2018 IL App (1st) 180478-U

THIRD DIVISION
December 28, 2018

No. 1-18-0478

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AMY MARTINEZ, as Special Administrator of the Estate of Kevin C. Bewley, deceased, Plaintiff-Appellant, v. ILLINOIS CRANE CO., Defendant-Appellee, (Mid-West MFG, a Delaware LLC, and Telecrane, defendants).	)	Appeal from the Circuit Court of Cook County No. 16 L 1350 Honorable Allen Price Walker, Judge Presiding

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

ORDER

¶ 1 *Held*: Affirmed in part, reversed in part, and remanded. Products-liability claim was properly dismissed as barred by relevant statute of repose. Defendant did not adequately establish that statute of repose barred negligence claim, and thus dismissal of that claim was error.

¶ 2 Kevin Bewley was killed in an accident involving a crane that was manufactured by defendant Illinois Crane. Plaintiff sued Illinois Crane for negligence and strict products liability. The circuit court dismissed the complaint, finding that both the negligence and strict products

liability claims were barred by their respective statutes of repose. We agree that the products-liability claim is barred, but a question of fact exists as to the negligence claim's timeliness. We affirm in part and reverse in part and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 In February 2016, Amy Martinez, the special administrator of Kevin Bewley's estate, filed a complaint against Mid-West MFG LLC, b/d/a PTC Alliance for negligence and strict products liability. In May 2016, Martinez amended her complaint to correct the defendant's name to Mid-West.

¶ 5 On May 12, 2016, Martinez filed a second amended complaint, adding Illinois Crane Co. and Telecrane as defendants. The complaint alleged that Kevin Bewley, the father of Martinez's granddaughter, sustained fatal injuries while operating a crane that was designed and manufactured by Illinois Crane. The complaint purported to state claims against Illinois Crane for negligence and strict products liability.

¶ 6 Mid-West (due to the workers-compensation bar) and Telecrane were ultimately dismissed from the case, rulings not before us. That left Count 2 of what is now the third amended complaint, Martinez's claim against Illinois Crane. In relevant part, Count 2 alleged that Bewley was using a crane while working at Mid-West and that

> "4. At all times referred to herein, it was the duty of Defendant, ILLINOIS CRANE CO., to plan, design, inspect and control the crane with reasonable care and to provide a safe place to work in order to avoid injury to others, including the Decedent, KEVIN C. BEWLEY.

5. At all relevant times herein, notwithstanding its aforesaid duties, Defendant, ILLINOIS CRANE CO., was then and there guilty of one or more of the following wrongful acts and/or omissions:

a. Failed to design its crane so that loads would not strike the crane operator;

b. Failed to provide available warning on the crane that would alert persons in the vicinity;

c. Provided a crane with inadequate and confusing controls;

d. Provided a crane that had an unsafe acceleration."

The complaint further alleged that as a proximate result of those breaches, Bewley suffered a fatal injury. Although Martinez's complaint only contained a single count against Illionis Crane, the parties have proceeded as if Martinez brought separate claims against Illinois Crane for negligence and strict products liability.

¶ 7 On October 4, 2017, Illinois Crane moved to dismiss Count 2 of Martinez's complaint under sections 2-619(a)(5) and (a)(9) of the Code of Civil Procedure. 735 ILCS 5/2-619(a)(5), (a)(9) (West 2016). The motion argued that Martinez's complaint could be viewed as a claim for negligence or strict products liability, and that a claim arising under either was barred by a statute of repose. See 735 ILCS 5/13-213(b) (West 2016); 735 ILCS 5/13-214(b) (West 2016).

¶ 8 Illinois Crane's motion was supported by an affidavit from its vice president, Peter Sievert. Sievert testified that he had been "associated" with Illinois Crane since 2003 and that he was familiar with the cranes manufactured and installed by Illinois Crane. He reviewed photographs depicting the crane involved in Bewley's accident and admitted that the crane was

manufactured and installed by Illinois Crane. He then swore "on information and belief" that Illinois Crane did not inspect or upgrade the crane after April 2004. Sievert then testified that:

> "8). That, at the time of installation, the crane was permanently installed by Illinois Crane, Inc., and that said installation took place prior to May of 2004.
>
> 9) That the crane, once installed by Illinois Crane, Inc., was an integral part of property and the manufacturing process at the site.
>
> 10) That installation of the crane allowed heavy loads to be maneuvered during the manufacturing process at 475 E. 16th Street in Chicago Heights, Illinois enhancing the use of the property and making it more valuable as a manufacturing property."

