2017 IL App (1st) 162266-U

No. 1-16-2266

Third Division
March 31, 2017

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

FINORT BORTO,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 15 L 010170
	)	
FIRST AMERICAN TITLE COMPANY,	)	Honorable
a California corporation,	)	Patrick J. Sherlock,
	)	Judge, presiding.
Defendant-Appellee.	)	

JUSTICE COBBS delivered the judgment of the court.

Presiding Justice Fitzgerald Smith and Justice Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held*: Plaintiff's complaint was untimely because it was not brought within the applicable statute of limitations. The discovery rule did not toll the statute of limitations because plaintiff should have known about the existing second mortgage as it was a part of the public record.

¶ 2 Plaintiff Finort Borto brought a complaint against First American Title Company (First American) alleging that First American breached its duty when it failed to record a release of mortgage following a real estate closing in 1998. In response, First American filed a motion to dismiss asserting that plaintiff's complaint was untimely pursuant to section 2-

619 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2015)). The trial court granted the motion to dismiss and subsequently denied plaintiff's motion to reconsider. We affirm.

¶ 3 I. BACKGROUND

¶ 4 This appeal arises from the dismissal of plaintiff's amended complaint. Before considering the issues raised on appeal, we first set forth the relevant facts as alleged in the amended complaint.

¶ 5 In September 1998, Steve Youseph, plaintiff's nephew, conveyed to him all of his right, title, and interest he held in a single family property located at 6320 N. LaCrosse Avenue, Chicago, Illinois (property). At that time the property was encumbered by two mortgages. The first mortgage was held by Ravenswood Mortgage Corporation and the second was held by Amerus Bank, now known as Bank of the West. The Bank of the West mortgage secured a revolving home equity line of credit in favor of Youseph. In December 1998, plaintiff secured a mortgage from Washington Mutual Bank (Washington Mutual). The Washington Mutual mortgage provided sufficient funds to pay off both existing mortgages on the property.

¶ 6 Plaintiff alleged that he was the third party beneficiary to the December 3, 1998 agreement between Washington Mutual and First American for closing services. As closing agent, First American was to administer the loan proceeds to pay off the existing mortgages, direct the banks to release those mortgages, and record the mortgage releases. At the time of closing, both mortgages were paid in full. Plaintiff further alleged that First American breached its agreement by failing to record a release of the Bank of the West mortgage and failing to notify them to close the home equity line of credit.

¶ 7 As First American failed to close the home equity line of credit, Youseph was able to continue borrowing against it. Youseph fell into default on his payments and, as a result, Bank of the West filed a mortgage foreclosure complaint in the circuit court of Cook County in August 2009. Plaintiff, as title holder to the property, was named as a defendant in the foreclosure action. On April 20, 2015, a judgment of foreclosure and sale was entered finding a default in the amount of $59,079.06. Plaintiff alleges that he first became aware of First American's failure to obtain and record a release of the Bank of the West mortgage in September 2009, when he was served with summons in the foreclosure case.

¶ 8 On October 6, 2015, plaintiff filed his initial complaint alleging that First American breached its obligations by failing to obtain and record a release of the Bank of the West mortgage. First American responded by filing a motion to dismiss pursuant to subsection 2-619(a)(5) alleging that the complaint was filed outside the statute of limitations as set forth in sections 13-205 and 206 of the Code. 735 ILCS 5/13-205 (West 2014); 735 ILCS 5/13-206 (West 2014). In response, plaintiff filed an amended complaint on January 27, 2016. In lieu of an answer, First American filed a motion to dismiss asserting that plaintiff's complaint was untimely. The trial court granted First American's motion and subsequently denied plaintiff's motion to reconsider.

¶ 9 II. ANALYSIS

¶ 10 Plaintiff contends that the trial court erred in finding his complaint was filed outside the statute of limitations. He argues that the discovery rule tolled the statute of limitations until he was served in the foreclosure action in 2009. Additionally, he argues that the trial court abused its discretion when it denied his motion to reconsider. First American responds by asserting that the discovery rule does not toll the statute of limitations because the

information related to the release of the Bank of the West mortgage was available in 1998 as part of the public record.

