2017 IL App (1st) 170156-U

FOURTH DIVISION
September 7, 2017

No. 1-17-0156

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MATTHEW J. EISLER,	)	Appeal from the
	)	Circuit Court of
Third-Party Plaintiff/Appellant,	)	Cook County
	)	
v.	)	No. 14 L 11499
	)	
FREEBORN & PETERS LLP,	)	Honorable
	)	Raymond W. Mitchell
Third-Party Defendant/Appellee.	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: Trial court's judgment affirmed. Third-party plaintiff's action for professional negligence and breach of contract against former attorneys was properly dismissed as time-barred under six-year statute of repose in section 13-214.3(d) of the Code of Civil Procedure. 735 ILCS 5/13-214.3 (West 2014).

¶ 2 Third-party plaintiff Matthew J. Eisler appeals the trial court's order granting third-party defendant Freeborn & Peters LLP (Freeborn)'s motion to dismiss Eisler's third-party complaint pursuant to section 2-619 of the Code of Civil Procedure. (735 ILCS 5/2-619 (West 2014)).

¶ 3 Plaintiff, Katherine E. Morsbach (Morsbach) filed a complaint against Eisler seeking to enforce his obligations on a personal guaranty he executed, guaranteeing payment of rent on a

lease agreement between Corner Pocket Corporation and Morsbach's deceased husband, Hans Morsbach (Hans). Eisler filed a third-party complaint against his former counsel, Freeborn, for breach of oral contract and professional negligence.

¶ 4 Eisler had engaged Freeborn to transfer all of Eisler's interests in his former company to his former business partner. Eisler claimed that the documents prepared by Freeborn failed to include an indemnification provision, or any other mechanism for managing the risk to Eisler of any ongoing liability arising from his prior association with the company, including Eisler's exposure under the personal guaranty.

¶ 5 The trial court dismissed Eisler's third-party complaint pursuant to section 2-619(a)(5) of the Code of Civil Procedure (Code) (735 ILCS 2-619(a)(5) (West 2014)), because Eisler's "action was not commenced within the time limited by law." The trial court concluded that Eisler's action was barred by the applicable six-year statute of repose for legal malpractice actions in section 13-214.3 of the Code. 735 ILCS 5/13-214.3 (West 2014)). We agree with the trial court's judgment and affirm.

¶ 6 I. BACKGROUND

¶ 7 Eisler's suit is based on professional services performed by Freeborn on Eisler's behalf, specifically Freeborn's alleged omissions in preparing various documents to effectuate the transfer of Eisler's interest in Victory Liquor Holding, LLC (VLH) to Eisler's business partner, Michael Klauer.

¶ 8 VLH held a 50-percent interest in a bar known as Victory Liquors, LLC (Victory Liquors). Victory Liquors had acquired 100% of The Corner Pocket Corporation (Corner Pocket). On December 1, 2006, Corner Pocket had entered into a lease agreement with Hans, the

landlord. Eisler had executed a Limited Guaranty dated December 1, 2006 (the Guaranty), guaranteeing payment of rent.

¶ 9 In January 2008, Freeman prepared documents to effectuate the transfer of Eisler's interest in VLH to Klauer. Eisler terminated his relationship with Freeborn in April 2009.

¶ 10 After Eisler left Victory Liquors, it became delinquent in its rental obligations. The landlord, Hans, died on May 6, 2011. Morsbach, the surviving widow, became the owner of the property.

¶ 11 On November 5, 2014, Morsbach filed a one-count complaint for breach of contract against Eisler. Pursuant to the terms of the Guaranty, she sought $117,600. Eisler was served with process on January 9, 2015.

¶ 12 On May 10, 2016, seven years after Freeborn's last legal services for Eisler were performed, Eisler filed a third-party complaint against Freeborn. The complaint was later amended. Count I of the third-party complaint alleged breach of oral contract. Count II alleged professional negligence. Eisler claimed that the documents Freeborn had prepared did not include an indemnification provision, or any other mechanism, for managing the risk to Eisler of any ongoing liability arising from his prior association with Victory Liquors. According to the record, Freeborn had not prepared the Guaranty. But Eisler also claimed that Freeborn did not secure a release of Eisler's obligations under the Guaranty and failed to undertake negotiations with Hans to release Eisler from liability under the Guaranty. Eisler settled the suit with Morsbach in September 2016.