¶ 9 On November 14, 2017, Sievert was deposed. Sievert testified that Illinois Crane installed the crane involved in the accident "prior to 2004." He was not personally involved in installing the crane at Mid-West, but he learned the approximate time when the crane was installed by "research[ing]" Illinois Crane's electronic accounting records from 2004 to present. That research produced two invoices from Mid-West for repair parts, dated 2004 and 2005, though not for the crane at issue. No other invoices relating to Mid-West, between the dates of 2004 through the present, were found.

¶ 10 That, in Sievert's mind, told him all he needed to know. He testified that, had Illinois Crane sold and installed a crane to Mid-West sometime between 2004 and 2017, an electronic record of the transaction would have been generated. Likewise, had Illinois Crane inspected or upgraded the crane sometime between 2004 and 2017, there would have been an electronic record of that activity. Based on the lack of any other Mid-West invoices during that time period, Sievert testified that the crane must have been installed before 2004, and that Illinois Crane did not inspect or upgrade the crane during that window of time.

¶ 11 In response to the motion for summary judgment, Martinez argued that Illinois Crane did not proffer sufficient evidence to demonstrate that the crane was sold or installed before 2004, most notably because Sievert could not identify the date of sale or installation. Martinez made that same argument as to Illinois Crane's arguments under section 13-214(b), the statute of repose potentially governing her negligence claim, and further claimed that Illinois Crane's motion failed because the Sievert affidavit did not contain sufficient factual assertions to establish that the crane was an "improvement" to Mid-West's property.

¶ 12 On February 14, 2018, the circuit court dismissed this final count of the complaint with prejudice. This timely appeal followed.

¶ 13 ANALYSIS

¶ 14 Martinez raises two issues on appeal. First, she argues that a party seeking to dismiss a claim under either section 13-213(b) or 13-214(b) of the Code must prove the exact date that the product at issue was sold, delivered, upgraded or inspected, and the circuit court erred by dismissing her complaint, because Illinois Crane failed to prove that precise date. Second, she argues that dismissal was inappropriate because the information contained in the Sievert affidavit was insufficient to impose the statutes of repose as a matter of law.

¶ 15 A motion for involuntary dismissal under section 2–619(a) admits the legal sufficiency of the complaint, but raises defects, defenses, or other affirmative matter which avoids the legal effect or defeats a plaintiff's claim." *Betts v. City of Chicago*, 2013 IL App (1st) 123653, ¶ 14. Section 2-619(a)(5) of the Code authorizes the circuit court to dismiss a complaint if it was "not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2016). Under this section, a defendant may raise the statute of limitations or repose as a basis for dismissal. See

Hermitage Corp. v. Contractors Adjustment Co., 166 Ill. 2d 72, 84 (1995); *Osten v. Northwestern Memorial Hospital*, 2018 IL App (1st) 172072, ¶¶ 10-11.

¶ 16 As the moving party, a defendant filing a 2-619 motion bears the initial burden of proof. *Betts*, 2013 IL App (1st) 123653, ¶ 14; see *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993) ("By presenting adequate affidavits supporting the asserted defense [citation], the defendant satisfies the initial burden of going forward on the motion."). At that point, "the burden then shifts to the plaintiff to establish that the defense is 'unfounded or requires the resolution of an essential element of material fact before it is proven.' " *Reilly ex rel. Reilly v. Wyeth*, 377 Ill. App. 3d 20, 36 (2007) (quoting *Kedzie*, 156 Ill. 2d at 116).

