2016 IL App (5th) 150230-U

NO. 5-15-0230

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

LARRY G. WEBB,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Jackson County.
	)	
v.	)	No. 12-L-105
	)	
J. MARK MACLIN,	)	Honorable
	)	Christy W. Solverson,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Presiding Justice Schwarm and Justice Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court erred in granting the defendant's motion for summary judgment based upon the statute of limitations and the statute of repose.

¶ 2 In this legal malpractice action, the plaintiff, Larry G. Webb, appeals from an order of the circuit court of Jackson County granting summary judgment for the defendant, J. Mark Maclin, on the basis that the plaintiff's amended complaint was barred by the statute of limitations and the statute of repose. The plaintiff also appeals from the trial court's determination that his motion to file a second amended complaint was moot in light of the summary judgment order. For the reasons set forth below, we reverse the

grant of summary judgment in favor of the defendant, and remand this cause of action for further proceedings.

¶ 3 BACKGROUND

¶ 4 On October 4, 2012, in the circuit court of Jackson County, the plaintiff filed a two count professional negligence action against the defendant. Count I of the complaint was based upon the sale of the plaintiff's restaurant, Larry's Pit BBQ, in Carbondale, Illinois. Count II involved the sale of the plaintiff's second restaurant, also known as Larry's Pit BBQ, located in DuQuoin, Illinois.

¶ 5 In count I, the plaintiff alleged that the defendant was a licensed attorney in the State of Illinois, who represented the plaintiff in the sale of his Carbondale restaurant. The plaintiff contended that the defendant drafted the sales agreement, which included the transfer of the nonexclusive use of the restaurant's trade name, "Larry's Pit BBQ," the building, the real estate on which it was located, and all of the furniture, fixtures, equipment, and other remaining personal property located at the premises. The buyers were Carolyn Sue Tuttle and David G. Tuttle. The sales agreement was signed by the plaintiff and the buyers on October 19, 2004. The defendant was not present on the date of the closing.

¶ 6 Under the terms of the sale, the buyers agreed to purchase the business from the plaintiff for $495,000. The purchase price included an initial payment of $195,000 in cash. The remaining $300,000 was to be secured by a promissory note, payable to the plaintiff, which was incorporated into the sales agreement. The agreement stated that the buyers would obtain the $195,000 cash down payment from the DuQuoin State Bank. In

exchange for this loan, the bank would receive a first mortgage lien on the land, building, and equipment. To secure the remaining balance of the $300,000 due under the contract, in addition to the promissory note, the plaintiff would receive a second mortgage on the real estate.

¶ 7 Count I further stated that the defendant had a duty to represent the plaintiff in the same manner as a reasonable attorney, but that the defendant breached this duty owed to the plaintiff. The defendant was allegedly negligent in that he failed to draft a second mortgage to protect the plaintiff's remainder interest due under the agreement, failed to have the buyers sign a second mortgage in favor of the plaintiff, failed to record the second mortgage, and failed to record a UCC lien to secure the plaintiff's interests in the personal property and inventory that was sold pursuant to the sales agreement. The plaintiff also alleged that as a direct and proximate cause of the acts or omissions of the defendant, the DuQuoin State Bank extended additional credit to the buyers[1] and, on September 25, 2008, secured its interest in the property by recording an additional mortgage. The additional mortgage allegedly gave the bank preference over the plaintiff's interest due pursuant to the $300,000 promissory note because the defendant failed to record the plaintiff's second mortgage before September 25, 2008, and/or failed

[1]The plaintiff pled that the bank extended additional credit to the buyers in September 2008, but the record shows the additional credit was extended to only Carolyn Tuttle. The record reflects that in December of 2006, the plaintiff released David Tuttle from all liability created by the Carbondale sales agreement.

to file a security interest under the UCC. Therefore, the plaintiff was left with an unsecured interest due pursuant to the terms of the promissory note. Finally, the plaintiff alleged that the buyers subsequently defaulted on their loan, and the bank foreclosed on the first mortgage. As a result of the foreclosure, the land, building, and all of the contents were sold for an amount that was insufficient to pay any of the remaining balance due the plaintiff for the sale of the Carbondale business.