¶ 13 The trial court dismissed Eisler's third-party action against Freeborn as time-barred under the six-year statute of repose for legal malpractice claims. See 735 ILCS 5/13-214.3 (West 2014). This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 The trial court's dismissal of a complaint under section 2-619(a)(5), as barred by an applicable statute of limitations, raises a question of law we review *de novo*. *Travelers Casualty & Surety Co. v. Bowman*, 229 Ill. 2d 461, 466 (2008); 735 ILCS 5/2-619(a)(5) (West 2014).

¶ 16 The trial court found applicable the statute of repose in section 13-214.3, which states in relevant part as follows:

> "(b) An action for damages based on tort, contract, or otherwise (i) 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.
>
> (c) ***[A]n action described in subsection (b) may not be commenced in any event more than 6 years after the date on which the act or omission occurred." 735 ILCS 5/13-214.3(b),(c) (West 2014).

¶ 17 Subsection (b) is a two-year statute of limitations incorporating the "discovery rule," which tolls the limitations period to the time when the plaintiff knows or reasonably should know of the injury. *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 10; see also *Henderson Square Condominium Ass'n v. LAB Townhomes, LLC*, 2015 IL 118139, ¶ 52 (noting court adopted discovery rule to ameliorate potentially harsh effect of mechanical application of statute of limitations that would result in it expiring before plaintiff even knew of cause of action).

¶ 18 Subsection (c) is a six-year statute of repose, which curbs the "long tail" of liability that can result from the discovery rule. *Snyder*, 2011 IL 111052, ¶ 10. A statute of repose begins to run when the allegedly negligent act last occurs and "extinguishes" liability after a fixed period of time thereafter, regardless of when a cause of action has accrued, and even if it has not yet

accrued. *Id*.; accord *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 16. A statute of repose is "not tolled by the discovery rule." *Id*.

¶ 19 Here, there is no dispute that Freeborn performed its last legal services for Eisler no later than April 30, 2009, and that Eisler filed his complaint against Freeborn on May 10, 2016—seven years after the last legal services were performed. Thus, without more, the six-year statute of repose in section 13-214.3(c) would quite obviously bar Eisler's action as having been filed one year too late.

¶ 20 Eisler acknowledges as much but says that a different statute of limitations governs and preempts section 13-214.3(c), specifically section 13-204 of the Code. That section states, in relevant part:

> "13-204. Contribution and indemnity.
>
> (a) In instances where no underlying action *seeking recovery for injury to or death of a person or injury or damage to property* has been filed by a claimant, no action for contribution or indemnity may be commenced with respect to any payment made to that claimant more than 2 years after the party seeking contribution or indemnity has made the payment in discharge of his or her liability to the claimant.
>
> (b) *In instances where an underlying action has been filed by a claimant, no action for contribution or indemnity may be commenced more than 2 years after the party seeking contribution or indemnity has been served with process in the underlying action* or more than 2 years from the time the party, or his or her privy, knew or should reasonably have known of an act or omission giving rise to the action for contribution or indemnity, whichever period expires later.

> (c) The applicable limitations period contained in subsection (a) or (b) shall apply to all actions for contribution or indemnity and *shall preempt, as to contribution and indemnity actions only, all other statutes of limitation or repose, but only to the extent that the claimant in an underlying action could have timely sued the party from whom contribution or indemnity is sought at the time such claimant filed the underlying action*, or in instances where no underlying action has been filed, the payment in discharge of the obligation of the party seeking contribution or indemnity is made before any such underlying action would have been barred by lapse of time." (Emphases added.) 735 ILCS 5/13-204 (West 2014).

¶ 21 Eisler claims that he filed suit against Freeborn within two years of being sued himself, and thus his third-party complaint against Freeborn was timely under section 13-204, which "preempt[ed]" the statute of repose. *Id*. But we agree with the trial court that Eisler's position does not square with our supreme court's interpretation of section 13-204 in *Travelers*, 229 Ill. 2d 461. There, our supreme court interpreted section 13-204 in a manner that would defeat Eisler's claim here for two separate reasons.

¶ 22 For one, our supreme court held that section 13-204 only applies to underlying tort, not contract, claims. *Travelers*, 229 Ill. 2d at 473. That holding is consistent with the language of subsection (a) of that statute highlighted above, referencing only "underlying action[s] seeking recovery for injury to or death of a person or injury or damage to property." 735 ILCS 5/13-204(a) (West 2014). The supreme court recognized that, while the word "contribution" in the statute obviously suggested a tort claim, the word "indemnity" could suggest either a contract or tort claim—but the supreme court held that the statute was only referring to *implied*

indemnification claims, which sound in tort, and not claims for indemnification expressed in contract. *Travelers*, 229 Ill. 2d at 473-74.

