FIFTH DIVISION
May 19, 2017

No. 1-15-3443

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

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LANE M. GENSBURG, as Trustee of the Howard J. Siegel Irrevocable Trust Agreement Dated November 26, 1990, Plaintiff-Appellant,	)	Appeal from the Circuit Court of Cook County.
v.	)	
THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, a New York Corporation, HOWARD SCHUFF, individually, LANG FINANCIAL GROUP CHICAGO, LTD., An Illinois Corporation, and ROSENTHAL BROS., INC., an Illinois corporation,	)	No. 14 L 013089
Defendants-Appellees.	)	Honorable John C. Griffin Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not err by finding plaintiff's claims were filed beyond the applicable statutes of limitations.

¶ 2 Plaintiff Lane M. Gensburg (Trustee), as trustee of the Howard J. Siegel Irrevocable Trust, brought the underlying action in the circuit court of Cook County to recover damages from the defendants, Guardian Life Insurance Company of America, Howard Schuff (Mr. Schuff), Lang Financial Group Chicago, Ltd., and Rosenthal Bros., Inc. (collectively defendants), for common law fraud and violations of the Illinois Consumer Fraud and Deceptive Business Practices Act (the Act) (815 ILCS 505/1, *et seq.* (West 2014)). The defendants moved to dismiss the Trustee's action, arguing, *inter alia*, that the claims were barred for being filed after their respective statutes of limitations periods. The circuit court found the defendants' limitations defenses to be meritorious and dismissed the Trustee's complaint pursuant to section 2-619(a)(5) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(5) (West 2014)). The Trustee now appeals the circuit court's order granting defendants' motions to dismiss his complaint, and for the reasons that follow, we affirm the decision of the circuit court.

¶ 3 Because this matter comes before us in the context of a dismissal under section 2–619 of the Code, we must accept as true all well-pleaded facts in the plaintiff's complaint and all inferences that may reasonably be drawn in the plaintiff's favor. *Ferguson v. City of Chicago*, 213 Ill. 2d 94, 96–97 (2004) (citing *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 277 (2003)). Conclusions of law, however, are not accepted as true. *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 85 (1995). Pursuant to these standards, and based on the allegations in the Trustee's complaint, the relevant facts of this case are as follows.

¶ 4 BACKGROUND

¶ 5 According to the Trustee's complaint, defendant Mr. Schuff was an insurance broker working as an agent or employee of the insurance brokerage firm Rosenthal Bros Inc. until 2003, at which time he became an agent or employee of the insurance brokerage firm Lang Financial Group Chicago, Ltd.

¶ 6 In 1990, Mr. Schuff met with the insureds, Howard and Catherine Siegel, at their residence to discuss possible life insurance policies for the insureds. During the meeting, Mr. Schuff advised the insureds of his qualifications, expertise and experience, including that he had been in the insurance business for quite some time, had many clients and had sold many insurance policies. Also during the meeting, Mr. Schuff recommended that the insureds purchase "a second to die life insurance policy***with a total face amount of $2.4 million." Mr. Schuff signed the insureds' application for the policy as the "Soliciting Agent/Dealer" on November 28, 1990.

¶ 7 According to the complaint, Mr. Schuff told the insureds that their annual premium payments for the policy would vanish over time and would no longer be required after a minimum of seven years, "but in no event more than twelve years after the [p]olicy anniversary, or by 2003." In support of this representation, Mr. Schuff provided the insureds with a written premium projection from Guardian in the form of an illustration, which showed the annual premium payments vanishing after 2003. Mr. Schuff told the insureds that the projection was reliable and accurately depicted the expected premium projections on the policy. Consequently, the insureds purchased the policy and it was issued by Guardian on or about May 29, 1991.

¶ 8 After paying the annual premiums up through 2003, the Trustee continued to be billed for additional payments. Subsequently, Howard called Mr. Schuff several times seeking an

explanation of why the premium payments had not vanished. On each of these occasions, Mr. Schuff told Howard that the premium payments were on the verge of vanishing and would only need to be paid for an additional year. On each of these occasions, Mr. Schuff also presented Howard with illustrations from Guardian which supported Schuff's statements. The last illustration projected that the premium payments would vanish by 2006. In response, Howard instructed the Trustee to continue making payments.

¶ 9 In 2006, Guardian continued to bill the Trustee for premium payments. As a result, Howard contacted Mr. Schuff again to ask why the payments were still required, and he indicated that he was considering cancelling the policy. Responding to Howard's inquiry, Mr. Schuff sent two Guardian illustrations. The first indicated that at the current death benefit of $2.4 million, the payments would vanish after 2013; the second indicated that if the death benefit was reduced to $1.2 million, the payments would vanish after 2009. Mr. Schuff further advised that these projections were contingent on the dividend interest rate remaining at or above its 2006 level. In response, Howard instructed the Trustee to continue paying the premiums on the policy.