¶ 8 On November 8, 2012, the defendant responded to the plaintiff's complaint by filing a motion to dismiss pursuant to 735 ILCS 5/2-615 (West 2010) and 735 ILCS 5/2-619 (West 2010). This motion did not comply with the statute for filing a combined motion to dismiss in that it failed to separate the arguments into distinct parts, as required by section 2-619.1. See 735 ILCS 5/2-619.1 (West 2010). In his motion, the defendant cited the statute of limitations (735 ILCS 5/13-214.3(b)) as a basis for dismissal, but offered no argument in support of that defense. The defendant also relied upon the statute of repose for legal malpractice claims (735 ILCS 5/13-214.3(c)), and contended that the plaintiff's complaint was untimely because more than six years had passed from the date of the agreement for sale to the filing of the plaintiff's complaint. Specifically, as to count I, the defendant argued that the statute of repose began to run on October 19, 2004, the date the parties executed the sales agreement for the Carbondale restaurant. The plaintiff did not file his cause of action until October 4, 2012, some eight years after the sales agreement was entered into. Therefore, the defendant claimed that the six-year statute of repose had expired. Thus, count I of the plaintiff's complaint should be dismissed. The defendant made a similar argument with regard to count II. The contract

for sale of the DuQuoin property was dated September 23, 2005. Therefore, the defendant argued that the statute of repose precluded the filing of the cause of action.

¶ 9 The plaintiff responded to the defendant's motion to dismiss count I, arguing that the statute of repose did not begin to run on October 19, 2004. Instead, the plaintiff maintained that the statute of repose was triggered on September 24, 2008, when the bank modified its first mortgage, and extended additional credit to the buyer, Carolyn Tuttle. Therefore, the plaintiff argued he had timely filed his complaint on October 4, 2012, well within the six-year period of repose. The plaintiff did not respond to the defendant's motion to dismiss count II.

¶ 10 On April 3, 2013, the trial court heard the defendant's motion to dismiss. There is no transcript of the hearing, and no written order by the court. The docket sheet simply indicates that the plaintiff conceded to the defendant's section 2-615 motion, and that the court granted the section 2-615 motion to dismiss. The record also indicates that the court allowed the plaintiff 30 days to replead his cause of action.

¶ 11 The plaintiff filed an amended complaint on May 8, 2013, alleging a single count of legal malpractice in the sale of his Carbondale restaurant. The amended complaint contained many of the same allegations previously alleged in count I of the plaintiff's original complaint. In further support of his claim, the plaintiff averred that he continued to receive payments from the buyers until February 2010. Additionally, until November 17, 2011, the defendant continued to represent the plaintiff, and repeatedly reassured the plaintiff, that the contract could be enforced. According to the plaintiff, the defendant's representations equitably estopped him from relying upon the statute of repose to bar the

cause of action. Furthermore, the plaintiff alleged that he did not discover the defendant's negligence until he consulted with a new attorney in November 2011.

¶ 12 On May 22, 2013, the defendant filed another motion to dismiss pursuant to 735 ILCS 5/2-615 and 735 ILCS 5/2-619. As before, the defendant's motion did not comply with the statute for filing a combined motion to dismiss. See 735 ILCS 5/2-619.1 (West 2010). Once again, the defendant's motion referenced the citation for the statute of limitations, but no specific argument was made with regard thereto. Based upon the new allegations in the plaintiff's amended complaint, the defendant claimed that the statute of repose continued to act as a bar to the plaintiff's claim. Specifically, the defendant argued that the plaintiff had failed to plead the last act upon which his claim of legal negligence was founded. The defendant also claimed that the plaintiff had not alleged sufficient facts to raise the defense of equitable estoppel. The defendant did not specifically address the plaintiff's argument regarding when he discovered the defendant's negligence.