¶ 17 In this regard, an appeal from a section 2–619 dismissal requires the same analysis as an appeal following a grant of summary judgment: "the reviewing court must ascertain whether the existence of a genuine issue of material fact should have precluded the dismissal, or absent such an issue of fact, whether dismissal is proper as a matter of law." *Brummel v. Grossman*, 2018 IL App (1st) 162540, ¶ 24 (quoting *Ultsch v. Illinois Municipal Retirement Fund*, 226 Ill.2d 169, 178 (2007)). If only one conclusion can be drawn from undisputed facts, the timeliness of a plaintiff's lawsuit can be decided as a matter of law. *Witherell v. Weimer*, 85 Ill. 2d 146, 156 (1981); *Heredia v. O'Brien*, 2015 IL App (1st) 141952, ¶ 24; *Goran v. Glieberman*, 276 Ill. App. 3d 590, 596 (1995); *LaSalle National Bank v. Skidmore, Owings & Merrill*, 262 Ill. App. 3d 899, 903 (1994). Our review is *de novo*. *Brummel*, 2018 IL App (1st) 162540, ¶ 24.

¶ 18 I. Specific Dates

¶ 19 We first consider Martinez's argument that to establish that dismissal is justified under either section 13-213(b) or 13-214(b) of the Code, the moving party must prove the specific date that the allegedly defective product was sold or delivered, or upgraded or inspected, as the case

may be. As this argument relates to both statutes of repose at issue, and because it could resolve this appeal, we start here.

¶ 20 This issue involves a question of statutory construction. "The cardinal rule of statutory construction is to ascertain and give effect to the legislature's intent." *Bank of New York Mellon v. Laskowski*, 2018 IL 121995, ¶ 12. "The most reliable indicator of legislative intent is the language of the statute, given its plain and ordinary meaning." *Id*.

¶ 21 Section 13-213(b) of the Code provides:

> "Subject to the provisions of subsections (c) and (d) no product liability action based on the doctrine of strict liability in tort shall be commenced except within the applicable limitations period and, in any event, within 12 years from the date of first sale, lease or delivery of possession by a seller or 10 years from the date of first sale, lease or delivery of possession to its initial user, consumer, or other non-seller, whichever period expires earlier, of any product unit that is claimed to have injured or damaged the plaintiff, unless the defendant expressly has warranted or promised the product for a longer period and the action is brought within that period." 735 ILCS 5/13-213(b) (West 2016).

Section 13-214(b) of the Code provides in relevant part:

> "No action based upon tort, contract or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property after 10 years have elapsed from the time of such act or omission." 735 ILCS 5/13-214(b) (West 2016).

¶ 22 We find nothing in these statutes that require that a specific triggering date be established, but rather only that the defendant establish that this triggering date fell outside the relevant window of time. To obtain relief under section 13-213(b), the defendant must establish that the product-liability action was not commenced "within *** 10 years from the date of first sale, lease or delivery of possession to its initial user, consumer, or other non-seller." 735 ILCS 5/13-213(b) (West 2016). Of course, the most logical and efficient way to prove these facts would be to establish, beyond dispute, the precise date of the "first sale, lease or delivery" of the product and then do simple math. That's how most cases proceed, because most of the time, the defendant can pinpoint a specific date of sale or delivery. See, *e.g.*, *Garza v. Navistar International Transportation Corp.*, 172 Ill. 2d 373, 376 (1996); *Davis v. Toshiba Machine Co., America*, 297 Ill. App. 3d 440, 446 (1998).

¶ 23 But nothing in this statute, and nothing in the case law, requires that method of proof; all it requires is that the defendant sufficiently demonstrate that ten or more years have elapsed between the "first sale, lease or delivery" of the relevant product and the filing of the lawsuit. All that's required, in other words, is that "only one conclusion" can be drawn from the "undisputed facts"—that the sale or delivery occurred more than 10 years after the lawsuit's filing. *Witherall*, 85 Ill. 2d at 156; *Heredia*, 2015 IL App (1st) 141952, ¶ 24; *Goran*, 276 Ill. App. 3d at 596; *LaSalle National Bank*, 262 Ill. App. 3d at 903.

¶ 24 Suppose, to use a more extreme example, that Illinois Crane went out of business in 1995, and thus it obviously did not sell it or deliver this crane at any time after it closed its doors. It established beyond dispute, in other words, that there is no possibility that it sold or delivered this crane within 10 years after the filing of this lawsuit. Would we say that Illinois Crane could find no refuge under section 13-213(b) because it could not tell us whether it sold or delivered

that particular crane in May 1992 or June 1993 or February 1994? Of course not. We would determine that only one conclusion can be drawn from the undisputed facts—that the sale or delivery must have occurred at some point more than 10 years after the lawsuit's filing, even if we don't know the precise date.