¶ 23 Here, Mosbach's underlying action against Eisler sounded in contract, not tort. Mosbach sued Eisler for breach of contract. So section 13-204 is not applicable and would not preempt the statute of repose for legal malpractice claims.

¶ 24 Second, the supreme court held that section 13-204 did not apply when the plaintiff in the underlying action could not have sued the third-party defendant directly. *Id*. at 474. This holding directly tracks the language of section 13-204(c) we highlighted above. See 735 ILCS 5/13-204(c) (West 2014) (limitations period for contribution/indemnity action shall preempt other statutes of limitation "only to the extent that the claimant in an underlying action could have timely sued the party from whom contribution or indemnity is sought at the time such claimant filed the underlying action").

¶ 25 Here, the underlying breach-of-contract claim was filed by Mosbach against Eisler, the counter-party to the Guaranty. Mosbach could not have sued Freeborn; she had no claim against Freeborn, which was Eisler's law firm, not a party to the Guaranty. In *Schulson v. D'Ancona and Pflaum, LLC*, 354 Ill. App. 3d 572, 577 (2004), we reiterated the longstanding doctrine that "a stranger to a contract between two parties"—there, as here, the "stranger" being the lawyer who prepared the contract—"cannot be held liable to indemnify one of the parties for breach of contract absent the stranger's express agreement to indemnify." See also *Wilder Corp. of Delaware v. Thompson Drainage & Levee District*, 658 F.3d 802, 806 (7th Cir. 2011) ("Illinois courts refuse *** to allow the doctrine of indemnity to be used to shift damages for breach of contract to a third party whose negligence caused the breach."); *Talandis Construction Corp. v. Illinois Building Authority*, 23 Ill. App. 3d 929, 935 (1974) ("a stranger to a contract between

two parties cannot be compelled to indemnify one of the parties for breach of contract absent the stranger's express agreement to so indemnify"); *Board of Education of High School District No. 88 v. Joseph J. Duffy Co.*, 97 Ill. App. 2d 158, 162 (1968) ("Our research discloses no authority—and [third-party plaintiff] cites none—for the proposition that liability for breach of contract might entitle the wrongdoer to indemnity from a third party who was a stranger to the contract and who had not contractually undertaken to indemnify the wrongdoer.").

¶ 26 Thus, under *Travelers*, because the underlying action sounded in contract, not tort, and because Mosbach could not have sued Freeborn in the underlying action, section 13-204 is not applicable and does not preempt the statute of repose. The trial court correctly dismissed Eisler's third-party complaint against Freeborn.

¶ 27 Eisler tries to avoid the holding of *Travelers* by claiming, first, that Mosbach *could have* sued Freeborn for aiding and abetting Eisler in breaching his fiduciary duty to Mosbach. We must reject this argument. We are doubtful that such a claim would overcome the longstanding rule we cited two paragraphs above, barring any lawsuit for indemnification by one party to a contract against the lawyer representing the other party. And we do not see how a claim for breach of fiduciary duty would be "seeking recovery for injury to or death of a person or injury or damage to property" (735 ILCS 5/13-204(a) (West 2014), much less that it would be an action sounding in tort, as required by *Travelers*. See *Kinzer v. City of Chicago*, 128 Ill. 2d 437, 445 (1989) (declining to apply tort immunity statute to claim for breach of fiduciary duty, because that claim is "controlled by the substantive laws of agency, contract [citations], and equity [citations]."); *Bank One, N.A. v. Borse*, 351 Ill. App. 3d 482, 488 (2004) (noting that, in *Kinzer*, "our supreme court expressly rejected the Restatement's view that an action for breach of fiduciary duty is a tort.").

¶ 28 But even if Eisler could possibly prevail on that argument, we will not consider it, because it comes far too late in the proceedings. It was never raised in the trial court, despite Eisler filing not only a response to Freeborn's motion to dismiss but also a supplemental brief addressing *Travelers*. Nor was it raised in Eisler's opening brief before this court. It was made for the first time in Eisler's reply brief. Neither the trial court nor Freeborn have ever had the opportunity to address this argument. We must find it forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued [in an appellant's brief] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."); *Moller v. Lipov*, 368 Ill. App. 3d 333, 342 (2006) (primary purpose of forfeiture rule is to provide trial court and opposing party opportunity to address argument and correct possible erroneous ruling).

