2018 IL App (4th) 180153-U

NO. 4-18-0153

FILED
December 19, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

| | | |
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| CARL SMICKER, | ) | Appeal from the |
| Plaintiff-Appellant, | ) | Circuit Court of |
| v. | ) | Ford County |
| LEO WEBER, Highway Commissioner Rogers Township, Illinois, | ) | No. 16CH17 |
| Defendant-Appellee. | ) | Honorable |
| | ) | Matthew John Fitton, |
| | ) | Judge Presiding. |

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Harris and Justice Knecht concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not err in dismissing plaintiff's claims against defendant because plaintiff's complaint was not filed within the period provided by the applicable statute of limitations.

¶ 2 On August 12, 2016, plaintiff Carl Smicker filed a complaint against Leo Weber, the Highway Commissioner for Rogers Township in Ford County, Illinois, and Exelon Corporation (Exelon). In an amended complaint filed on November 17, 2016, Smicker substituted Commonwealth Edison Company (Commonwealth) for Exelon. On May 1, 2017, the trial court dismissed Smicker's claims against Weber. On February 2, 2018, the court entered a written order clarifying its earlier order dismissing the claims. Smicker appeals, arguing the court erred in dismissing his claim against Weber. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On August 12, 2016, Carl Smicker filed a three-count complaint against Highway

Commissioner Weber and Exelon as a result of the installation of power poles on Smicker's property. On November 17, 2016, plaintiff filed an amended complaint substituting Commonwealth for Exelon. In count I, which was directed at Commonwealth, Smicker sought to quiet his title to the property in question. Count II alleged Weber aided and abetted Commonwealth's trespass on Smicker's property. Count III accused Weber of trespass.

¶ 5 On December 12, 2016, Weber filed a motion to dismiss Smicker's claim against him. Weber argued Smicker's claims against him were barred by the one-year statute of limitations found in section 8-101(a) of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/8-101(a) (West 2016)). Assuming, *arguendo*, Smicker's claims were not time-barred, Weber argued Smicker's claims against him should be dismissed because they were substantially insufficient in law.

¶ 6 On May 1, 2017, the trial court granted Weber's motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-619 (West 2016)) based on the statute of limitations. On June 5, 2017, Smicker filed a motion for clarification regarding the court's oral dismissal order.

¶ 7 On January 23, 2018, the trial court entered a stipulated order dismissing Smicker's claim against Commonwealth pursuant to a settlement agreement entered into by those two parties.

¶ 8 On February 2, 2018, the trial court entered a written order clarifying its earlier order dismissing plaintiff's claims against Weber. The court noted it was dismissing with prejudice the two counts against Weber pursuant to both section 2-619 and section 2-615 of the Procedure Code (735 ILCS 5/2-615, 2-619 (West 2016)). The court also made an Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) finding on its order dismissing plaintiff's claims

against Weber.

¶ 9 This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 The trial court dismissed the counts of plaintiff's complaint against Commissioner Weber pursuant to section 2-619 of the Procedure Code (735 ILCS 5/2-619 (West 2016)) because the complaint was not filed within the one-year statute of limitations provided by the Tort Immunity Act (745 ILCS 10/8-101(a) (West 2016)). Smicker acknowledges the poles were installed on his property during the fall of 2014 and cannot dispute his complaint was not filed until August 2016. Instead, Smicker argues the statute of limitations has not run in this case because the continued presence of the power poles on his property constitutes a continuous trespass. As a result, according to Smicker, the trial court erred in dismissing his claim based on the statute of limitations.

¶ 12 According to Smicker's brief to this court, "The law regarding the rule of continuing trespass, particularly for permanent objects placed in violation of an easement or right-of-way, is non-controversial and well established." However, he ignores recent cases by our supreme court and the First District Appellate Court, which we discuss below.

¶ 13 Smicker does cite our supreme court's decision in *Neely v. Coffey*, 81 Ill. 2d 439, 410 N.E.2d 839 (1980), as authority for his argument the power poles represented a continuing trespass. The plaintiffs in *Neely* sought to enjoin the defendants from obstructing a roadway leading to the plaintiffs' property and to have the court declare they had an easement to use the roadway. The defendants filed a counterclaim seeking a mandatory injuction requiring two of the plaintiffs, John T. and Rebecca Clark, to remove a sewer line which had been constructed partially by the city and partially by the Clarks for the Clarks' use, 100 feet of which ran

underneath the surface of the roadway which the defendants claimed to own. *Neely*, 81 Ill. 2d at 441-42, 410 N.E.2d at 840-41.