¶ 13 On January 22, 2014, the circuit court entered an order denying the defendant's motion to dismiss. In its order, the court concluded that the plaintiff had adequately pleaded the rule allowing an individual to file a cause of action within two years from the time the person knew or reasonably should have known of the injury for which damages are sought. The court based this finding on the plaintiff's allegation that he did not discover the defendant's negligence until November 2011, when the plaintiff consulted another attorney. With regard to the statute of repose, the court found the plaintiff had adequately pleaded that the last act of representation took place on or near November 17,

2011. In light of these findings, the court held that the plaintiff's complaint, filed in October 2012, was "well within the two year statute of limitations."

¶ 14 After his motion was denied, the defendant filed an answer and a counterclaim. Thereafter, on April 4, 2014, the defendant filed an amended answer and counterclaim to the plaintiff's amended complaint. In his amended answer, the defendant denied the allegations of professional negligence. The defendant's pleading also asserted several affirmative defenses. Specifically, the defendant alleged that the scope of his representation did not include the filing of the second mortgage or promissory note, that the defendant had delivered all of the documents he was obligated to provide, and that the plaintiff had released David Tuttle without the defendant's knowledge. The defendant also included the statute of limitations defense, alleging that the plaintiff had agreed to file the documents prepared by the defendant, including the promissory note and second mortgage, on October 19, 2004, but failed to do so. The defendant claimed that the plaintiff knew or should have known of his injury on that date. The affirmative defense also referred to a letter the defendant claimed he sent to the plaintiff on May 20, 2010, informing him that the mortgage prepared by the defendant was never recorded. The defendant contended that the plaintiff's original complaint, filed on October 4, 2012, was commenced more than two years after the alleged legal malpractice occurred, and more than two years after the plaintiff knew or reasonably should have known of the alleged negligence, in light of his receipt of the letter dated May 20, 2010.

¶ 15 The defendant also raised as a defense the statute of repose, alleging that the restaurant was sold on October 19, 2004, which was also the last date that the defendant

performed legal work on that transaction. Based upon that date, the defendant contended that the statute of repose expired in October 2010, and served as a bar to the plaintiff's complaint filed in October 2012.

¶ 16 Additionally, the defendant filed a counterclaim wherein he alleged that he was owed attorney fees for services rendered to the plaintiff through February 16, 2012. The defendant attached a detailed copy of his bill for services rendered. The last contact with the plaintiff, as evidenced by the bill, was on November 17, 2011. The subsequent charges were for the drafting of a motion to withdraw, and an appearance in court on February 16, 2012.

¶ 17 On May 30, 2014, the plaintiff filed his answer to the defendant's counterclaim, also with affirmative defenses. The plaintiff also filed a reply to the affirmative defenses regarding the statute of limitations and the statute of repose. In the answer to the defendant's counterclaim, the plaintiff alleged that he owed nothing due to the legal malpractice committed by the defendant in the sale of the Carbondale restaurant. With regard to the defendant's affirmative defenses, the plaintiff claimed that the defendant was equitably estopped from asserting the defense of the statute of limitations or the statute of repose. In particular, the plaintiff alleged that the defendant's May 20, 2010, letter informed the plaintiff that the contract for sale was enforceable against the buyers, that the plaintiff was reassured by the defendant that the balance due was still collectable from the buyers, that the plaintiff reasonably relied on these representations, and that the defendant continued to try to collect the amount due from the buyers. Finally, the plaintiff alleged that the defendant waived the affirmative defenses of the statute of

limitations and the statute of repose by filing a counter-complaint (735 ILCS 5/13-207 (West 2012)).