¶ 29 Eisler next argues that the controlling authority here is not *Travelers* but the supreme court's decision in *Guzman v. C.R. Epperson Construction, Inc*., 196 Ill. 2d 391 (2001). In *Guzman*, a home construction case, the homeowner sued a general contractor for both breach of contract and breach of the implied warranty of habitability, alleging numerous defects in the home. *Id*. at 393-94. The general contractor filed a third-party complaint against several subcontractors that included both express and implied indemnity claims. *Id*. at 394. The issue before the court was the retroactivity of the amendment to section 13-204, which effectively shortened a four-year imitations period on the general contractor's action to two years. After concluding that section 13-204 was to be applied retroactively, the court's focus was on whether the general contractor had a reasonable period of time to file its claim after the effective date of the amendment. *Id*. at 402-03.

¶ 30 The court in *Guzman* did not address the language in section 13-204(a) that the statute only applied to personal-injury and property-damage claims, nor did the court discuss

whatsoever the language in subsection (c), requiring that the claimant in the underlying action could have sued the third-party defendant. Considering that *Guzman* predates *Travelers* and did not directly address any of the issues decided in *Travelers*, we will not parse *Guzman* for perceived inconsistencies with *Travelers*. The holding in *Travellers* is more recent and directly on point with the issues in this case, and thus it controls our disposition.

¶ 31 Finally, Eisler relies on this court's decision in *Lucey v. Law Offices of Pretzel & Stouffer, Chartered*, 301 Ill. App. 3d 349 (1998). In *Lucey*, the plaintiff alleged that a law firm had given him negligent legal advice in 1989, which directly led to him being sued later that same year. In 1995, he sued the law firm that gave him the allegedly negligent advice. *Id*. at 349-50. This court affirmed the dismissal of plaintiff's legal malpractice action as premature, because that lawsuit had not yet ended in a judgment against the plaintiff, and thus he had not yet sustained any damages as a result of the allegedly bad advice. *Id*. at 353, 358. The holding in *Lucey* has no bearing on our disposition of this appeal.

¶ 32 But the court in *Lucey* then looked to the future: "Since the issue is likely to arise if plaintiff's cause of action does eventually accrue and he refiles his complaint, we address the potential application of the statute of limitations." *Id*. at 360. The court noted that a new six-year statute of repose (the one at issue here) had been enacted into law that would cut off plaintiff's legal malpractice claim six years after the allegedly negligent advice was given in July 1989—meaning his claim was barred as of July 1995, a time long past. *Id*. at 361. The plaintiff's malpractice claim would be barred, in other words, before it even accrued. Though the court recognized that this result might seem harsh, it wrote that the plaintiff would not be without a remedy, because a "legal malpractice action may be brought via a third-party complaint on an

implied indemnity theory" under section 13-204 (*id*. at 363), which had its own statute of limitations that preempted all others. *Id*. at 364.

¶ 33 Whatever the appellate court in *Lucey* may have predicted about the interaction between the statute of repose and section 13-204 cannot overcome what the supreme court has directly *held* about section 13-204. We agree with the trial court that, to the extent that *Lucey* is inconsistent with the supreme court's interpretation of section 13-204 in *Travelers*, the supreme court's interpretation is controlling.

¶ 34 If Eisler has a valid claim against Freeborn—something we cannot know at the pleading stage—then this result may seem harsh. Unlike litigation settings, where the result of legal malpractice becomes immediately apparent by way of an adverse judgment, negligent legal advice in the transactional setting (such as here) might not become apparent until years or even decades later. See *id*. at 361 (noting distinction between legal malpractice in transactional versus litigation setting). A statute of repose may knock out a cause of action before it accrued.

¶ 35 This would not be the first time the statute of repose has yielded harsh results, but our supreme court has answered that by explaining that "[a] statute of repose gives effect to a policy different from that advanced by a statute of limitations; it 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 or her cause of action." *Ferguson v. McKenzie*, 202 Ill. 2d 304, 311 (2001); accord *Prospect Development, LLC v. Kreger*, 2016 IL App (1st) 150433, ¶ 22. "[T]he fact that a repose provision may, in a particular instance, bar an action before it is discovered is an accidental rather than necessary consequence." (Internal quotation marks omitted.) *Wackrow v. Niemi*, 231 Ill. 2d 418, 427 (2008) (quoting *Mega v. Holy Cross Hospital*, 111 Ill. 2d 416, 424 (1986)).

¶ 36 Because we agree with the trial court that the statute of repose bars Eisler's malpractice suit against Freeborn, we need not consider Freeborn's additional arguments supporting dismissal.

¶ 37 III. CONCLUSION

¶ 38 We affirm the decision of the circuit court dismissing Eisler's amended third-party complaint pursuant to section 2-619 of the Code.

¶ 39 Affirmed.