¶ 25 We reach the same conclusion regarding section 13-214(b), which bars a negligence action if "10 years have elapsed from the time of" the acts or omissions giving rise to liability. 735 ILCS 5/13-214(b) (West 2016). The statute simply requires the passage of ten or more years between the negligent acts and the filing of the lawsuit. If the defendant can establish undisputed facts that can only lead to the conclusion that the allegedly negligent acts occurred more than 10 years before the lawsuit's filing, it has carried its burden and is entitled to dismissal. The specific date is irrelevant, as long as the triggering date can be indisputably ruled out as having occurred within the 10-year time frame.

¶ 26 Neither party has cited a decision that specifically addressed the question before us. But in some decisions considering the triggering of a limitations period, the court has examined a range of possible dates and found that, even if the facts were viewed most favorably to the plaintiff, and the triggering date was the latest of those dates, the claim would still be time-barred. See, *e.g.*, *Witherall*, 85 Ill. 2d at 157 (plaintiff should have known of adverse effects from birth-control pill "at least by the time of plaintiff's second hospitalization in 1972," which rendered claim time-barred); *Heredia*, 2015 IL App (1st) 141952, ¶ 39 (plaintiff had sufficient knowledge of her injuries, "at the very latest," in 2010). Granted, specific dates were included in those cases, but the salient point is that it was unnecessary to fix among many possible dates because it could be established, beyond dispute, that whichever date it was, even the date most favorable to the plaintiff, it was outside the relevant window for a timely claim.

¶ 27 Here, by comparison, we could say the same of Illinois Crane's position. It may not claim to know when, precisely, the triggering date occurred—the sale or delivery of the crane, or the negligent design or construction of the crane—but it does claim that it was before 2004. That is really the same thing as saying, to mimic *Heredia*, that the triggering date occurred, "at the very latest," December 31, 2003. That would be giving Martinez every benefit of the doubt and fixing on the very latest day before 2004—but would still render the claim untimely.

¶ 28 If Illinois Crane can present undisputed facts that only lead to the conclusion that the relevant triggering events occurred before the year 2004, it will have satisfactorily established the timing element of either statute of repose, even if the precise pre-2004 date is unknown.

¶ 29 II. Section 13-214(b)

¶ 30 We next consider Martinez's argument that dismissal pursuant to section 13-214(b) was inappropriate because Illinois Crane failed to prove that the crane was an "improvement" to Mid-West's property. The "improvement" requirement comes straight from section 13-214(b)'s plain text, barring a negligence lawsuit for "any act or omission *** in the design, planning, supervision, observation or management of construction, or construction *of an improvement to real property* after 10 years have elapsed from the time of such act or omission." (Emphasis added.) 735 ILCS 5/13-214(b) (West 2016).

¶ 31 The "[r]elevant criteria for determining what constitutes an 'improvement to real property' include: [1] whether the addition was meant to be permanent or temporary, [2] whether it became an integral component of the overall system, [3] whether the value of the property was increased, and [4] whether the use of the property was enhanced." *St. Louis v. Rockwell Graphic Systems, Inc.*, 153 Ill. 2d 1, 4-5 (1992). Those factors are broad and inclusive, and we can discern no reason why, in the face of appropriate evidence, a court would be precluded from finding that

a crane like the one here is an improvement to real property. See *Witham v. Whiting*, 975 F.2d 1342 (7th Cir. 1992) (40-ton hoist crane installed at steel plant was "improvement").

¶ 32 The gist of Martinez's argument is that the individual who testified via affidavit and deposition—Peter Sievert from Illinois Crane—did not have personal knowledge of the things to which he swore, and thus the evidence was insufficient. He could not say from personal knowledge, Martinez argues, that the installation of the crane was permanent, that the crane was an integral part of Mid-West's property and business, that the crane enhanced the use of the property, and that it increased the property's value.

¶ 33 Illinois Crane claims that Martinez forfeited this argument, as she did not move to strike the affidavit below based on the affiant's lack of personal knowledge.

