2019 IL App (2d) 180773-U
No. 2-18-0773
Order filed June 10, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CHARLES A. STULGINSKAS, Plaintiff-Appellant, v. FIRST MIDWEST BANCORP, INC., and FIRST MIDWEST BANK, Defendants-Appellees.	)	Appeal from the Circuit Court of Lake County. No. 17-L-607 Honorable Thomas M. Schippers, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Burke and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed plaintiff's claims as untimely. Affirmed.

¶ 2 Plaintiff, Charles A. Stulginskas, sought to recover damages for defendants', First Midwest Bancorp, Inc., and First Midwest Bank's (First Midwest's), alleged failure to return funds that plaintiff deposited in two individual retirement accounts (IRAs) in 1983 and 1985, respectively. The trial court granted defendants summary judgment on plaintiff's two breach-of-contract counts (counts I and II), finding that the claims were time-barred, and it dismissed the remaining counts (negligence (counts III and IV); breach of fiduciary duty (counts V and VI);

and breach of bailment (counts VII and VIII)), with prejudice, finding that they were also time-barred and that the bailment counts failed to state a cause of action. Plaintiff appeals. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff was born on September 4, 1929. In 1983 and in 1985, plaintiff entered into written contracts with defendants' predecessor[1] to open and fund, with a $2,000 deposit, two IRAs (account Nos. 726-33 and 1066-34). Each IRA was evidenced by: (1) a certificate that provided that the accounts were held by plaintiff pursuant to an IRA agreement; (2) an IRA agreement made on Internal Revenue Service (IRS) Form 5305, entitled "Individual Retirement Trust Account" (the 1983 form is signed by plaintiff); and (3) an IRA disclosure statement.

¶ 5 In compliance, at the time, with federal tax law addressing required minimum distributions, each IRA agreement required that the funds in the accounts be disbursed, in part or in full, in the tax year in which the Grantor/account owner (*i.e.*, plaintiff) turned age 70½ (here, on March 4, 2000). (Current law requires such distributions to begin by April 1st of the year following the year in which the individual reaches age 70½. 26 U.S.C. § 401(a)(9), 408(a)(6) (West 2018)). As relevant here, the agreements provided that, if the account owner took no action to select one of five options in which to receive the funds, the funds would be disbursed in a single lump sum in the year in which the owner turned age 70½ (*i.e.*, here, by December 31, 2000).[2]

[1] Plaintiff initially contracted with First Federal Savings and Loan Association. In 1991, First Federal was acquired by Northern States Financial Corporation, and, in 1998, First Federal merged with Bank of Waukegan. In 2005, Bank of Waukegan was renamed NorStates Bank.

[2] The 1983 disclosure statement stated:

¶ 6 Plaintiff alleged that, up until the fall of 2016, he made no withdrawals from his IRAs. In the fall of 2016, plaintiff, with his original IRA documents in hand, requested that First Midwest pay him the funds in his IRAs. The bank responded that it had no records documenting the accounts; it retained records for no more than six years after an account was terminated; and that other documents it had (which it provided to plaintiff) reflected that the IRA accounts were closed and the funds distributed in 1999. (The other documents consisted of a form 1099-R and a statement from plaintiff's savings account showing a large deposit into the account in January 1999.)

¶ 7 Plaintiff filed his initial complaint in this case on August 14, 2017. In a third amended complaint filed on April 25, 2018, plaintiff alleged: (1) breach of contract (counts I and II); (2)

> "Distributions may begin as soon as the participant attains age 59½, but they must begin before the close of the taxable year in which the participant attains age 70½. *** If the participant fails to elect any of the methods [of distribution] before the end of the taxable year in which age 70½ is attained, the trustee will distribute the full balance in the Plan to the participant in a single sum prior to the close of that taxable year."

The 1985 disclosure statement stated:

> "Distribution of benefits without IRS penalty tax for premature distribution may begin as soon as you attain age 59½ , or become disabled but must begin before the close of the taxable year in which you attain age 70½. *** If you fail to elect a method of distribution before the end of the taxable year in which you attain age 70½, distribution of the full balance of the IRS must be made to you in a single sum prior to the close of that taxable year."

negligence (counts III and IV); (3) breach of fiduciary duty (counts V and VI) and (4) breach of bailment (counts VII and VIII).