¶ 14 The trial court found the sewer line did constitute a trespass on defendant's property but ruled damages, and not a mandatory injunction, was the proper remedy. *Neely*, 81 Ill. 2d at 442, 410 N.E.2d at 841. The appellate court held the sewer line constituted a trespass and approved the trial court's award of $10 in damages. *Neely*, 81 Ill. 2d at 442, 410 N.E.2d at 841. The supreme court also stated the sewer line constituted a continuing trespass because it exceeded the scope of the highway easement. *Neely*, 81 Ill. 2d at 444, 410 N.E.2d at 842. However, plaintiffs did not argue the trespass counterclaim was barred by the statute of limitations, and the supreme court did not address the statute of limitations. As a result, *Neely* does not establish when a trespass action accrues for purposes of determining the statute of limitations.

¶ 15 Defendant also points to our supreme court's decision in *Meyers v. Kissner*, 149 Ill. 2d 1, 594 N.E.2d 336 (1992), as support for his position. However, once again, his reliance on this case is misplaced. In *Meyers*, the defendants, who owned land adjacent to the plaintiff's property, erected a large earthen levee on their property in 1977. Another defendant landowner extended the levee the following year. The levee obstructed the natural drainage pattern, causing injury to plaintiff's property. *Meyers*, 149 Ill. 2d at 6, 594 N.E.2d at 338. In 1986, the plaintiff filed suit against the neighboring landowners, seeking the removal of the levee and monetary damages. The defendants argued the plaintiff's claim was untimely under the applicable statute of limitations. *Meyers*, 149 Ill. 2d at 6, 594 N.E.2d at 338. The supreme court stated:

> "[W]hen exactly a cause of action accrues for the overflow of water onto land is an issue of much debate and conflicting views. [Citation.] The law in Illinois as

> commonly cited by the appellate court is as follows. Where the construction of a permanent structure is necessarily injurious to the servient land by unreasonably increasing the flow of water onto the servient land, the cause of action accrues upon completion of the structure. However, if the structure is not apparently injurious, the cause of action accrues only after actual injury is incurred. Additionally, even though actual flooding may be uncertain in time, duration and extent, a structure which displays the obvious potential to cause an unnatural overflow will constitute an immediate permanent injury. Damages incurred as a result of a necessarily injurious permanent structure must be recovered all in one suit. However, where the damage inflicted by the structure is characterized as temporary, successive actions may be maintained." *Meyers*, 149 Ill. 2d at 9, 594 N.E.2d at 339.

The supreme court noted this body of law developed in large part from expansions of its decisions involving suits brought against the Sanitary District of Chicago. *Meyers*, 149 Ill. 2d at 9, 594 N.E.2d at 339. The court noted that in the sanitary district cases, "a statutory provision provided that the flow of water down the channel was to be constant, and not increased except as the population increased, and in which case the increase would be permanent and the flow still constant." *Meyers*, 149 Ill. 2d at 9, 594 N.E.2d at 339. The supreme court distinguished the situation in *Meyers* from the sanitary district cases because the flow of water at issue in *Meyers* was not subject to statutory regulation but instead followed the whims of nature. "The volume of water, its velocity and the amount of flooding, if any, is uncontrolled." *Meyers*, 149 Ill. 2d at 10, 594 N.E.2d at 339-40.

¶ 16 The supreme court held the levee constituted a nuisance to the plaintiff.

According to the court:

> " '[W]here one creates a nuisance, and permits it to remain, so long as it remains it is treated as a continuing wrong, and giving rise, over and over again, to causes of action.' [Citation.] Since defendants' levees constituted a nuisance to plaintiff by increasing the washing, erosion, and scouring of his land, the mere passage of five years does not change the levees' character. '[T]he maintenance of a structure which will continue to cause a wrongful diversion of water upon the plaintiff's land, in quantities varying with the seasons, is a continuing nuisance, and an invasion of the plaintiff's right from day to day, and he may select his own time for bringing an action therefor,' and he is not barred by the lapse of five years from the erection of the structure. [Citations.] For continuing violations such as the one at hand, the five-year statute of limitations merely specifies the window in time for which monetary damages may be recovered prior to the filing of the complaint. Thus, we hold that this case falls within the ordinary rules applicable to continuing nuisances and continuing trespasses and that plaintiff is not barred from recovering monetary damages for the five-year period preceding the filing of the complaint. [Citation.] This view, we believe, will prove to be more workable in the context of adjacent landowners than that which was expressed in, and which has for the most part developed upon, the sanitary district cases." *Meyers*, 149 Ill. 2d at 10-11, 594 N.E.2d at 340.

