2016 IL App (3d) 150687-U

Order filed August 26, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

ANDERSON WILKINS LOWE LIFE INSURANCE BROKERS, INC.,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Whiteside County, Illinois,
Plaintiff-Appellant,	)	
v.	)	Appeal No. 3-15-0687 Circuit No. 15-L-16
JOEL M. DOWNIE d/b/a JOEL M. DOWNIE P.C.,	)	Honorable Stanley B. Steines,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err when it dismissed plaintiff's accounting malpractice claim on the grounds that it was barred by both the statute of limitations and *res judicata*.

¶ 2 The trial court granted summary judgment in favor of defendant, Joel M. Downie. Plaintiff, Anderson Wilkins Lowe Life Insurance Brokers, Inc. (AWL), appeals arguing the trial court erred in finding the statute of limitations and *res judicata* barred AWL's accounting malpractice claim against defendant. We affirm.

¶ 3 FACTS

¶ 4 AWL was incorporated in 1981 and is in the business of selling and servicing insurance products. At the time of incorporation, Nyle Anderson was one of three shareholders in the business. In 1985, Frank Nelsen was appointed to AWL's board of directors. AWL, through Nelsen, retained defendant to serve as AWL's accountant. In September of 2010, by court order, Anderson was enjoined from exercising any power or authority as a shareholder, officer, or director of AWL.

¶ 5 On November 22, 2011, a dispute arose between Anderson and Nelsen relating to AWL. Anderson filed a lawsuit against Nelsen, defendant, and others alleging a conspiracy against Anderson. The claim against defendant was based, in part, on actions taken by defendant while performing accounting services for AWL. Defendant moved to dismiss the complaint based on failure to plead the elements of conspiracy.

¶ 6 Before the trial court ruled on defendant's motion, Anderson filed a motion for appointment of a receiver "to preserve and protect the assets of [AWL] pending the outcome of [the] litigation." In his motion, Anderson requested that a receiver be appointed to manage AWL's affairs based on Anderson's ownership interest in AWL and the alleged fraud and self-dealing of Nelsen. In Anderson's motion, he accused Nelsen of intentionally failing to file AWL's corporate tax return. To support this allegation, Anderson attached a letter from the Internal Revenue Service (IRS) to Anderson dated December 22, 2011. The letter stated that "the last corporate income tax return filed by [AWL was] 2001." In addition, Anderson made the following allegations in the motion to appoint a receiver:

> "Nelsen has been managing the financial affairs of AWL since approximately 1994, which includes the preparation and filing of tax returns. To complete this

> task, Nelsen engaged the services of [defendant]. In fact, [defendant] has prepared returns for AWL since at least 2006, but these returns were never filed. *** In addition, Nelsen, through [defendant], has provided these returns to financial institutions in connection with loan renewals, representing that the returns had been filed."

¶ 7 The trial court granted defendant's motion to dismiss without prejudice, as well as Anderson's motion to appoint a receiver. On July 5, 2012, the trial court appointed a receiver for AWL. The same day, Anderson filed a second amended complaint alleging conspiracy claims based on defendant's performance of accounting services for AWL. Defendant moved to dismiss the second amended complaint arguing that Anderson had again failed to plead the elements of conspiracy. Ultimately, the trial court dismissed the only claim against defendant with prejudice. Anderson did not appeal the trial court's order dismissing the claim against defendant.[1]

¶ 8 On January 9, 2015 (four years after the conspiracy complaint), AWL filed a complaint against defendant alleging accounting malpractice. AWL's complaint against defendant is the subject of the instant appeal. Defendant moved to dismiss the complaint on the basis that the claims were barred by the statute of limitations and *res judicata*. AWL did not respond to the motion, but instead sought and received leave of court to amend the complaint. AWL filed its amended complaint on July 16, 2015.

¶ 9 The amended complaint alleged that defendant committed accounting malpractice while acting as AWL's accountant. The claim was based on the allegation that from 2001 through 2009, AWL was obligated to, but did not, file state and federal tax returns. According to the amended complaint, defendant knew that AWL failed to file state and federal tax returns for

[1]The outcome of the claims against the remaining defendants is unclear from the record.

those years. During the same period, defendant also became aware that AWL was a potential victim of fraud. As a result of defendant's acts and omissions, the complaint alleged that AWL suffered damages in the form of unnecessary professional fees and payment of interest and penalties.