¶ 8 Defendants moved, on January 3, 2018, for summary judgment on counts I and II and, on March 21, 2018, moved to dismiss (pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2018))) counts III and IV. In their summary-judgment motion, defendants argued that the admitted facts showed that plaintiff alleged that he did not elect to withdraw any amount when he reached age 70½ and that he did not receive any funds from the accounts. If true, defendants argued, then the agreements were breached no later than December 31, 2000, and the 10-year statute of limitations for breach of contract and breach of bailment expired long before the litigation began (in August 2017). 735 ILCS 5/13-206 (West 2018). If the allegations were not true, they asserted, then plaintiff had already received his money and there was no breach or damages. They conceded that plaintiff's alleged non-receipt of the funds was a disputed factual question, but argued that it was not material because, either way, defendants were entitled to summary judgment. In their motion to dismiss the negligence counts, defendants, as relevant here, argued that the claims were time-barred. Defendants also moved to dismiss (735 ILCS 5/2-619.1 (West 2018)) the breach-of-fiduciary-duty and breach-of-bailment counts (counts V through VIII) of plaintiff's third amended complaint, arguing that: (1) they were barred by the statute of limitations; (2) the breach-of-fiduciary-duty claims were duplicative of other claims; and (3) the breach of bailment claims were not cognizable under Illinois law.

¶ 9 On June 27, 2018, the trial court granted defendants summary judgment and dismissed, with prejudice, as barred by the statute of limitations, counts I and II of plaintiff's complaint. In announcing its findings, the court determined that, on January 1, 2001, plaintiff was on notice

(and the statute of limitations began to run) that defendants breached the agreements and plaintiff "was charged with knowledge of and assent to the agreement[s] signed." Addressing the discovery rule, the trial court further found that plaintiff was presumed to know the language of the contracts he signed and that ignorance of their contents was no excuse; the statute was not tolled.

¶ 10 On August 9, 2018, the court dismissed, with prejudice, pursuant to section 2-619 of the Code, counts III and IV of plaintiff's complaint, finding that the claims were barred by the statute of limitations. It also dismissed, with prejudice: counts V and VI (pursuant to section 2-619); counts VII and VIII (pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2018))); and counts VII and VIII (pursuant to 2-619). The trial court determined that the statute of limitations barred the claims and further found that, as to counts VII and VIII, the bailment claims failed because a creditor/debtor relationship does not create a bailment.

¶ 11 On August 31, 2018, plaintiff moved to reconsider the trial court's July 27, 2018, and August 9, 2018, orders. On September 6, 2018, the trial court denied plaintiff's motion. Plaintiff appeals.

¶ 12 II. ANALYSIS

¶ 13 Plaintiff argues that the trial court erred in: (1) dismissing his claims as untimely; (2) finding that he failed to state a claim for breach of bailment; and (3) denying his requests to conduct discovery depositions. For the following reasons, we affirm the trial court's judgment.

¶ 14 A. Timeliness

¶ 15 We review *de novo* a trial court's ruling granting or denying a summary-judgment motion (*Pace Communications Services Corp. v. Express Products, Inc.*, 2014 IL App (2d) 131058, ¶

15), as well as a court's ruling on a motion to dismiss brought under section 2-619 (*Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006)).

¶ 16 The trial court granted defendants summary judgment on the breach-of-contract counts (counts I and II). Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2018). To determine if there is a genuine issue of material fact, the court examines the pleadings, together with any depositions, admissions, or affidavits on file. All inferences from the facts are drawn in favor of the party opposing the summary judgment motion. *Ralls v. Glendale Heights*, 233 Ill. App. 3d 147, 151 (1992).

¶ 17 The trial court granted defendants' motion, under section 2-619(a)(5), to dismiss the negligence, breach-of-fiduciary-duty, and breach-of-bailment (counts III through VIII) counts. A motion to dismiss under section 2-619 of the Code "admits the legal sufficiency of the complaint but asserts that some affirmative matter defeats the plaintiff's claim." *Stone Street Partners, LLC v. City of Chicago Department of Administrative Hearings*, 2017 IL 117720, ¶ 4. When ruling on a section 2-619 motion to dismiss, a trial court must interpret all pleadings, affidavits, and other supporting documents in the light most favorable to the nonmoving party. *Caywood v. Gossett*, 382 Ill. App. 3d 124, 129 (2008). Section 2-619(a)(5) provides that a defendant may move for dismissal when an action has not been commenced within the time limited by law. 735 ILCS 5/2-619(a)(5) (West 2018). When considering a motion to dismiss under 2-619, a court accepts as true all well-pleaded facts and reasonable inferences that may arise from those facts. *Kanerva*, 2014 IL 115811, ¶ 33; *Stone Street*, 2017 IL 117720, ¶ 4.