¶ 18 Subsequently, on June 30, 2014, the defendant filed a motion for judgment on the pleadings or, in the alternative, for summary judgment. The defendant argued that the pleadings before the court clearly indicated that the plaintiff acknowledged receipt of the defendant's May 20, 2010, letter wherein the defendant informed the plaintiff that the mortgage had not been recorded. Therefore, the statute of limitations would have been triggered as of that date, and because the plaintiff filed his complaint on October 4, 2012, the two-year statute of limitations had expired. The defendant also argued that his counter-claim for attorney fees did not, in any way, constitute a waiver of the defendant's affirmative defenses that the plaintiff's claim was untimely. According to the defendant, section 13-207 (735 ILCS 5/13-207 (West 2012)) was inapplicable and irrelevant because his counterclaim for attorney fees was not barred at the time he filed his action against the plaintiff.

¶ 19 On July 25, 2014, while the motion for summary judgment was pending, the plaintiff asked the court for leave to file a second amended complaint. The second amended complaint alleged two counts of legal malpractice. Count I pertained to the sale of the plaintiff's Carbondale restaurant, and count II concerned the sale of the plaintiff's restaurant in DuQuoin. The plaintiff alleged that his second cause of action had been revived pursuant to section 13-207 of the Code because the defendant filed a counterclaim. The plaintiff further relied on section 13-207 to argue that the defendant

waived any defense regarding the statute of limitations or statute of repose because the defendant filed the counter-complaint for attorney fees.

¶ 20 All pending motions were heard by the court on February 19, 2015. At the conclusion of the argument, the court took the matter under advisement. On March 2, 2015, in a brief order, the trial court vacated its previous order denying the defendant's motion to dismiss. The court determined from the evidence presented that the plaintiff had knowledge that the note and mortgage were not recorded when he received the May 20, 2010, letter from the defendant. The order further indicated that, "[a]ll parties agree that the Court's Order of January 22, 2014[,] should be vacated due to this new evidence and that Order is hereby VACATED." At the conclusion of that hearing, the court made no reference to the defendant's motion for judgment on the pleadings.

¶ 21 Thereafter, on May 5, 2015, the court entered an order granting the defendant's motion for summary judgment. In doing so, the court found that on May 20, 2010, the defendant wrote the plaintiff a letter informing him that the second mortgage had never been recorded. The plaintiff acknowledged that he had received the letter, but claimed that the defendant continued to assure the plaintiff that the contract could be enforced, despite the fact that the mortgage was not recorded. The court therefore indicated that as of May 20, 2010, the plaintiff discovered that the promissory note and mortgage had not been recorded, which gave him five months to file his cause of action before it was barred by the statute of repose. Based upon these facts, the circuit court found that the limitations period expired on October 20, 2006, and the statute of repose ran on October 20, 2010.

¶ 22 Consequently, the court dismissed the plaintiff's amended complaint, relying on both the statute of limitations, and the statute of repose. The court further concluded that the plaintiff did not properly plead equitable estoppel, and that section 13-207 of the Code could not be used to save the plaintiff's claim. Finally, the court ruled that the plaintiff's motion to file a second amended complaint was moot in light of its summary judgment order. This appeal followed.

¶ 23 ANALYSIS

¶ 24 A motion for summary judgment is to be granted if "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 2014). The pleadings, depositions, admissions, and affidavits on file must be construed against the movant and in favor of the opponent, but the opponent cannot simply rely on his complaint or answer to raise an issue of fact when the movant has supplied facts which, if not contradicted, entitle him to judgment as a matter of law. *Jackson Jordan, Inc. v. Leydig, Voit, & Mayer*, 158 Ill. 2d 240, 249 (1994). Summary judgment is a drastic remedy, and when doubt exists as to the right to summary judgment, the wiser judicial policy is to permit resolution of the dispute by a trial. *Jackson Jordan, Inc.*, 158 Ill. 2d at 249. Our review of a trial court's ruling on a motion for summary judgment is *de novo*. *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 305 (2005).