¶ 10 Defendant moved to dismiss the amended complaint pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2014)) on the grounds that AWL's claim was barred by the statute of limitations and *res judicata*. First, the motion to dismiss argued that AWL's action was barred by the two-year statute of limitations. In support, defendant relied on the fact that the last accounting service performed by defendant for AWL occurred on December 16, 2010—defendant's preparation of AWL's 2009 tax return. Because the amended complaint was filed more than two years after the last act of defendant, defendant argued that AWL's action was barred by the statute of limitations. Defendant argued that the "discovery rule" did not postpone the commencement of the limitations period because AWL was aware of its failure to file federal tax returns by December 22, 2011—the date of the letter from the IRS informing Anderson that AWL had not filed its tax returns since 2001. This argument was based on the same letter Anderson had attached to the motion to appoint a receiver for AWL in the conspiracy lawsuit.

¶ 11 In the alternative, defendant's motion to dismiss argued that AWL's amended complaint should be dismissed because AWL's claim was barred by *res judicata*. Specifically, defendant argued that AWL's claim derived from the same accounting services (and facts) as those that provided the basis for the conspiracy claim Anderson pursued against defendant.

¶ 12 AWL responded to defendant's motion to dismiss by arguing that the statute of limitations did not bar its claim because it was unaware of its injury until November 2014.

Relying on the affidavit of AWL's receiver, AWL argued that the December 22, 2011, letter from the IRS did not put AWL on notice of defendant's potential wrongdoing. In the receiver's affidavit, the receiver asserted that he could not rely on the letter in determining whether failure to file taxes was wrongfully caused. Further, the receiver averred that he attempted to investigate the facts surrounding AWL's taxes, but defendant refused to turn over all of AWL's books and records because defendant asserted his accounting privilege. According to AWL, it was not until defendant was ordered by the trial court in November 2014 to produce partial access to AWL's books and defendant's deposition in the conspiracy litigation that the receiver became aware of defendant's involvement in AWL's finances.

¶ 13 As to *res judicata*, AWL argued that there was no identity of the causes of actions between the accounting malpractice lawsuit and the conspiracy litigation. Specifically, AWL argued that identity of the causes of action did not exist because the facts which entitle AWL to recovery in its accounting malpractice claim are different from the facts which entitle AWL to recovery in the conspiracy complaint. Further, AWL argued that *res judicata* was not met because AWL and Anderson were not in privity due to the fact that Anderson had previously been enjoined by the trial court from acting as an agent of AWL since September 2010.

¶ 14 The trial court held a hearing on defendant's motion to dismiss plaintiff's amended complaint. After hearing the arguments, the trial court found that AWL's claim was barred by the statute of limitations, as well as *res judicata*. Regarding the statute of limitations, the trial court found that the receiver for AWL, was on notice of the allegations concerning defendant's involvement with the alleged wrongdoing regarding AWL's taxes as of at least July 5, 2012 (the day he was appointed receiver). Thus, the two-year statute of limitations barred AWL's claims because AWL filed its complaint on January 9, 2015.

¶ 15 As to *res judicata*, the trial court found that all elements of the doctrine had been met. Specifically, the trial court found that the allegations against defendant in the conspiracy lawsuit interrelate with the same allegations in the accounting malpractice lawsuit. Further, the trial court found that the parties or the identity of interests in the two suits are the same, as AWL's receiver is protecting the interests of Nelsen and Anderson. The trial court then found that there was a final judgment entered on November 8, 2012. Having found all three elements were satisfied, the trial court granted defendant's motion to dismiss on *res judicata* grounds as well.

¶ 16 ANALYSIS

¶ 17 On appeal, AWL argues that the trial court erred in finding that its claim was barred by the statute of limitations and *res judicata*. "A section 2-619 motion to dismiss admits as true all well-pleaded facts, along with all reasonable inferences that can be gleaned from those facts." *Henderson Square Condominium Ass'n v. LAB Townhomes, LLC*, 2015 IL 118139, ¶ 34. We review a section 2-619 motion to dismiss *de novo*. *Wackrow v. Niemi*, 231 Ill. 2d 418, 422 (2008). For clarity, we discuss each basis for dismissing the complaint separately.

¶ 18 I. Statute of Limitations

¶ 19 First, AWL argues that the trial court erred when it found that its complaint was untimely. Specifically, AWL contends that the "discovery rule" postponed the commencement of the limitations period such that its complaint was timely. Upon review, we find the limitations period commenced when the receiver was appointed (July 5, 2012). Therefore, we hold AWL's complaint, filed more than two years later (January 9, 2015), is untimely.