¶ 11 A. Jurisdiction

¶ 12 Initially, we must address this court's jurisdiction. First American argues that our jurisdiction is limited to the review of the trial court's order denying the motion for reconsideration because that is the only order referenced by plaintiff in his notice of appeal. We disagree. It is well settled that the notice of appeal may be construed to bring up for review an earlier unspecified order where that order is a step in the procedural progression to the specified order. *Schmidt v. Joseph*, 315 Ill. App. 3d 77, 80 (2000) (citing *Heller Financial, Inc. v. Johns-Byrne Co.*, 264 Ill App. 3d 681, 689 (1994)). In *Heller*, the court specifically held: "in its notice of appeal, [appellant] seeks review of the trial court's refusal to reconsider its judgment, a ruling wherein the court necessarily contemplated once again all of the orders which comprised its ultimate judgment in the case. Thus, all of those previous orders were subsumed by the order from which [appellant's] appeal is taken." *Heller*, 64 Ill App. 3d at 689. The facts of this case are analogous to those in *Heller*. Although plaintiff only referenced the order denying the motion to reconsider in his notice of appeal, the order granting First American's motion to dismiss is a step in the procedural progression to that order. Accordingly, we find that we have jurisdiction to review both orders.

¶ 13 B. Standard of Review

¶ 14 First American brought its motion to dismiss pursuant to section 2-619(a)(5) of the Code. A motion to dismiss under section 2-619 admits the legal sufficiency of the complaint but asserts affirmative matters outside of the complaint barring the claim. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). A section 2-619 motion admits as true all well-pleaded facts, along

with reasonable inferences that can be gleaned from those facts. *Piser v. State Farm Mutual Automobile Insurance Co.*, 405 Ill. App. 3d 314, 344 (2010). The court should grant a section 2-619 motion if "after construing the documents in the light most favorable to the non-moving party, there are no disputed issues of material fact. *Hoover v. Country Mutual Insurance Co.*, 2012 IL App (1st) 110939, ¶ 31. We review the dismissal of a cause of action pursuant to section 2-619 *de novo*. *Id.*

¶ 15 C. Applicable Statute

¶ 16 First American alleged that plaintiff's complaint was filed outside of the statute of limitations as provided for in either section 13-205 or 13-206 of the Code. Section 13-205 sets five years as the limitations period for actions based upon unwritten contracts. 735 ILCS 5/13-205 (West 2014) Section 13-206 sets ten years as the limitations period for actions based upon written contracts. 735 ILCS 5/13-205 (West 2014). Both section 13-205 and 13-206 provide that the statute of limitations begins to run the moment the cause of action accrues. This court has held that for contract actions, a cause of action accrues at the time of the breach of contract, not when a party sustains damages. *Indiana Insurance Co. v. Machon & Machon, Inc.*, 324 Ill. App. 3d 300, 303 (2001).

¶ 17 Plaintiff makes no assertion as to whether the agreement at issue was written or oral, relying instead on the application of the discovery rule to sustain his claim. First American responds that regardless of the nature of the agreement or the associated limitations period, plaintiff's claim is time barred and the discovery rule does not apply. For reasons discussed later in this order, we need not determine whether the agreement was written or oral.

¶ 18 However, accepting that the agreement was written and that, therefore, the 10-year limitations period applied, the latest that plaintiff could have brought his claim would have

been by December 2008. Plaintiff filed his initial complaint on October 5, 2015, well beyond the 10-year limitations period. Thus, for plaintiff's claim to survive dismissal, the discovery rule must be applicable.

¶ 19 D. The Discovery Rule

¶ 20 The rigid bar imposed by a statute of limitations is balanced by the discovery rule. *Dancor International Ltd. V. Friedman, Goldberg & Mintz*, 288 Ill. App. 3d 666, 672 (1997). The discovery rule was developed to avoid the mechanical application of a statute of limitations in situations involving individuals who would be barred from suit before even being aware of an injury. *Scottsdale Insurance Co. v. Lakeside Community Committee*, 2016 IL App (1st) 141845, ¶ 23 (citing *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 77-78 (1995)). Cases applying the discovery rule hold that the statute starts to run when the plaintiff knows or reasonably should know that he has been injured and that his injury was wrongfully caused. *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 415 (1981); *Broadnax v. Marrow*, 326 Ill. App. 3d 1074, 1079 (2002).