The situation in *Meyers* is distinguishable from the situation in this case. The damage caused by the levee to the plaintiff's ground continued to get worse, and the extent of the damage was unpredictable. In the case before this court, the damage caused by the power poles does not

continually increase. In other words, the extent of the damage was obvious from the time the poles were installed.

¶ 17 Since *Meyers* was decided, our supreme court has provided additional guidance and clarification on what constitutes a continuing tort. In *Feltmeier v. Feltmeier,* 207 Ill. 2d 263, 798 N.E.2d 75 (2003), the supreme court clarified the law on what constitutes a continuing tort, and the court's reasoning supports the trial court's dismissal of Smicker's claim pursuant to the statute of limitations. In *Feltmeier,* our supreme court stated:

> "Generally, a limitations period begins to run when facts exist that authorize one party to maintain an action against another. [Citation.] However, under the 'continuing tort' or 'continuing violation' rule, 'where a tort involves a continuing or repeated injury, the limitations period does not begin to run until the date of the last injury or the date the tortious acts cease." [Citations.]
>
> At this juncture, we believe it important to note what does *not* constitute a continuing tort. A continuing violation or tort is occasioned by continuing unlawful acts and conduct, not by continual ill effects from an initial violation. [Citations.] Thus, where there is a single overt act from which subsequent damages may flow, 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. [Citations.] For example, in *Bank of Ravenswood* [*v. City of Chicago*, 307 Ill. App. 3d 161, 717 N.E.2d 478 (1999)], the appellate court rejected the plaintiffs' contention that the defendant city's construction of a subway tunnel under the plaintiff's property constituted a continuing trespass violation. The plaintiffs' cause of action arose at the time its interest was invaded,

*i.e.*, during the period of the subway's construction, and the fact that the subway was present below ground would be a continual effect from the initial violation, but not a continual violation. *Bank of Ravenswood*, 307 Ill. App. 3d at 168, 717 N.E.2d 478 ***.

A continuing tort, therefore, does not involve tolling the statute of limitations because of delayed or continuing injuries, but instead involves viewing the defendant's conduct as a continuous whole for prescriptive purposes." (Emphasis in original.) *Feltmeier*, 207 Ill. 2d at 278-79, 798 N.E.2d at 85-86.

¶ 18 This case is analogous to the situation in *Bank of Ravenswood*, which our supreme court cited with approval in *Feltmeier*. The appeal in *Bank of Ravenswood* arose out of a trespass claim brought by the plaintiffs, the Bank of Ravenswood as a Trustee and Ogden Partners (Ogden), against the City of Chicago (the City) because of the construction of a subway system under property plaintiffs purchased to develop into a townhome community. *Bank of Ravenswood*, 307 Ill. App. 3d at 163, 717 N.E.2d at 480. "The complaint alleged that the City failed to acquire a permanent easement for the subway to travel under the property and was thus liable for damages incurred, because Ogden had to construct a vibration insulation system (VIS) so that the residents could enjoy the property." *Bank of Ravenswood*, 307 Ill. App. 3d at 163, 717 N.E.2d at 480.

¶ 19 Construction of the subway began on January 9, 1986, pursuant to a two-year right of entry agreement entered into by the City and Dearborn Park Corporation (DPC), which owned the property at the time. *Bank of Ravenswood*, 307 Ill. App. 3d at 163-64, 717 N.E.2d at 480-81. The two-year agreement was made with the assumption the parties would later enter into a permanent easement agreement. *Bank of Ravenswood*, 307 Ill. App. 3d at 163-64, 717

N.E.2d at 481. In June 1988, DPC sold the property to Ogden prior to finalizing the permanent easement with the City. After Ogden closed on the property, the acoustical consulting firm it hired after taking possession but prior to closing informed Ogden a VIS was necessary and should be erected. *Bank of Ravenswood*, 307 Ill. App. 3d at 164, 717 N.E.2d at 481.

