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2018 IL App (3d) 170431-U

Order filed March 15, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

| | | |
|--|---|-------------------------------|
| DAWN SMITH and KEITH SMITH, |) | Appeal from the Circuit Court |
| |) | of the 12th Judicial Circuit, |
| Plaintiffs-Appellants, |) | Will County, Illinois, |
| |) | |
| v. |) | Appeal No. 3-17-0431 |
| |) | Circuit No. 16-TX-300 |
| STEPHEN P. WEBER, in his official capacity |) | |
| as Will County Treasurer and as Trustee of the |) | |
| Property Tax Code Indemnity Fund, |) | Honorable |
| |) | John C. Anderson, |
| Defendant-Appellee. |) | Judge, Presiding. |

JUSTICE WRIGHT delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice McDade specially concurred.

ORDER

¶ 1 *Held:* The trial court properly granted defendant's motion to dismiss pursuant to section 2-619(a)(5) of the Code of Civil Procedure where the statute of limitations had expired and the facts of the case did not warrant the application of the doctrine of equitable tolling.

¶ 2 The plaintiffs, Dawn Smith and Keith Smith, filed a petition for indemnification pursuant to section 21-305 of the Property Tax Code (35 ILCS 200/21-305 (West 2016)), which allows a qualified person who lost a property due to the issuance of a tax deed to seek an award from the

county's tax deed indemnity fund for any losses sustained. The trial court granted a motion to dismiss plaintiffs' indemnity petition after finding the indemnity petition was not initiated within the 10-year period set forth by section 21-305(d) of the Property Tax Code (35 ILCS 200/21-305(d) (West 2016)). The trial court also found that plaintiffs were not entitled to equitable tolling of the limitations period. Plaintiffs appeal. We affirm.

¶ 3

FACTS

¶ 4

Beginning in about 1998 through 2009, the plaintiffs, Dawn and Keith Smith (plaintiffs), then-married, lived together in a home located at 720 Fox Street, Joliet, Illinois (the property), that was owned by one of Dawn's relatives.¹ In 2004, Dawn inherited the property. Before Dawn inherited the property in 2004, the record reveals that the real estate taxes for the property were not paid for the tax year 2000. Consequently, on November 2, 2001, SIPI, LLC (SIPI) paid the delinquent real estate taxes on the property for the tax year 2000 and SIPI received a certificate of purchase. Thereafter, the Will County clerk executed a tax deed in favor of SIPI on April 15, 2005. SIPI recorded the tax deed on May 19, 2005, with the Will County recorder of deeds.

¶ 5

Plaintiffs allege that the amount of real estate taxes paid by SIPI before the issuance of the 2005 tax deed was \$4322.50. SIPI subsequently sold the property to Midwest Capital Investments, LLC (Midwest) on August 10, 2005. Plaintiffs allege that Midwest is the current holder of title to the home.

¶ 6

I. Federal Bankruptcy Proceeding

¶ 7

Before plaintiffs filed the instant state court indemnity claim, plaintiffs unsuccessfully attempted to recover the home in an adversary proceeding as a part of a federal bankruptcy case. On April 13, 2007, plaintiffs filed a joint petition for bankruptcy under chapter 13 of the United

¹On December 6, 2011, a judgment for dissolution of marriage was entered with respect to the marriage of plaintiffs in case No. 11-D-955 in the circuit court of Will County, under which plaintiff Keith Smith claimed an interest in the real estate and its proceeds.

States Bankruptcy Code (Bankruptcy Code) (11 U.S.C. § 1301 *et seq.* (2006)) in the United States Bankruptcy Court for the Northern District of Illinois under case No. 07-B-6631. The bankruptcy schedules in case No. 07-B-6631 listed as a real estate asset the right to reclaim the property at issue under section 548 of the Bankruptcy Code (11 U.S.C. § 548 (West 2006)), valuing that right at \$90,000, and also claimed a homestead exemption in the amount of \$15,000. In connection with the chapter 13 bankruptcy proceeding, plaintiffs also filed an adversary complaint against SIPI and Midwest on April 13, 2007, under case No. 07-A-00239, seeking to avoid the tax sale of their property as a fraudulent transfer pursuant to section 548(a)(1)(B) of the Bankruptcy Code (11 U.S.C. § 548(a)(1)(B) (West 2006)).

