintiff's knowledge that his injury was wrongfully caused also initiated the statute of limitations as to his claim against the law firm, as the claims were "uniquely intertwined and inseparable, as he claims that the [law firm] aided and abetted [the business associates] in their breach." *Id.* ¶ 24.

¶ 50 Similar to *Janousek*, Pastry Partners was put on notice that it was injured and the injury was wrongfully caused when the union issues surfaced following closing on the bakery sale, despite its belief that the bakery would be free of union issues after the closing. More specifically, Pastry Partners was aware of the letter from the union regarding the pension

withdrawal liability, that the Pearsons threatened to sue if they did not sign the post-closing agreement, and that the Pearsons would not offset the amounts paid for the pension withdrawal liability against the promissory note. Indeed, Pastry Partners knew not only of the wrongful injury, but also knew of Richard Greenswag's role in creating it and his purported admission of negligence. Moreover, as in *Janousek* and in contrast to *Lucey*, requiring Pastry Partners to bring suit before the underlying suit concluded did not undermine judicial economy or the attorney-client relationship as the two claims were intertwined.

¶ 51 Similarly helpful to our analysis is *Blue Water Partners, Inc. v. Edwin D. Mason, Foley & Lardner*, 2012 IL App (1st) 102165. In that case, the plaintiffs sued their former business partners alleging wrongful diversion of business opportunities and breach of promise because the business partners formed a company which competed directly with a company formed earlier by the plaintiffs and the business partners. *Id.* ¶¶ 16-17. The trial court held that the plaintiffs extinguished their claims against the business partners in signing a series of releases; the plaintiffs later sued their attorneys for assisting in creating the competing company, but the trial court found the malpractice claim was time barred. *Id.* ¶¶ 18, 23, 32. On appeal, the court held that the statute of limitations on the plaintiffs' legal malpractice claim began to run at the same time as the claim against the former business partners because the two claims were inseparably intertwined. *Id.* ¶ 67. The judgment in the underlying suit "added nothing to the malpractice cause of action against the defendant attorneys," nor did it "crystalize the legal rights" of the plaintiffs, or make any alleged negligence by the defendant attorneys "painfully obvious." (Internal quotation marks omitted). *Id.* ¶ 65. Although a favorable judgment for the business partners would also have shown no breach of duty by the defendant attorneys in helping to form the competing company, this did not render the legal malpractice claim premature as the two

claims were inextricably tied, and it would have not undermined public policy or judicial economy to pursue the claims together. *Id.* ¶ 67. The court distinguished *Lucey* in finding that

> "a legal malpractice action has not accrued when the question of whether the malpractice plaintiff has actually been damaged has yet to be resolved in an underlying suit by a finding that the attorney gave negligent advice. In other words, as the circumstances in *Lucey* make clear, the adverse judgment accrual rule applies where the 'plaintiff has become entangled [in litigation] due to the purportedly negligent advice of his attorney.' *Id.* at 356. Whether the advice by the attorney was in fact negligent must be resolved for the policy reasons stated in *Lucey* before the malpractice suit accrues. *Id.* at 357. We do not address a claim of negligent advice in the instant case." *Id.* ¶ 59.

¶ 52 The *Blue Water Partners* court reasoned that "[o]ther cases discussing legal malpractice make clear as well that the context of the alleged malpractice determines the elements of proving malpractice. *** The circumstances of the alleged professional negligence often determines when a cause of action accrues to begin the running of the statute of limitations ***." *Id.* ¶ 60. The court explained that in *Lucey,* a judgment in the underlying lawsuit against the plaintiff served to "confirm legal malpractice by giving rise to actual damages directly attributable to the negligent advice of counsel," but, in contrast, in *Blue Water Partners* the judgment in the underlying lawsuit "did nothing to confirm the *existence* of damages allegedly suffered by BWP." *Id.* ¶ 65.

¶ 53 Examining the circumstances of the alleged malpractice here demonstrates that the cause of action accrued when, as a result of the negligent assistance by the Greenswag defendants, Pastry Partners became liable for and began paying the union pension liabilities, as previously

discussed. Pastry Partners incurred damages, *i.e.*, monetary loss, before the judgment was entered against it in the Pearson litigation. The jury's verdict helped to confirm the amount of those damages, but not their existence.