¶ 10 The dividend interest rate remained at or above its 2006 level from 2006 through 2013. In early 2013, Mr. Schuff contacted Howard and informed him that the premium payments on the policy were no longer required after 2013. Shortly thereafter, Mr. Schuff contacted Howard again to inform him that he had been mistaken and that further payments on the policy would be required beyond 2013.

¶ 11 On May 21, 2013, Mr. Schuff emailed Howard and his counsel four additional illustrations from Guardian. The email explained that based on the current death benefit of $2.4 million and the 2013 dividend interest rate of 6.65%, the first illustration demonstrated that payments would be due until 2021; the second illustration demonstrated that at a reduced

dividend interest rate of 5.65%, payments would be due through the year 2045; the final two illustrations concerned a reduced death benefit to $1.6 million. According to the Trustee, this was the first time that the insureds discovered that their policy was not in fact a vanishing premium insurance policy and "that they had been deceived all along."

¶ 12 On December 18, 2014, the Trustee filed a two-count complaint against the defendants seeking recovery based on common law fraud and for damages arising from the defendants' alleged violation of the Act. In response, the defendants filed motions to dismiss arguing, *inter alia,* that the Trustee's claims were barred by the applicable statutes of limitations. On November 9, 2015, the circuit court granted defendants' motions to dismiss finding the Trustee's claims were barred by the applicable statutes of limitations. That same day, the Trustee filed a timely notice of appeal.

¶ 13 ANALYSIS

¶ 14 Standard of Review

¶ 15 We apply the *de novo* standard of review to the circuit court's dismissal of a plaintiff's complaint pursuant to section 2–619(a)(5) of the Code. *Caywood v. Gossett*, 382 Ill. App. 3d 124, 129 (2008) (citing *Paszkowski v. Metropolitan Water Reclamation District of Greater Chicago,* 213 Ill. 2d 1, 6 (2004)).

¶ 16 Discussion

¶ 17 On appeal, the Trustee challenges the circuit court's order dismissing as time-barred the claims against defendants. The parties agree that the statute of limitations for common law fraud is five years (735 ILCS 5/13-205) (West 2014)) and that the statute of limitations for claims brought under the Act is three years (805 ILCS 505/10a(e) (West 2014)); however, the parties disagree as to when the limitations periods began to run.

¶ 18 The defendants contend that the limitations periods began to run in 2003 when the insureds realized that the premium payments would be required despite Mr. Schuff's representations that they would vanish. Conversely, the Trustee contends that the statute of limitations did not begin to run until May 21, 2013. He contends that the discovery rule tolled the running of the statute of limitations until the insureds discovered that their policy was not a vanishing premium insurance policy.

¶ 19 Under the discovery rule, the statute of limitations period does not begin to run until the injured party knows or reasonably should know of the injury and knows or reasonably should know that the injury was wrongfully caused."*Steinmetz v. Wolgamot*, 2013 IL App (1st) 121375, ¶ 30 (quoting *Khan v. Deutsche Bank AG,* 2012 IL 112219, ¶ 20). The phrase "wrongfully caused" does not mean knowledge of a specific defendant's negligent conduct or knowledge of the existence of a cause of action. *Id.* Rather, the term refers to when an injured party "becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved." *Id.* (quoting *Castello v. Kalis,* 352 Ill. App. 3d 736, 744–45 (2004)). In other words, "when a party knows or reasonably should know both that an injury has occurred and that it was wrongfully caused, the statute begins to run and the party is under an obligation to inquire further to determine whether an actionable wrong was committed. In that way, an injured person is not held to a standard of knowing the inherently unknowable [citation], yet once it reasonably appears that an injury was wrongfully caused, the party may not slumber on his rights." *Id.* (quoting *Nolan v. Johns–Manville Asbestos,* 85 Ill. 2d 161, 171, (1981)); see also *Khan,* 2012 IL 112219, ¶ 21. "The question of when a party knew or should have known both of an injury and its [probable] wrongful cause is one of fact, unless the

facts are undisputed and only one conclusion may be drawn from them." *Id.* (quoting *Nolan,* 85 Ill. 2d at 171).

¶ 20 In the present case, the parties do not dispute the facts or that the injury occurred in 2003 when the Trustee continued to be billed for the premium payments; however, the parties do disagree on the point in time when the insureds knew or should have known that their injury was wrongfully caused. After reviewing the complaint, it is clear that, at the latest, the insureds knew or should have known that their injury was wrongfully caused in 2006.

¶ 21 According to the complaint, Guardian issued the insurance policy on May 29, 1991, and Mr. Schuff told the insureds that the premium payments would vanish by 2003. In 2003 the insureds learned that the premiums had not vanished as promised and that the Trustee was still being billed. Subsequently, Howard contacted Mr. Schuff for an explanation, and Mr. Schuff stated that the payments were on the verge of vanishing. He also stated that the payments would only need to be paid for an additional year; however, he later presented Howard with an illustration depicting the premium payments vanishing by 2006. Notwithstanding these illustrations, in 2006 the premiums still had not vanished, which prompted Howard to tell Mr. Schuff he was considering cancelling the policy. By this time, none of Mr. Schuff's representations had come to fruition, and the Trustee had been paying on the insurance policy for over 15 years, which was three years past the original deadline.