¶ 8 Plaintiffs' federal case entailed multiple appeals to the United States District Court for the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit. See *In re Smith*, 614 F.3d 654 (7th Cir. 2010); *In re Smith*, 811 F.3d 228 (7th Cir. 2016), *cert. denied sub nom. Smith v. SIPI, LLC*, 137 S. Ct. 103 (2016). For the sake of brevity, this Court will not repeat the long procedural history of the federal proceeding. On January 20, 2016, the Seventh Circuit held, among other things, that the bankruptcy court properly concluded the plaintiffs' recovery as debtors was limited to the value of one homestead exemption, or \$15,000. *In re Smith*, 811 F.3d 228, 247 (7th Cir. 2016). Subsequently, plaintiffs filed a petition for writ of certiorari with the United States Supreme Court, which was denied on October 3, 2016. *Smith v. SIPI, LLC*, 137 S. Ct. 103 (2016).

¶ 9 II. State Court Indemnity Proceeding

¶ 10 On October 31, 2016, plaintiffs filed a petition for indemnity pursuant to section 21-305 of the Property Tax Code (35 ILCS 200/21-305 (West 2016)) against Stephen P. Weber, in his official capacity as Will County treasurer and trustee of the property tax indemnity fund

(defendant). In the petition for indemnity, plaintiffs sought compensation for the losses they sustained due to the issuance of the 2005 tax deed. In part, plaintiffs requested the trial court to enter judgment against defendant in the sum of \$90,677.50.² In their October 31, 2016, petition for indemnity, plaintiffs claimed that the 10-year statute of limitations contained in section 21-305(d) of the Property Tax Code (35 ILCS 200/21-305(d) (West 2016)) should be equitably tolled. In support of their argument for equitable tolling, plaintiffs asserted they “could not reasonably be expected to have filed this suit within the ten year period where they had not yet been barred or in any way precluded from continuing to prosecute their 2007 federal court proceeding to recover the property.” On this basis, plaintiffs argued that the 10-year statute of limitations contained in section 21-305(d) should be equitably tolled from the date of the issuance of the April 15, 2005, tax deed through January 20, 2016, the date the Seventh Circuit issued a decision in the second appeal.

¶ 11 On November 23, 2016, defendant filed a motion to dismiss plaintiffs’ petition for indemnity under section 2-619(a)(5) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(5) (West 2016)) based on a statute of limitations defense. On January 5, 2017, plaintiffs filed a response to the motion to dismiss and attached a supporting affidavit under Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013) and exhibits. On January 19, 2017, defendant filed a reply in support of the motion to dismiss, asserting lack of subject matter jurisdiction as an additional defense. On March 1, 2017, plaintiffs filed a sur-reply in opposition to the motion to dismiss addressing defendant’s lack of jurisdiction argument.

¶ 12 On March 20, 2017, the trial court held a hearing on defendant’s motion to dismiss and took the matter under advisement. On June 7, 2017, the trial court entered an order granting

²According to plaintiffs, this amount was calculated by taking the fair market value of the property on the date the 2005 tax deed was issued, which was \$110,000, and subtracting the \$4322.50 in taxes paid by SIPI and the \$15,000 federal court judgment.

defendant's motion to dismiss pursuant to section 2-619(a)(5) with prejudice. The trial court found that the plaintiffs' petition for indemnity was untimely. The trial court held that the statute of limitations was jurisdictional and could not be equitably tolled. Moreover, the trial court stated that "even if equitable tolling were possible, the court would reject tolling under the facts of the case." On July 6, 2017, plaintiffs filed a timely notice of appeal.

¶ 13

ANALYSIS

¶ 14

On appeal, plaintiffs contend that the trial court erred by granting defendant's section 2-619(a)(5) motion to dismiss on the basis that plaintiffs' petition for indemnity was untimely under the 10-year statute of limitations. 735 ILCS 5/2-619(a)(5) (West 2016). First, plaintiffs argue the trial court erred by holding the 10-year statute of limitations period set forth by section 21-305(d) of the Property Tax Code (35 ILCS 200/21-305(d) (West 2016)) is "jurisdictional" rather than an ordinary statute of limitations. Further, plaintiffs contend that the trial court erred by failing to apply the doctrine of equitable tolling to extend the 10-year limitations period in light of the facts of this case.