¶ 20 Section 13-214.2 of the Code provides for a two-year statute of limitations for actions against a public accountant, accounting firm, or its employees based upon tort, contract, or otherwise for an act or omission in the performance of professional services. 735 ILCS 5/13-

214.2(a) (West 2014). The language of the section incorporates the discovery rule, "the effect of which is to postpone the start of the period of limitations until the injured party knows or reasonably should know of the injury and knows or reasonably should know that the injury was wrongfully caused." *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 20.

¶ 21 Under the discovery rule, " 'when a party knows or reasonably should know both that an injury has occurred and that it was wrongfully caused, the statute [of limitations] begins to run and the party is under an obligation to inquire further to determine whether an actionable wrong was committed.' " *Id.* ¶ 21 (quoting *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 171 (1981)). A person has knowledge that an injury is wrongfully caused when he possesses "enough information about the injury to alert a reasonable person to the need for further inquiries to determine if the cause of the injury is actionable at law." *LaSalle National Bank v. Skidmore, Owings & Merrill*, 262 Ill. App. 3d 899, 902 (1994).

¶ 22 At the time the receiver was appointed (July 5, 2012), AWL was aware of the complaint filed by Anderson which alleged that defendant acted wrongfully in performing accounting services for AWL and that AWL had not filed tax returns. AWL was also aware of Anderson's motion to appoint a receiver and the letter from the IRS to Anderson which stated that "the last corporate income tax return filed by [AWL was] 2001." Notably, AWL was aware of the allegation in the motion to appoint a receiver that defendant prepared AWL's tax returns "since at least 2006," but never filed any of the returns. The receiver's knowledge of AWL's failure to file tax returns during a time defendant performed accounting services for AWL alone is sufficient to alert AWL (through the receiver) that AWL was injured and that the injury was wrongfully caused. As a result, we hold the limitations period began running on July 5, 2012 (the date the receiver was appointed). Thus, the complaint in the present case is barred by the statute

of limitations as it was filed January 9, 2015, more than two years after the limitations period began.

¶ 23 In an effort to avoid this conclusion, AWL cites to the fact that it was not until 2014 that defendant further disclosed AWL's financial records and testified in a deposition. According to AWL, it was not until this time that it discovered that its injury was wrongfully caused. "[T]he term 'wrongfully caused' as used in the discovery rule does not connote knowledge of negligent conduct or knowledge of the existence of a cause of action." *Khan*, 2012 IL 112219, ¶ 22. Rather, the term should be viewed in a general sense and not a term of art. *Id.* To that end, the general rule is that although a plaintiff's knowledge that the problems at issue might be wrongfully caused is generally not sufficient to trigger the statute of limitations (*LaSalle National Bank*, 262 Ill. App. 3d at 905), it is not required that a plaintiff know the full extent of his injuries for the statute of limitations to start running (*Khan*, 2012 IL 112219, ¶ 22). At the time the receiver was appointed, AWL was on notice that its tax returns had not been filed (in violation of state and federal law) during the time period defendant performed accounting services for AWL. At the same time, AWL was also aware of Anderson's allegation that Nelsen, through defendant, fraudulently provided unfiled tax returns (prepared by defendant) to financial institutions, and misrepresented that the returns had actually been filed. AWL's knowledge of these facts is sufficient to put it on actual notice that its injuries were wrongfully caused.

¶ 24 II. *Res Judicata*

¶ 25 While not necessary to our disposition, we also find that the trial court properly dismissed AWL's amended complaint on the alternative basis that AWL's action was barred by the doctrine of *res judicata*. In *Lutkauskas v. Ricker*, 2015 IL 117090, ¶ 44, our supreme court described the requirements of *res judicata* as follows:

> "*Res judicata* is an equitable doctrine designed to prevent multiple lawsuits between the same parties where the facts and issues are the same. [Citation.] Under the doctrine, a final judgment on the merits rendered by a court of competent jurisdiction operates to bar a subsequent suit between the same parties and involving the same cause of action. [Citations.] In addition to the matters that were actually decided in the first action, the bar also applies to those matters that could have been decided in the prior suit. [Citations.] Three requirements must be satisfied for *res judicata* to apply: (1) the rendition of a final judgment on the merits by a court of competent jurisdiction; (2) the existence of an identity of cause of action; and (3) identity of the parties or their privies. [Citations.]" *Id.*

¶ 26 In the present case, AWL challenges only the second and third elements of *res judicata* (identity of cause of action and parties). As to the second element, AWL argues that there is no identity of cause of action because "the operative facts which would have entitled Anderson to recovery are different from the operative facts which entitle AWL to recovery in this matter." In support, AWL cites to the fact that the conspiracy complaint involved claims against Nelsen and the conspiracy claim against defendant did not derive from AWL's taxes or defendant's refusal to cooperate with the receiver. According to AWL, "[t]hese allegations are entirely different from the present case brought by the Receiver," which is based on accounting malpractice. We disagree.