¶ 54 Alternatively, Pastry Partners assert that the Greenswag defendants waived the statute of limitations argument because they asserted in their motion to dismiss the contribution claim in the Pearson litigation that the contribution claim was not yet ripe. We disagree. A party is allowed to "plead inconsistent theories of recovery or defense, and the proof at trial will determine which theory, if any, entitles him to a favorable verdict." *Daehler v. Oggpian*, 72 Ill. App. 3d 360, 370 (1979). "Illinois law unquestionably allows litigants to plead alternative grounds for recovery, regardless of the consistency of the allegations, as long as the alternative factual statements are made in good faith and with genuine doubt as to which contradictory allegation is true." *Heastie v. Roberts*, 226 Ill. 2d 515, 557-58 (2007). See 735 ILCS 5/2-613(b) (West 2008) ("When a party is in doubt as to which of two or more statements of fact is true, he or she may, regardless of consistency, state them in the alternative or hypothetically in the same or different counts or defenses.").

¶ 55 Pastry Partners also argue that the trial court's imposition of a stay against the contribution claim in the Pearsons litigation equated to a finding that the claim was not justiciable because damages had not yet been incurred while the Pearson case remained pending.

¶ 56 Again, we disagree. "A stay order seeks to preserve the status quo existing on the date of its entry and does not address in any way the merits of the underlying dispute. [Citation.] A circuit court may stay proceedings as part of its inherent authority to control the disposition of cases before it. [Citation.] It may consider factors such as the orderly administration of justice and judicial economy in determining whether to stay proceedings." *Estate of Bass ex rel. Bass v.*

Katten, 375 Ill. App. 3d 62, 68 (2007). The trial court never ruled on the motion to dismiss in the Pearson litigation; it merely entered and continued the motion. As the Greenswag defendants note, the trial court in the Pearson case did not issue the stay until one year after the motion to dismiss was filed. Moreover, the Greenswag defendants raised in the motion to dismiss the contribution complaint not only the argument that the claim was premature due to lack of certainty regarding damages, but they also asserted the statute of limitations defense. In imposing the stay, the trial court in the Pearson litigation did not indicate upon which grounds it was being instituted. The trial court's order staying the contribution claim in the Pearson litigation did not amount to a decision on the merits of the defenses raised by the Greenswag defendants or on their motion to dismiss. The Greenswag defendants have not waived the statute of limitations argument.

¶ 57 Pastry Partners further contend that the statute of limitations applicable to contribution claims applies here, instead of the limitations period applicable to legal malpractice claims. According to this argument, its contribution claim would be timely as it was filed within two years from the date the Pearsons filed their lawsuit against Pastry Partners. See 735 ILCS 5/13-204 (West 2008).

¶ 58 Under the Joint Tortfeasor Contribution Act, " 'where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them ***.' " *Vroegh v. J & M Forklift*, 165 Ill. 2d 523, 528 (1995) (quoting 740 ILCS 100/2 (West 1992)). However, our supreme court in *Vroegh* further explained:

> "a party's obligation to make contribution rests on his liability in tort to the injured or deceased party, *i.e.*, the plaintiff in the underlying action. There is

> no requirement that the bases for liability among the contributors be the same. [Citation.] However, some basis for liability to the original plaintiff must exist. If a defendant is not a tortfeasor *vis-a-vis* the original plaintiff, it cannot be a joint tortfeasor *vis-a-vis* a codefendant and may not be held liable to that codefendant for contribution." *Vroegh v. J & M Forklift*, 165 Ill. 2d 523, 528-29 (1995)

¶ 59 As the Greenswag defendants point out, the Pearsons' claims against Pastry Partners did not rest on tort. Rather, the Pearsons claimed breach of contract and sought a declaratory judgment on the promissory note. Thus, the Greenswag defendants could not be joint tortfeasors *vis-à-vis* Pastry Partners. Moreover, the right to contribution requires that the party seeking contribution and the party against whom it is sought "be potentially capable of being held liable to the plaintiff in a court of law or equity." *Vroegh*, 165 Ill. 2d at 529. Here, the Greenswag defendants were not capable of being held liable to the Pearsons. Richard Greenswag did not represent them and owed them no duty.