¶ 22 The Trustee contends that this Court should reverse the circuit court's dismissal because the insureds did not possess sufficient information to put them on notice that the injury might have been wrongfully caused. He contends that it was reasonable for the insureds to assume that market forces, like the dividend interest rate referenced by Mr. Schuff, might have had some effect on the exact timing of when premiums would vanish. This argument is without merit.

¶ 23 It is well settled that when a plaintiff uses the discovery rule to delay commencement of the statute of limitations, the plaintiff has the burden of proving the date of discovery. *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 85 (1995). In order to satisfy their burden, a plaintiff must plead facts necessary to explain why the cause of action was not discovered sooner. *Pratt v. Sears Roebuck & Co.*, 71 Ill. App. 3d 825, 829 (1979) (citing *Chicago Park District v. Kenroy, Inc.*, 58 Ill. App. 3d 879 (1978)). We note that the Trustee has not pleaded facts demonstrating that the insureds made any assumptions about the effects of or had knowledge of market forces or dividend interest rates prior to 2006. On the contrary, the complaint alleges that in 2006 Mr. Schuff explained for the first time that the point at which the payments would vanish was contingent on the dividend interest rates staying constant. Under these conditions, the obligation to pay for any portion of the policy would vanish or be offset by using dividend and/or interest from the insurance policy. This information was both material and omitted during Mr. Schuff's 1990 sales pitch. Such an omission, taken together with the fact that the premium payments had not vanished by three separate deadlines over the course of 15 years, constituted sufficient information to put the insureds on notice that their injury might have been wrongfully caused.

¶ 24 Next, the Trustee contends that the insureds cannot be faulted for failing to discover the truth about the defendants' false representations and that the insureds reasonably relied on Mr. Schuff's numerous representations that the premiums would vanish. According to the complaint, the material undisclosed facts were in the sole possession of the defendants, and they were actively concealed from the insureds. These arguments are also without merit. We have already concluded that in 2006 the insureds possessed sufficient information to put them on notice that their injury might have been wrongfully caused. The complaint demonstrates that by 2006 the

insureds knew the following: (1) none of Mr. Schuff's representations regarding when the premiums would vanish had come to fruition; (2) the date when the premium payments would disappear was contingent on dividend interest rates; (3) Mr. Schuff failed to tell the insureds during his initial representations in 1990 that when the premium payments would disappear was contingent on dividend interest rates; and (4) that after 15 years, they had not received the benefit of their bargain. Therefore, any concealment by the defendants after 2006 was irrelevant because the insureds possessed sufficient information concerning their injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct should have been taken. *Steinmetz*, 2013 IL App (1st) 121375, ¶ 30.

¶ 25 Similarly, the insured's fraudulent concealment argument is also unpersuasive. The Trustee contends that the defendants failed to disclose and concealed from the insureds the "economic variables which determined whether and when premiums could ever vanish." We find this allegation contradicts the Trustee's assertion that in 2006 Mr. Schuff explained to the insureds for the first time that the point at which the premiums would vanish was contingent on the dividend interest rates. Therefore, the facts demonstrate that the insureds were aware of the previously undisclosed facts in 2006, and we find nothing in the record to support tolling limitations periods based on fraudulent concealment.

¶ 26 Further, plaintiff's contention that the continuing violation rule tolled the statute of limitations is also without merit. The continuing violation rule states that where a tort involves continuing or repeated injurious behavior, the statute of limitations does not begin to run until the (1) date of the last injury or (2) when the tortuous acts cease. *Gredell v. Wyeth Laboratories, Inc.*, 346 Ill. App. 3d 51, 58 (2004). However, where there is a single overt act from which subsequent damages may flow, as is the case before this Court, the statute begins to run on the

date the defendant invaded the plaintiff's interest and inflicted injury, and this is so despite the continuing nature of the injury. *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 279 (2003).

¶ 27 The Trustee does not base his continuing violation rule argument on the date of injury; instead, he contends that Mr. Schuff's fraudulent misrepresentations in 2013 were tortuous acts sufficient to toll the limitations periods. The tort of fraudulent misrepresentation requires (1) a false statement of material fact; (2) known or believed to be false by the person making it; (3) an intent to induce the plaintiff to act; (4) action by the plaintiff in justifiable reliance on the truth of the statement; and (5) damage to the plaintiff resulting from such reliance. *Doe v. Dilling*, 228 Ill. 2d 324, 342–43 (2008). The facts demonstrate that the insureds did not rely on Mr. Schuff's misrepresentations in 2013. The complaint states that it was the 2013 misrepresentations that prompted the insureds' realization that they were being deceived. Moreover, the Trustee initiated the underlying action based on the insureds concluding that they were being deceived. Accordingly, the defendants' conduct in 2013 cannot be said to be tortuous where the basis for the continuing violation rule argument rests on the defendants' alleged fraudulent misrepresentation.

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, we affirm the judgment of the trial court.

Affirmed.