¶ 27 "[S]eparate claims will be considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief." *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 311

(1998). Stated differently, "the dismissal of a single theory of recovery against a particular defendant operates as a final adjudication of all claims based on other theories of recovery that could have been brought as part of the initial action, as long as they arise from the same core of operative facts." *Ricker*, 2015 IL 117090, ¶ 47.

¶ 28 In the conspiracy complaint, Anderson alleged conspiracy claims based on accounting services performed by defendant for AWL. In particular, Anderson alleged that defendant (acting as AWL's accountant) participated in a scheme with other individuals and was executing the scheme through AWL. During the pendency of the conspiracy litigation, Anderson and AWL knew of additional causes of action against defendant when they learned that AWL had had not filed tax returns since 2001. Anderson and AWL could have raised those additional claims, but did not during the conspiracy litigation. See *Altair Corporation v. Grand Premier Trust and Investment, Inc.*, 318 Ill. App. 3d 57, 62 (2000). In the instant litigation, AWL changes its theory to allege a claim of accounting malpractice against defendant based on the same conduct—failure to file AWL's state and federal tax returns and failure to alert AWL that it was a potential victim of fraud. The facts are the same for both lawsuits. The only difference between the two lawsuits is the theory asserted by AWL (conspiracy and accounting malpractice). "[S]imply alleging a new theory of recovery is insufficient to assert a different cause of action, where multiple theories of recovery are predicated on the same core of operative facts." *Id.* Therefore, we hold the second element of *res judicata* is satisfied.

¶ 29 Next, AWL claims that the third element of *res judicata* has not been met because there is no privity between Anderson and AWL. In support, AWL cites to the fact that Anderson was enjoined by the trial court in the conspiracy litigation from acting as an agent of AWL in

September 2010. According to AWL, this fact prevented Anderson "from taking any actions on AWL's behalf or acting in its interests." We disagree.

¶ 30 "Privity is said to exist between parties who adequately represent the same legal interests." (Internal quotation marks omitted.) *People ex rel. Burris v. Progressive Land Developers, Inc.*, 151 Ill. 2d 285, 296 (1992). "For purposes of *res judicata*, '[i]t is the identity of interest that controls in determining privity, not the nominal identity of the parties.' " *Ricker*, 2015 IL 117090, ¶ 50 (quoting *Burris*, 151 Ill. 2d at 296).

¶ 31 As alleged by Anderson in the conspiracy complaint and by AWL in the accounting malpractice complaint, Anderson is an owner and shareholder of AWL. As a shareholder of AWL, Anderson would be an agent of AWL and was acting in that capacity when he initiated the conspiracy litigation. See *Horwitz, Schakner & Associates, Inc. v. Schakner*, 252 Ill. App. 3d 879, 884 (1993). Thus, Anderson stood to recover in the conspiracy litigation against defendant based on his status as an owner and shareholder of AWL. Now, AWL (on behalf of its owners and shareholders, including Anderson) attempts to assert an accounting malpractice claim against defendant for the same accounting services that were at issue in the conspiracy litigation. The fact that the trial court enjoined Anderson from acting as an agent of AWL does not sever the privity between AWL and Anderson. The identity of interest in both the conspiracy and the accounting malpractice litigation is the same—the legal interest of the owners and shareholders of AWL. Whether Anderson is now permitted to take action on behalf of AWL is irrelevant. Anderson acted as AWL's agent when he sought and received the appointment of a receiver for AWL in the conspiracy litigation. The receiver can, and has, taken action on behalf of AWL and its shareholders (including Anderson) during the conspiracy litigation, as well as the accounting malpractice litigation. Consequently, we hold the third requirement of *res judicata* is met.

CONCLUSION

¶ 32 The judgment of the circuit court of Whiteside County is affirmed.

¶ 33 Affirmed.