¶ 20 On February 22, 1990, Ogden filed a two-count complaint against the City and the Chicago Transit Authority to enjoin trespass and for other relief. *Bank of Ravenswood*, 307 Ill. App. 3d at 164, 717 N.E.2d at 481. The lawsuit was partially settled in April 1991 because the plaintiffs granted the City a permanent easement to operate trains in the subway tunnel below the property. The trains did not begin to regularly operate until after this permanent easement was granted. *Bank of Ravenswood*, 307 Ill. App. 3d at 164, 717 N.E.2d at 481. On May 7, 1993, the City filed a motion for judgment on the pleadings, arguing plaintiffs' trespass claim was barred because DPC had promised to grant the permanent easement. The City also argued consent, waiver, estoppel, and the statute of limitations. *Bank of Ravenswood*, 307 Ill. App. 3d at 164, 717 N.E.2d at 481. A trial judge eventually granted the City's motion for summary judgment on damages and dismissed the case. *Bank of Ravenswood*, 307 Ill. App. 3d at 165, 717 N.E.2d at 481.

¶ 21 On appeal, the City argued Ogden was time-barred from bringing the claim against the City because of the one-year statute of limitations provided by section 8-101 of the Tort Immunity Act (745 ILCS 10/8-101 (West 1996)). Ogden, like Smicker in the case before this court, argued the subway was a continuing trespass and not subject to a statute of limitations period. In the alternative, if the appellate court determined a statute of limitations did apply, Ogden argued the four-year period found in section 13-214 of the Code of Civil Procedure (735 ILCS 5/13-214 (West 1996)) should apply. *Bank of Ravenswood*, 307 Ill. App. 3d at 165, 717

N.E.2d at 482. The court found the one-year statute of limitations applied, stating:

> "In Illinois, the 'purpose of a statute of limitations is certainly not to shield a wrongdoer; rather it is to discourage the presentation of stale claims and to encourage diligence in the bringing of actions.' [Citation.] Generally, a limitations period begins 'when facts exist which authorize one party to maintain an action against another.' [Citations.] Thus, a plaintiff's cause of action accrues at the time its interest is invaded; the mere fact that the extent of its damages is not immediately ascertainable does not postpone the accrual of a plaintiff's claim. [Citation.]
>
> Where a tort involves a continuing or repeated injury, however, the statute of limitations does not begin to run until the date of the last injury or when the tortuous acts cease. [Citation.] A continuing violation, however, is occasioned by continuing unlawful acts and conduct, not by continual ill effects from an initial violation. [Citation.] Moreover, 'where there is but one overt act from which subsequent damages may flow, it is held that 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. [Citation.]
>
> Plaintiffs maintain that no statute of limitations period applies because the presence of the subway under the property constituted a continuing trespass violation. The City opposes this theory, arguing that the single act of constructing the subway does not comprise a 'continuous' injury to plaintiffs.
>
> In this case, the City constructed the subway between July and September of 1988. The record reveals that the subway did not begin its operation until

> 1993. Following the rule that a plaintiff's cause of action arises at the time its interest is invaded, plaintiffs' cause of action began to run during the period of the subway's construction. The fact that the subway was present below ground would be a continual effect from the initial violation but not a continual violation." *Bank of Ravenswood*, 307 Ill. App. 3d at 167-68, 717 N.E.2d at 483-84.

The First District held the plaintiffs' lawsuit was time-barred because it was filed more than one year after September 1988, which was the latest time the plaintiffs' claim could have accrued. *Bank of Ravenswood*, 307 Ill. App. 3d at 168, 717 N.E.2d at 484.

¶ 22 In the case *sub judice*, the power poles were installed during the fall of 2014. The fact the power poles remain on Smicker's property is the continual effect of the initial violation of Smicker's property. However, the fact these poles remain on defendant's property is not a continual violation. As a result, the trial court correctly found Smicker's claim barred pursuant to the statute of limitations.

¶ 23 Because the trial court did not err in dismissing Smicker's claims against Weber pursuant to section 2-619 of the Procedure Code (735 ILCS 5/2-619 (West 2016)), we need not address whether the court erred in dismissing plaintiff's claims against Weber pursuant to section 2-615 of the Procedure Code (735 ILCS 5/2-615 (West 2016)).

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, we affirm the trial court's dismissal of plaintiff's claims against defendant, Commissioner Weber, because the claims were not filed within the applicable limitations period.

¶ 26 Affirmed.