¶ 18 The breach-of-contract (counts I and II) and breach-of-bailment (counts VII and VIII) claims are governed by a 10-year statute of limitations. 735 ILCS 5/13-206 (West 2018) (statute

of limitations for written contracts is "10 years next after the cause of action accrued"). The statute of limitations for breach-of-fiduciary-duty (counts V and VI) and negligence (counts III and IV) claims is five years. 735 ILCS 5/13-205 (West 2018) ("actions *** to recover damages for an injury done to property, real or personal, *** and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued"); *Armstrong v. Guigler*, 174 Ill. 2d 281, 294 (1996) ("five-year statute of limitations for all civil actions not otherwise provided for" applies to breach-of-fiduciary-duty claims, including those that "arose from a written contract").

¶ 19 "For contract actions and torts arising out of contractual relationships, *** the cause of action ordinarily accrues at the time of the breach of contract, not when a party sustains damages." *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 77 (1995). A claim for breach of fiduciary duty accrues, and the limitation period commences, "when the plaintiff knew or reasonably should have known of the injury and that it was wrongfully caused." *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill. App. 3d 605, 618 (2007).

¶ 20 The discovery rule "delays the commencement of the relevant statute of limitations until the plaintiff knows or reasonably should know that he [or she] has been injured and that his [or her] injury was wrongfully caused." *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill. 2d 240, 249 (1994). Stated differently, the limitation period commences when "the injured person becomes possessed of sufficient information concerning his [or her] injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved." *Knox College*, 88 Ill. 2d at 416. At that point, the burden is upon [the] plaintiff to inquire further as to the existence of a cause of action." *Hoffman v. Orthopedic Systems, Inc.*, 327 Ill. App. 3d 1004, 1011 (2002); see also *Hermitage Corp.*, 166 Ill. 2d at 85 ("When a plaintiff uses the discovery

rule to delay commencement of the statute of limitations, the plaintiff has the burden of proving the date of discovery").

¶ 21 Fixing the discovery date that triggers the statute of limitations is generally a factual question inappropriate for summary judgment. *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 416 (1981). However, summary judgment is appropriate when: (1) the facts known by the plaintiff are not in dispute; and (2) only one conclusion can be drawn from them. *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 171 (1981). Similarly, the issue of whether a claim was brought within the time allowed by the discovery rule is ordinarily a factual question, but it may be determined as a matter of law when the answer is clear from the pleadings. *Clay v. Kuhl*, 189 Ill. 2d 603, 609-10 (2000); see also *Fuller Family Holdings*, 371 Ill. App. 3d at 618 (assessing ruling on section 2-619 motion; question of commencement of a limitations period "may be determined as a matter of law when the answer is clear from the pleadings").

¶ 22 Here, plaintiff argues that defendants raised the statute of limitations in an attempt "to evade the consequences from their own wrongful conduct." He suggests that there are "many reasons" that could account for the disappearance of his IRAs: bank employees could have stolen the funds; records of the accounts could have been misfiled or tampered with; or records could have been lost in the midst of the various changes of ownership of the bank.

¶ 23 Turning to the discovery rule, plaintiff argues that the trial court should have found that he timely filed his complaint (in August 2017) within one year of his actual discovery (in the fall of 2016) that defendants had lost records of his IRA accounts. He also notes that, generally, application of the discovery rule is a factual question.

¶ 24 Plaintiff takes issue with the trial court's finding that plaintiff was charged with knowledge of the terms of the contracts he signed and with knowledge of the law. He contends

that it is unreasonable to expect an IRA owner such as himself to know the terms of a multi-page IRA agreement and its disclosure attachments, which were "lengthy, in small[ ]font, and arduous." Furthermore, he argues that the agreements were adhesion contracts, as reflected in the fact that, in his view, the language concerning required minimum distributions is hidden in the maze of fine print. Plaintiff also asserts that there was no proof that defendants ever explained to him the contents and details of the agreements or sent him any communications concerning his IRAs throughout their duration.