¶ 15

In response, defendant argues that plaintiffs' petition for indemnity is time-barred and that equitable tolling is inapplicable. However, defendant concedes the 10-year statute of limitations contained in section 21-305(d) of the Property Tax Code is not jurisdictional.

¶ 16

A motion to dismiss brought under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2016)) admits the legal sufficiency of the complaint, but asserts that an affirmative matter defeats the claim. *Bjork v. O'Meara*, 2013 IL 114044, ¶ 21. Under section 2-619(a)(5), a defendant is entitled to involuntary dismissal if the "action was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2016). A section 2-619 motion to dismiss admits as true all well-pleaded facts, as well as all reasonable inferences that may arise

from those facts. *Bjork*, 2013 IL 114044, ¶ 21. In determining whether a cause of action was properly dismissed under section 2-619(a)(5) based on the statute of limitations, we apply a *de novo* standard of review. *Johnson v. Augustinians*, 396 Ill. App. 3d 437, 439 (2009). A reviewing court may affirm the trial court’s decision on any ground supported by the record, regardless of whether the trial court made the court’s decision on the proper ground. *Estate of Johnson by Johnson v. Condell Memorial Hospital*, 119 Ill. 2d 496, 502 (1988).

¶ 17 First, we consider the propriety of the trial court’s ruling that plaintiffs’ petition for indemnity is time-barred under the 10-year statute of limitations. Section 21-305(d) of the Property Tax Code provides: “A petition of indemnity under this Section must be filed within 10 years after the date the tax deed was issued.” 35 ILCS 200/21-305 (West 2016).

¶ 18 Here, it is undisputed that plaintiffs’ petition was not filed until October 31, 2016, which is more than 10 years after the date the tax deed was issued on April 15, 2005. Yet, plaintiffs argue that the 10-year limitations period to file the indemnity action did not begin until all avenues to recover their property had been exhausted in the federal proceeding and appeals. In particular, plaintiffs rely on section 21-305(a) of the Property Tax Code (35 ILCS 200/21-305(a) (West 2016)). This section requires the property owner to sustain a loss or damage by reason of the issuance of a tax deed and to be barred or precluded in any way “from bringing an action for the recovery of the property.” Based on this statutory language, plaintiffs claim they did not suffer a loss until the date the Seventh Circuit issued a decision in the second appeal on January 20, 2016. Thus, plaintiffs claim that “until their federal court effort proved unsuccessful, the Smiths could not lawfully avail themselves of their state statutory indemnity remedy.”

¶ 19 The question of when the 10-year statute of limitations begins to run turns on the proper interpretation of the statute. The proper interpretation and construction of a statute is a question

of law we review *de novo*. *Landis v. Marc Realty, L.L.C.*, 235 Ill. 2d 1, 6 (2009). The court’s primary objective in construing a statute is to ascertain and give effect to the intent of the legislature, and the most reliable indication of the legislative intent is the plain language of the statute itself. *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 15. Consequently, when the language of the statute is clear and unambiguous, the court cannot depart from the plain language of the statute by reading into it exceptions, limitations, or conditions that the legislature did not express. *Id.* Here, section 21-305(d) of the Property Tax Code expressly states that a petition for indemnity “must be filed within 10 years after the date the tax deed was issued.” 35 ILCS 200/21-305(d) (West 2016).

¶ 20 Any proceeding in state court concerning a tax deed to property had to be filed within 10 years, but obviously could be stayed pending the resolution of plaintiff’s appeals in federal court. Based on the plain language of the statute, we conclude that the statute of limitations began to run on April 15, 2005, when the tax deed was issued in this case. There was nothing that prevented plaintiffs from bringing a cause of action for indemnity under section 21-305 of the Property Tax Code within the 10-year limitations period.

¶ 21 Next, we address the trial court’s ruling that the 10-year limitations period set forth in section 21-305(d) of the Property Tax Code is “jurisdictional.” Both parties are in agreement that this ruling by the trial court was erroneous. We accept defendant’s concession of this issue. Supreme court precedent establishes that a limitations period contained in a statutorily created cause of action is “jurisdictional,” but this proposition is not a rule of general applicability and is confined only to the area of administrative review law in which the legislature determines the extent of the circuit court’s jurisdiction. See *Belleville Toyota, Inc. v. Toyota Motor Sales*,

U.S.A., Inc., 199 Ill. 2d 325, 336-40 (2002) (stating that except in the area of administrative review, the jurisdiction of the circuit court is conferred by the constitution, not the legislature).