¶ 60 In addition, although Pastry Partners styled its claim as one of contribution in the Pearson litigation, "the nature of the liability determines the appropriate statute of limitations." *Toushin v. Ruggiero*, 2015 IL App (1st) 143151, ¶ 42 (citing *Travelers Casualty & Surety Co. v. Bowman*, 229 Ill. 2d 461, 469 (2008)). The basis of Pastry Partners' contribution claim was, essentially, a claim of legal malpractice. "Therefore, [the] type of injury, and not the pleader's designation of the nature of the action, controls our determination." *Id.* The statute of limitations applicable to legal malpractice actions applies in this case.

¶ 61 C. Equitable Tolling

¶ 62 Pastry Partners alternatively contends, as it did in the trial court, that the statute of limitations should be equitably tolled because the Greenswag defendants misled it in their motion to dismiss the contribution claim in the Pearsons litigation in asserting that the contribution claim was premature, and the trial court's stay prevented Pastry Partners from pursuing its cause of action.

¶ 63 Under the doctrine of equitable tolling, a plaintiff's failure to comply with the statute of limitations is excused " ' if the defendant has actively misled the plaintiff, or if the plaintiff has been prevented from asserting his or her rights in some extraordinary way, or if the plaintiff has mistakenly asserted his or her rights in the wrong forum.' "*American Family Mutual Insurance Co. v. Plunkett*, 2014 IL App (1st) 131631, ¶ 32 (quoting *Clay v. Kuhl*, 189 Ill. 2d 603, 614 (2000)). An extraordinary barrier would include a " 'legal disability, an irredeemable lack of information, or situations where the plaintiff could not learn the identity of proper defendants through the exercise of due diligence.' " *Id.* (quoting *Thede v. Kapsas*, 386 Ill. App. 3d 396, 403 (2008)). The doctrine of equitable tolling applies even when the defendant is not at fault. *Id.* However, equitable tolling "is rarely applied" in Illinois. *Id.* ¶ 33.

¶ 64 We do not find the doctrine of equitable tolling applicable here. There is no evidence that the Greenswag defendants actively misled Pastry Partners. As stated, a party is permitted to advance different and conflicting defenses. *Daehler*, 72 Ill. App. 3d at 370; *Heastie*, 226 Ill. 2d at 557-58; 735 ILCS 5/2-613(b) (West 2008). The Greenswag defendants asserted in their motion to dismiss the contribution claim in the Pearson litigation that it was barred by the statute of limitations and that it was premature. This is not evidence that they were attempting to "actively mislead" Pastry Partners in advancing alternative defenses. The stay did not prevent Pastry Partners from asserting its rights in some extraordinary way. The Greenswag defendants did not

request a stay and the trial court did not articulate a reason for imposing the stay. The stay had no effect on the timeliness of their claim. Even at the time they filed the third party complaint against the Greenswag defendants in the Pearson litigation, the statute of limitations had already run. Thus, its claim was already untimely at the time it was filed and before the stay was imposed. Pastry Partners' own lack of due diligence in timely filing the claim is to blame. Moreover, there is no indication that Pastry Partners mistakenly asserted its rights in the wrong forum. Thus, equitable tolling does not apply.

¶ 65 D. Equitable Estoppel

¶ 66 Pastry Partners asserts that equitable estoppel should apply here because it detrimentally relied on the Greenswag defendants' position that no damage had yet been sustained, which resulted in the stay in the Pearson litigation.

¶ 67 For equitable estoppel to apply, the party claiming estoppel must show that:

> "(1) the other person misrepresented or concealed material facts; (2) the other person knew at the time he or she made the representations that they were untrue; (3) the party claiming estoppel did not know that the representations were untrue when they were made and when they were acted upon; (4) the other person intended or reasonably expected that the party claiming estoppel would act upon the representations; (5) the party claiming estoppel reasonably relied upon the representations in good faith to his or her detriment; and (6) the party claiming estoppel would be prejudiced by his or her reliance on the representations if the other person is permitted to deny the truth thereof." *Klancir v. BNSF Railway Co.*, 2015 IL App (1st) 143437, ¶ 22.