¶ 21 The discovery rule does not rely solely on a potential plaintiff's actual knowledge, but rather, it asks whether the individual reasonably should have known of a wrongfully caused injury. *SK Partner I, LP v. Metro Consultants Inc.*, 408 Ill. App. 3d 127, 130 (2011). A party knew or reasonably should have known that an injury is "wrongfully caused" when he or she obtains sufficient information to put any reasonable person on inquiry to resolve whether legally actionable conduct occurred. *Hoffman v. Orthopedic Systems, Inc.*, 327 Ill. App. 3d. 1004, 1011 (2002).

¶ 22 Plaintiff argues that he was not aware of the breach until 2009 when he was named as a defendant and served in the mortgage foreclosure action. In Illinois, it has long been held that parties are held to be aware of and responsible for information contained in the public record. *Wheeler v. McEldowney*, 60 Ill. 358, 360 (1871). Where a mortgage is recorded in the appropriate public office, the public record provides notice to the whole world. *Hachem v. Chicago Title Insurance Co.*, 2015 IL App 143188 ¶ 27 (2015). Further, a plaintiff can be charged with knowledge of the absence of information contained in the public record even if they fail to investigate. *Diovatelli v. Diovatelli*, 2013 IL App 111297 ¶ 35. Here, all the information plaintiff needed to know about the Bank of the West mortgage was contained in the public record in 1998, specifically in the Cook County Recorder of Deeds. Accordingly, plaintiff should have known of his injury in 1998 and therefore, the statute of limitations was not tolled.

¶ 23 We are not persuaded by plaintiff's attempts to distinguish this case from *Diovatelli*, a case involving a family dispute. In that case, the plaintiffs gave money to the defendants in the form of loans and investments to enable the defendants to purchase property to run a business. *Diovatelli*, 2013 IL App 111297 ¶ 3. The plaintiff believed they had purchased an interest in the business and acquired properties that would entitle them to a reasonable return of equity. *Id.* at ¶ 6. However, when a separate divorce case involving the defendants was filed, the defendants asserted a 100% legal interest in the company and failed to repay any of the money to the plaintiffs. *Id*. at ¶ 7. In affirming the trial court's dismissal of the plaintiff's claims for, *inter alia*, unjust enrichment, the court reasoned that the plaintiffs should have been aware of the company's corporate status and titles to the properties because they were both matters of public record. *Id*. at ¶ 18.

¶ 24 Plaintiff argues that, unlike the plaintiffs in *Diovatelli*, he had no reason to consult the public record. However, we decline to read into the holding in *Diovatelli* the creation of a "reason to consult" exception to the discovery rule. *Diovatelli* simply reaffirmed that where information is available in the public record, a party is charged with knowing or should know when they suffer injury. *Diovatelli*, 2013 IL App 111297 at ¶ 18. Similarly, we find that plaintiff knew or should have known about his injury in 1998.

¶ 25 E. Motion to Reconsider

¶ 26 Plaintiff contends that the trial court erred in denying his motion for reconsideration. Plaintiff's argument is not only lacking in clarity, but fails to demonstrate any error in the trial court's ruling on the motion.

¶ 27 The purpose of a motion to reconsider is to bring to the trial court's attention newly discovered evidence not available at the time of the first hearing, changes in the law, or errors in the previous application of existing law to the facts at hand. *Evanston Insurance Co. v. Riseborough, 2014 IL 114271, ¶36.* A motion to reconsider should be denied if it merely recites previously made arguments. *Farley Metal, Inc. v. Barber Coleman Co., 269 Ill. App. 3d 104, 116 (1994)*.

¶ 28 The standard of review applicable to the denial of a motion to reconsider is *de novo*. *Compton v. Country Mutual Insurance Co.*, 382 Ill. App. 3d 323, 330 (2008). However, where the denial of a motion to reconsider is based on new matter, such as additional facts or new arguments or legal theories that were not presented during the course of the proceedings leading to the issuance of the order being challenged, the *abuse of discretion* standard applies. *Id*.

¶ 29 Here, plaintiff's motion presented nothing to defeat the statute of limitations bar. Accordingly, under either standard, we find that the trial court did not err in its denial.

¶ 30 III. CONCLUSION

¶ 31 For the foregoing reasons, we find that plaintiff's complaint was not timely because the ten-year statute of limitations, as provided in section 13-206, began to run in December 1998. The statute of limitations was not tolled because plaintiff should have known of his injury because the information was contained in the public record. Finally, the trial court did not err in denying plaintiff's motion to reconsider. Accordingly, we affirm trial court's grant of First American's motion to dismiss.

¶ 32 Affirmed.