¶ 22 Here, plaintiffs’ cause of action does not arise under the administrative review law. Consequently, the parties have correctly recognized that the limitations period contained in section 21-305(d) of the Property Tax Code does not go to the subject matter jurisdiction of the court in this case.

¶ 23 Next, we consider plaintiffs’ position that the doctrine of equitable tolling applies and would extend the 10-year limitations period, making the petition timely. In cases such as the present one, where the facts are largely undisputed, we may decide whether the doctrine of equitable tolling applies as a matter of law. See *Hart v. Loan Kieu Le*, 2013 IL App (2d) 121380, ¶ 5. Therefore, the standard of review regarding a question of law is *de novo*. *American Family Mutual Insurance Co. v. Plunkett*, 2014 IL App (1st) 131631, ¶ 29.

¶ 24 Although equitable tolling is recognized in Illinois, it is rarely applied. *Id.* at ¶ 33. In *Clay v. Kuhl*, the supreme court stated that equitable tolling may be appropriate: (1) if the defendant actively misled the plaintiff; (2) if the plaintiff was prevented from asserting his or her rights in some extraordinary way; or (3) if the plaintiff mistakenly asserted his or her rights in the wrong forum. *Clay v. Kuhl*, 189 Ill. 2d 603, 614 (2000). Our court has concluded that tolling is warranted under extraordinary circumstances. Extraordinary barriers that may warrant tolling include “legal disability, an irredeemable lack of information, or situations where the plaintiff could not learn the identity of proper defendants through the exercise of due diligence.” *Thede v. Kapsas*, 386 Ill. App. 3d 396, 403 (2008).

¶ 25 Here, plaintiffs contend that equitable tolling applies because plaintiffs “mistakenly asserted their rights in the wrong forum.” Specifically, plaintiffs claim that plaintiffs reasonably

believed that their federal suit would result in the successful recovery of the value of their home based on prior federal bankruptcy case law. If that happened, plaintiffs argue that they would not have a viable state indemnity claim. Plaintiffs contend that after they exhausted all appeals in federal court, they realized that they mistakenly sought relief to recover the value of their home in the wrong forum.

¶ 26 As defendant argues, the record does not support the conclusion that plaintiffs merely filed their claim in the wrong forum. In the federal proceeding, plaintiffs unsuccessfully attempted to avoid the alleged fraudulent transfer of their home pursuant to section 548(a)(1)(B) of the Bankruptcy Code (11 U.S.C. § 548(a)(1)(B) (West 2006)). Here, plaintiffs are attempting to pursue a very different type of claim, one seeking a payment from the statutory indemnity fund under section 21-305 of the Property Tax Code (35 ILCS 200/21-305 (West 2016)).

¶ 27 We hold that a simple mistake solely attributable to plaintiffs does not qualify as an extraordinary circumstance justifying equitable tolling in this case. Plaintiffs have not accused defendant of contributing to this mistake by misleading plaintiffs in any way or otherwise impeding plaintiffs from asserting their rights under the indemnity statute in a timely manner. Thus, we conclude that equitable tolling is not warranted here.

¶ 28 The trial court correctly granted defendant's motion to dismiss plaintiffs' petition for indemnity pursuant to section 2-619(a)(5) of the Code of Civil Procedure after finding the indemnity petition is time-barred since plaintiffs did not initiate this request within the liberal 10-year limitations period.

¶ 29 CONCLUSION

¶ 30 The judgment of the circuit court of Will County is affirmed.

¶ 31 Affirmed.

¶ 32 JUSTICE McDADE, specially concurring:

¶ 33 I cannot fault the reasoning and conclusions of the majority and, therefore, concur in the decision. I write separately simply to verbalize two questions for which I have been unable to find satisfactory answers. First, can plaintiffs be “qualified persons” eligible to claim indemnity under the statute (35 ILCS 200/21-305 (West 2016)) if they still have the possibility of recouping the monetary value of the property through litigation that was ongoing when the statute of limitations period expired? In essence, did plaintiffs even have a cause of action to plead prior to the expiration of the 10-year period set out in the statute? Second, the ongoing litigation was a prior bankruptcy proceeding. Rather than equitable tolling, might the Bankruptcy Act’s automatic stay have tolled the running of the statute until a final decision was reached regarding a property interest at stake in both the state and federal courts.