¶ 68 The party claiming estoppel bears the burden of proof by clear and unequivocal evidence. *Steinmetz v. Wolgamot*, 2013 IL App (1st) 121375, ¶ 40. " 'Generally, the question of whether a plaintiff's reliance was reasonable is a question of fact; however, where only one conclusion can be drawn from the undisputed facts, the question becomes one for the court to determine.' " *Id.* ¶ 41 (quoting *Siegel Development, LLC v. Peak Construction LLC*, 2013 IL App (1st) 111973, ¶ 114).

¶ 69 Pastry Partners has failed to demonstrate that equitable estoppel applies here. There is no indication that the Greenswag defendants ever made any untrue representations with respect to the statute of limitations issue, either before any litigation commenced or during the course of the proceedings in the Pearson litigation or the present case. To the contrary, according to Gould, Richard Greenswag went so far as to admit his negligent conduct in a conversation with Gould. Moreover, as stated, although the Greenswag defendants asserted in the Pearson litigation that no damage had yet been sustained, this was merely pled as one of their alternative defenses. It did not constitute a "material fact" upon which a claim for equitable estoppel may be based. As we have also stated, there is no evidence that the trial court agreed or relied upon this position in granting the stay.

¶ 70 E. Judicial Estoppel

¶ 71 Pastry Partners also contends that judicial estoppel applies here because the Greenswag defendants took two factually inconsistent positions in separate judicial proceedings, *i.e.*, arguing in their motion to dismiss in the Pearson litigation that the contribution claim was premature, and arguing the motion for summary judgment in the present case that the statute of limitations had run on the legal malpractice claim.

¶ 72 The following five factors must be established in order to employ judicial estoppel:

> "The party to be estopped must have (1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial administrative proceedings, (4) intending for the trier of fact to accept the truth of the facts alleged, and (5) have succeeded in the first proceeding and received some benefit from it." *Seymour v. Collins*, 2015 IL 118432, ¶ 37.

¶ 73 Here, the Greenswag defendants have not taken two factually inconsistent positions. Rather, they have argued for different legal implications based on the same set of facts. Indeed, in making a motion to dismiss, a party must take all well-pleaded facts as true (*Philadelphia Indemnity Insurance Co. v. Pace Suburban Bus Service*, 2016 IL App (1st)151659, ¶ 21), and in moving for summary judgment, a party must necessarily advocate that no material fact issues exist (*Mashal*, 2012 IL 112341, ¶ 49; *Golla*, 167 Ill. 2d at 358-59). Pastry Partners asserts that the circuit court stayed the third party complaint in the Pearson litigation based on the alleged lack of damages to Pastry Partners. However, as we have previously noted, the trial court in the Pearsons litigation issued no reason for imposing the stay against the contribution claim and it never issued a decision on the Greenswag defendants' motion to dismiss. Therefore, the Greenswag defendants never benefited from any contrary position advanced in the trial court in the Pearsons litigation.

¶ 74 F. Mootness

¶ 75 In light of our decision that Pastry Partners' legal malpractice claim was untimely, we need not address Pastry Partners' other claims. Although Pastry Partners argues that the individual plaintiffs had an attorney-client relationship with Richard Greenswag and that his alleged malpractice extended to issues surrounding the promissory note, these issues have been rendered moot given our finding that the legal malpractice claim is barred by the statute of

limitations. Generally, our courts need not "decide moot questions, render advisory opinions, or consider issues where the result will not be affected regardless of how those issues are decided." *In re Alfred H.H.,* 233 Ill.2d 345, 351 (2009). "The purpose of the doctrine of standing is to ensure that courts resolve actual controversies between parties rather than abstract questions or moot issues." *In re Estate of Henry*, 396 Ill. App. 3d 88, 93 (2009). "The actual controversy requirement of standing cannot be satisfied where the underlying issues of the case are moot or premature. [Citation.] An issue is considered moot where events occur which make it impossible for the court to grant effectual relief." *Sharma v. Zollar*, 265 Ill. App. 3d 1022, 1027 (1994).

¶ 76 CONCLUSION

¶ 77 For the foregoing reasons, we affirm the circuit court's decision granting summary judgment in favor of the Greenswag defendants.

¶ 78 Affirmed.