¶ 25 Defendants respond that the trial court correctly dismissed all of plaintiff's claims on statute-of-limitations grounds. They contend that, taking as true plaintiff's allegation that he never sought any disbursements from his IRAs until 2016, the plain terms of the agreements would have required defendants to begin disbursing funds to him no later than December 31, 2000, because that was the year in which he turned age 70½. Thus, on January 1, 2001, either defendants: disbursed the IRA funds to plaintiff (and there was no breach), or failed to do so (and breached the agreements and a claim accrued that day). Defendants further argue that, given the 10-year statute of limitations for breach-of-contract claims, any claims plaintiff had (that accrued on January 1, 2001) became time-barred when he failed to file a complaint by January 1, 2011. Defendants maintain that it is immaterial which scenario actually occurred because they are entitled to judgment under either one.

¶ 26 Alternatively, defendants propose that we can affirm the trial court's ruling as a grant of a section 2-619 motion to dismiss. They note that they had presented their timeliness argument in a summary-judgment motion because plaintiff's initial complaint did not include the IRA agreements, though he did include them in his third amended complaint. Thus, defendants contend, their timeliness argument concerning counts I and II does not rely upon any documents

outside the pleadings (as amended) and may be affirmed as if raised in a section 2-619 motion to dismiss. See also *Clark v. Children's Memorial Hospital*, 2011 IL 108656, ¶¶ 118-123 (assessing timeliness argument in context of summary-judgment ruling).

¶ 27 Turning to the remaining counts in the third amended complaint (alleging negligence, breach of fiduciary duty, and breach of bailment), defendants argue that the trial court did not err in dismissing them (pursuant to section 2-619) on the basis of the statute of limitations. Accepting plaintiff's allegations that: he never withdrew any funds from the accounts; did not seek any withdrawals before 2016; and that he was born on September 4, 1929, the plain language of the agreements required defendants to pay plaintiff the entire proceeds by the end of 2000. Thus, defendants note, the claims accrued on January 1, 2001. The negligence (counts III and IV) and breach-of-fiduciary-duty (counts V and VI) claims became time-barred when no action was filed by January 1, 2006. 735 ILCS 5/13-205 (West 2018) (five year statute of limitations). The breach-of-bailment claims (counts VII and VIII), they further argue, became time-barred when no action was initiated by January 1, 2011. 735 ILCS 5/13-206 (10-year statute of limitations).

¶ 28 We conclude that, on January 1, 2001, when he allegedly failed to receive a payout of his IRAs from defendants, a reasonable person in plaintiff's shoes should have learned that he had been injured and that his injury was wrongfully caused. *Jackson Jordan*, 158 Ill. 2d at 249. The terms of the agreements state in several places that, if the grantor does not take a required minimum distribution in one of five options after he or she turned age 70½, then the funds would be disbursed in a single lump sum prior to the close of that taxable year. A party to an agreement is charged with knowledge of and assent to the agreement signed. *Melena v. Anheuser-Busch, Inc.*, 219 Ill. 2d 135, 150 (2006). The failure to read a document before signing it is normally no

excuse for the party who signs it. *Breckenridge v. Cambridge Homes, Inc.*, 246 Ill. App. 3d 810, 819 (1993). "Illinois law on this question is long-standing and consistent. The supreme court held in *Black v. Wabash, St. Louis & Pacific Ry. Co.*, 111 Ill. 351, 358 (1884), that a competent adult is charged with knowledge of and assent to a document the adult signs and that ignorance of its content does not avoid its effect. That principle has been consistently reiterated by the supreme court and by the appellate court." *Steele v. Provena Hospitals*, 2013 IL App (3d) 110374, ¶ 121. Further, under general contract law principles, "statutes and laws in existence at the time a contract is executed are considered part of the contract," and "[i]t is presumed that parties contract with knowledge of the existing law." *Braye v. Archer–Daniels-Midland Co.*, 175 Ill. 2d 201, 217 (1997). Throughout the IRA documents, there are numerous references to age 70½. The references appear, for example, five times on the first page of the Form 5305 trust document for the 1983 IRA (which contains plaintiff's signature on the third page) and five times in the instructions section of that document. References to age 70½ also appear five times on the first page of the disclosure document for the 1983 IRA, four times on the second page, and once the third and fourth pages, respectively. Thus, even a cursory review of the documents would have revealed to a reasonable person that attainment of age 70½ triggered certain events or obligations with respect to the IRAs.