¶ 25 On appeal, the plaintiff argues that the circuit court erred in granting summary judgment. The plaintiff's first contention of error is that there are genuine issues of

material fact as to when the statute of limitations began to run. Similarly, the plaintiff argues that the trial court erred in determining when the statute of repose began to run. The plaintiff also argues that the defendant waived any statute of limitations or statute of repose defense because he filed a counterclaim for attorney fees. The plaintiff further maintains, for purposes of the statutes of limitation and repose, that he adequately pled equitable estoppel, which should have prevented the court from granting summary judgment. Finally, the plaintiff argues that the trial court abused its discretion by refusing to allow him to file a second amended complaint. We begin our analysis with the plaintiff's argument regarding the statute of limitations.

¶ 26 Statute of Limitations

¶ 27 The plaintiff claims that the trial court erred in determining when the statute of limitations began to run. The plaintiff posits that the statute of limitations did not accrue on May 20, 2010, the date of the letter to the plaintiff that informed him the mortgage had not been recorded. The plaintiff questions whether that letter provided enough information to place him on notice that he had been injured. In support of his argument, the plaintiff cites to the concluding sentence, which states, "[a]s it now stands, while you have not [*sic*] mortgage on the restaurant property, you do a [*sic*] have an enforceable contract against both David and Carolyn Tuttle." The plaintiff claims that the inclusion of that specific line leads one to believe that the sales agreement remained enforceable. Further, the plaintiff argues that he did not discover his injury until November 2011, when he consulted with a new attorney. Therefore, the plaintiff claims there is a question

of fact that remains to be decided, thereby precluding summary judgment. We agree with the plaintiff.

¶ 28 The statute of limitations for professional negligence by an attorney is set forth in section 13-214.3 of the Code (735 ILCS 5/13-214.3 (West 2014)). Subsection (b) of section 13-214.3 provides that an action for damages "against an attorney arising out of an act or omission in the performance of professional services *** must be commenced within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought." 735 ILCS 5/13-214.3(b) (West 2014). The statute of limitations incorporates the "discovery rule," delaying the commencement of the statute of limitations until the person knows or reasonably should know that he has been injured, and that the injury may have been wrongfully caused. *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 81 (1995); *Jackson Jordan, Inc.*, 158 Ill. 2d at 249. The time at which a party has, or should have, the requisite knowledge to maintain a cause of action under the discovery rule is ordinarily a question of fact. *Jackson Jordan, Inc.*, 158 Ill. 2d at 250. However, where it is clear from the undisputed facts that only one conclusion can be drawn, the question may be resolved as a matter of law. *Newell v. Newell*, 406 Ill. App. 3d 1046, 1051 (2011).

¶ 29 In this case, the central question to be answered is when the plaintiff knew, or reasonably should have known, that he had been injured, and that his injury may have been the result of his attorney's negligence. After reviewing the record, we find that there remain genuine issues of material fact regarding when the statute of limitations period began to run. Indeed, the pleadings and their attachments raise several possibilities as to

when the limitations period might have started. The first potential date is October 19, 2004. The defendant's affirmative defense asserts that the plaintiff was responsible for recording the promissory note and mortgage after the closing on the sale of the plaintiff's Carbondale restaurant. Under this scenario, the plaintiff would have had the duty to record the note and mortgage on October 19, 2004. Thus, if the note was not recorded, the plaintiff would have had actual knowledge of that fact, and any error or omission would have occurred on that date. In granting summary judgment, however, the trial court did not make a finding of fact as to who was responsible for recording the mortgage. The plaintiff has always maintained that the duty to record the note and the mortgage belonged to the defendant. Therefore, the parties have opposite views regarding their respective obligations, and the pleadings, at this stage, must be construed in favor of the plaintiff, and against the defendant. In light of these contradictory allegations, we find that there remains genuine issues of material fact, and the circuit court erred in its determination that the statute of limitations commenced to run on October 19, 2004.

¶ 30 The defendant also argues that, at the very least, the statute of limitations began to run on May 20, 2010, when the plaintiff was informed by letter that the mortgage had not been recorded. As noted above, the plaintiff claims that the language of the letter did not place him on notice that he had been injured by the defendant. The plaintiff further alleges that in addition to the letter, the defendant continued to provide reassurances to the plaintiff that the balance owed under the contract remained collectable. The defendant's attorney fee documentation attached to the counterclaim indicates that the

defendant worked for the plaintiff up until November 17, 2011. In light of these contested facts, it is clear that there are additional issues of fact that require resolution, such that it is not clear that the statute of limitations began to run on May 20, 2010.