¶ 34 It's true that Martinez could have moved to strike those portions of the affidavit that she claimed were not based on personal knowledge. It's also fair to say that, while Martinez generally challenged the sufficiency of the Sievert affidavit in the trial court, she did not specifically challenge it based on his lack of personal knowledge. She simply argued that his testimony was not enough, in substance, to establish beyond reasonable dispute the necessary factors enumerated in *Rockwell Graphic Systems, Inc.*, 153 Ill. 2d at 4-5.

¶ 35 Still, forfeiture is not appropriate here. It's a limitation on the parties, not this court. *Wilson v. Humana Hospital*, 399 Ill. App. 3d 751, 757 (2010). Martinez clearly challenged the sufficiency of Illinois Crane's evidence in the trial court, if not specifically claiming Sievert's lack of personal knowledge. We must now make an independent determination of its sufficiency. And considering whether Sievert was even qualified to have made those statements in his affidavit is an indispensable part of that sufficiency analysis. It's an obvious consideration, even

had Martinez never mentioned it to us. We will not ignore a highly relevant aspect of our independent analysis just because the parties didn't raise it to the trial judge.

¶ 36 With that aside, we agree with Martinez that Illinois Crane's evidence was insufficient to establish that the crane was an "improvement to real property." Sievert is a vice president with Illinois Crane whose focus, according to his deposition testimony, is "the office accounting system, legal responsibilities, [and] insurance responsibilities." He did install cranes himself in the past, so he might have been qualified to state that the installation of the crane was permanent, based on the photographs he viewed of the crane. But we fail to see how he would have any basis to state that the crane was an integral part of Mid-West's business, that it enhanced the use of Mid-West's property, or that it made the Mid-West property more valuable. Those are mere conclusions with no supporting facts. Nothing in the affidavit (or, for that matter, in the brief deposition he gave) supplied any foundational facts such as his familiarity with Mid-West's business, his knowledge of its overall facility, or the market value of its property before or after the installation of the crane.

¶ 37 Because the Sievert affidavit was insufficient to establish that the crane at issue was an improvement to Mid-West's property, it remains an open question whether section 13-214(b) governs this case. We reverse the circuit court's dismissal of the negligence claim and remand for further proceedings. We express no opinion on the ultimate applicability of section 13-214(b) to this case, nor should anything in this opinion be construed as precluding further litigation of this issue; we hold only that, as things currently stand, a question of fact exists.

¶ 38 III. Section 13-213(b)

¶ 39 We agree with Illinois Crane, however, that the affidavit and deposition testimony of Sievert established that the crane was not delivered or sold at any time after 2004. Sievert

testified in his deposition that, had Illinois Crane sold or delivered a crane for Mid-West between the years 2004 and 2017, an electronic invoice would have been generated; the fact that he found none regarding this particular crane told him that the sale or delivery did not occur during that time frame. As a vice president responsible for accounting, he would have personal knowledge of these facts and would be fully qualified to attest to them (Martinez does not argue otherwise).

¶ 40 Martinez points to Sievert's deposition testimony that Illinois Crane also has physical paper documents filling "[m]ultiple file cabinets." But that doesn't change Sievert's testimony that an electronic record of a transaction is always generated, and no relevant one was located on the computerized system. Other than speculation that there might be something to find in those paper documents, Martinez has offered nothing to rebut Sievert's testimony, and we can find no basis in the record to reject that testimony. It thus stands unrebutted.

¶ 41 Only one conclusion can be drawn from Sievert's undisputed testimony—that Illinois Crane's sale or delivery of the crane did not occur in 2004 or any year thereafter, which can only mean that it occurred before 2004. As we have already explained, that's enough to entitle Illinois Crane to relief under section 13-213(b), as the sale or delivery occurred more than 10 years before Martinez's lawsuit. The product-liability claim is barred, and summary judgment was properly entered on that claim.

¶ 42 CONCLUSION

¶ 43 To the extent that Martinez's complaint has pleaded a products-liability claim, we affirm the dismissal of that claim. But we reverse the dismissal of her negligence claim and remand for further proceedings.

¶ 44 Affirmed in part; reversed in part; remanded.