¶ 29 As to plaintiff's argument that the IRA agreements constituted adhesion contracts, we find that argument forfeited. Plaintiff raised the argument for the first time at the August 9, 2018, hearing, and the trial court declined to consider it because it was not previously raised in any of plaintiff's written responses to the dispositive motions. We conclude that his failure to properly raise the argument before the trial court results in forfeiture of the issue on appeal. However, forfeiture aside, we conclude that the argument has no merit because plaintiff's

complaint contains no allegations that could support a finding of unconscionability, which is required to render an alleged adhesion contract unenforceable. See *Kinkel v. Cingular Wireless, LLC*, 223 Ill. 2d 1, 26 (2006). The references to age 70½ in the IRA documents, we believe, are not "difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it." *Id.* at 22-23 (quoting *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 100 (2006) (addressing procedural unconscionability claim)). Nor are they " 'hidden in a maze of fine print.' " *Id.* at 23 (quoting *Frank's Maintenance & Engineering, Inc. v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 989-90 (1980)). As discussed, there are numerous references to age 70½.

¶ 30 Finally, we note that plaintiff states that the IRA agreements, some of which were made on forms prepared by the IRS, misstate the required minimum distribution withdrawal deadline. He posits that the forms' statement that the age 70½ distributions begin in the taxable year the IRA owner attains age 70½ is not correct and should state that distributions must begin no later than April 1 of the calendar year following the calendar year in which the owner attains age 70½. Plaintiff, as defendants note, is incorrect. Prior to the Tax Reform Act of 1986, the law was as is stated on the IRA forms at issue in this case—the taxable year in which the owner attains age 70½. See Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 § 242. The Tax Reform Act of 1986 amended the law to provide that distributions begin no later than April 1 of the calendar year following the calendar year in which the owner attains age 70½. See Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 § 1121.

¶ 31 We affirm summary judgment and dismissal of plaintiff's claims, because the running of the statutes of limitations was not tolled by the discovery rule. Because this ruling is dispositive

of all of his claims, we need not reach plaintiff's remaining argument concerning the bailment counts.

¶ 32 B. Discovery Requests

¶ 33 Plaintiff's final argument is that the trial court abused its discretion in denying his request to conduct discovery depositions. For the following reasons, we find his claim unavailing.

¶ 34 Illinois Supreme Court rules permit liberal pretrial discovery. *Winfrey v. Chicago Park District*, 274 Ill. App. 3d 939, 949 (1995). Illinois Supreme Court Rule 201(b)(1) (eff. May 29, 2014) states that, "[e]xcept as provided in these rules, a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action[.]"

¶ 35 In *Harris Trust & Savings Bank v. Chicago College of Osteopathic Medicine*, 116 Ill. App. 3d 906 (1983), the court stated:

> "With reference to the claim that discovery was improperly curtailed, the law is well settled that a trial judge has wide discretion in controlling the scope of discovery; a reviewing court will not interfere with his rulings on discovery absent a manifest abuse of discretion; there is no abuse of discretion to deny discovery of a subject not relevant to the issues; discovery should be denied where there is insufficient evidence that the requested discovery is relevant." *Id.* at 912.

"Relevance for discovery purposes includes not only what is admissible at trial, but also that which leads to admissible evidence. *** The circuit court's discretion over the discovery process should be exercised by keeping in mind that the goal is the ascertainment of the truth." (Citations omitted.) *Dufour v. Mobile Oil Corp.*, 301 Ill. App. 3d 156, 160 (1998).

¶ 36 Plaintiff sought to depose Adam McDonald, NorStates Bank's risk manager, arguing that a deposition was necessary to discern the bank's policies and procedures concerning record

retention and to obtain information concerning his communications on whether plaintiff received the IRA funds from his accounts. On appeal, plaintiff notes that discovery should be liberally granted and argues that McDonald's deposition was "critical" to support his claims against defendants.

¶ 37 We conclude that the trial court did not abuse its discretion in denying plaintiff's discovery requests. We agree with the trial court and defendants that plaintiff's requests were not relevant to the central issue before the court—whether or not plaintiff's claims were timely. Plaintiff's requests addressed the banks' record-retention policies, and he speculated, without any factual support, that perhaps "malfeasance or shenanigans" had occurred with his accounts. He never offered any reasons addressing how a deposition would affect the dispositive motions before the court, all of which addressed timeliness. Accordingly, we find no error with the trial court's rulings.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, the judgment of the circuit court of Lake County is affirmed.

¶ 40 Affirmed.