¶ 31 Finally, the plaintiff has averred that he did not know of his injury until he consulted with another attorney in November 2011. Thus, the plaintiff has invoked the "discovery rule," which, under the circumstances herein, requires resolution by the trier of fact.

¶ 32 Having considered the various pleadings on file, there remains genuine issues of material fact that are more appropriate for consideration through the civil trial process so that the trier of fact can evaluate all of the evidence. Accordingly, we find that the circuit court erred in granting summary judgment based upon its determination of when the statute of limitations began to run. Having determined that the circuit court erred in granting summary judgment on this basis, we need not address the plaintiff's remaining arguments regarding the statute of limitations.

¶ 33 Statute of Repose

¶ 34 The plaintiff's next argument is that the trial court erred in its determination that the statute of repose served as a bar to his cause of action. The statute of repose for legal malpractice provides that the action may not be commenced in any event more than six years after the date on which the act or omission occurred. 735 ILCS 5/13-214.3(b) (c) (West 2014). The statute of repose for legal malpractice begins on the last act of representation with regard to the omission upon which the malpractice is founded. *O'Brien v. Scovil*, 332 Ill. App. 3d 1088, 1090 (2002). In other words, the statute of

repose begins on the date on which the attorney performs the work involved in the alleged negligence. *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 18. The statute of repose establishes a cutoff point, six years after the date on which the act or omission occurred. The period of repose is intended to terminate the possibility of liability after a defined period of time, regardless of a potential plaintiff's lack of knowledge of his cause of action. *Goodman v. Harbor Market, Ltd.*, 278 Ill. App. 3d 684, 690 (1995). Simply put, the statute of repose terminates the right to bring an action when the event giving rise to the cause of action does not transpire within the specified period. *Goodman*, 278 Ill. App. 3d at 691. The plaintiff has the burden of proving the existence of facts that would call into play a rule tolling the period of limitations or repose. *Jones v. Dettro*, 308 Ill. App. 3d 494, 498 (1999).

¶ 35 Here, it is important to determine what event gave rise to the plaintiff's cause of action. The defendant argues that the last legal work performed on the plaintiff's transaction was October 19, 2004, because the plaintiff's malpractice claim is founded upon the making and drafting of the sales agreement, and is not based upon any efforts to enforce the contract. We disagree. The plaintiff has repeatedly maintained that his claim revolves around the failure of the defendant to record the note and mortgage in order to protect the plaintiff's rights in case of a default on the contract by the buyers. He has also maintained that the defendant could have prevented any injury by recording the mortgage before September 25, 2008, the date when the bank extended further credit to the buyer, Carolyn Tuttle. Additionally, the defendant's records for attorney fees indicate that he worked on behalf of the plaintiff until November 17, 2011. These competing allegations

raise an issue of fact to be decided by the evidence adduced at trial. Therefore, we find that the trial court erred in granting summary judgment in favor of the defendant based upon the statute of repose. In light of this finding, we decline to address the plaintiff's remaining contentions of error concerning the statute of repose.

¶ 36 CONCLUSION

¶ 37 For the reasons set forth above, we vacate the order of the circuit court granting the defendant's motion for summary judgment based upon the statute of limitations and the statute of repose. Taking into consideration our order vacating the summary judgment, we also vacate the trial court's determination that the plaintiff's motion to file his second amended complaint was moot. Upon remand for further proceedings, the trial court should liberally allow amendments to pleadings to permit parties to fully present their causes of action. *Jeffrey M. Goldberg & Associates, Ltd. v. Collins Tuttle & Co.*, 264 Ill. App. 3d 878, 885 (1994).

¶ 38 Vacated; remanded.