2015 IL App (1st) 131248-U

SIXTH DIVISION
May 22, 2015

No. 1-13-1248

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DAVID C. CHUA, M.D., S.C., LTD., DAVID C. CHUA, M.D., Individually and as Trustee and on behalf of DAVID C. CHUA, M.D., S.C., LTD. 412(i) Defined Benefits Plan,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	No. 11 L 4879
LAURA L. DAVIS and MING MING TONG,	)	
Defendants-Appellees,	)	
and	)	
Larry Shippee, The Benefits Consulting Group, Inc., Pacific Life Insurance Company, Inc., Mike Hendry, Individually and in his Official Capacity as Officer of Pacific Life Insurance Company, Inc.,	)	Honorable Bridget M. McGrath, Judge Presiding.
Defendants.	)	

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

Held: The trial court did not err in dismissing plaintiffs' verified amended complaint pursuant to section 2-619(a)(5) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2010)), which allows a cause of action to be dismissed if it was not commenced within the time limited by law.

¶ 1 Plaintiffs[1] (hereinafter referred to as Chua) filed a verified amended complaint seeking to recover damages arising from its funding and participation in a "defined benefit plan" as defined and governed by the federal Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. § 1001 *et seq.* (2000)). The particular "defined benefit plan" at issue in this case was designated the David C. Chua, M.D., S.C., Ltd. 412(i) Defined Benefits Plan (Plan). The Plan was purportedly in compliance with section 412(i) of the Internal Revenue Code (IRC) (26 U.S.C. § 412(i)).[2]

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[1] David C. Chua, M.D., individually and as trustee and on behalf of David C. Chua, M.D., S.C., Ltd. 412(i) Defined Benefits Plan.

[2] A defined benefit plan is a pension plan under which the benefits to be received by employees and their beneficiaries are prescribed by the plan or determined with a formula stated in the plan. B. Bittker & L. Lokken, Federal Taxation of Income, Estates and Gifts ¶ 61.1, p. 6. A section 412(i) plan is a defined benefit plan funded exclusively with individual life insurance or annuity contracts. " ' To create a [412(i) plan], an employer establishes a trust to hold the plan's assets, and the trust uses tax-deductible employer contributions to purchase and maintain life insurance and/or annuity policies for the plans.' " *Chua v. Shippee*, No. 13 C 383, 2013 WL 4846689, at *1 (N.D. Ill. September 10, 2013) (quoting *Drilling Consultants, Inc. v. First Montauk Securities*

¶ 2 Among the defendants Chua sued are the defendants involved in this appeal, Laura L. Davis and Ming Ming Tong. Davis and Tong allegedly recommended, solicited, and submitted the application for and/or administered the Plan. Chua alleged three causes of action against these two defendants: intentional misrepresentation, negligent misrepresentation, and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act.

¶ 3 Defendants filed various motions to dismiss pursuant to section 2-619 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2010)), arguing that Chua's claims against them were time-barred by the two-year limitations period set forth in section 13-214.4 of the Code (735 ILCS 5/13-214.4 (West 2010)). This section of the Code provides that all actions against insurance producers and representatives must be brought within two years of the date the cause of action accrues.[3] Defendants argued that Chua's causes of action against them accrued on July 28, 2008, when the Internal Revenue Service (IRS) sent Chua a letter assessing tax penalties under IRC §6707A for failing to disclose a reportable listed transaction in relation to the Plan, but that Chua did not file its verified complaint until May 11, 2011, almost three years

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Corp., 806 F. Supp. 2d 1228, 1232 n. 2 (M.D. Fla. 2011). "A problem with 412(i) plans is that they can be used as abusive tax shelters." *Shippee*, No. 13 C 383, 2013 WL 4846689, at *1.

[3] Section 13-214.4 of the Code provides in relevant part:

> "All causes of action brought by any person or entity under any statute or any legal or equitable theory against an insurance producer, registered firm, or limited insurance representative concerning the sale, placement, procurement, renewal, cancellation of, or failure to procure any policy of insurance shall be brought within 2 years of the date the cause of action accrues." 735 ILCS 5/13-214.4 (West 2010).

later, and therefore Chua's claims against them were time-barred by the two-year statute of limitations in section 13-214.4 of the Code.

¶ 4 Chua countered that its causes of action against defendants regarding IRC §6707A did not accrue for limitation purposes until it discovered its injuries on December 3, 2009, when the appeals office of the IRS sent it a notice closing its appeal. Chua further maintained that its causes of action against defendants regarding deficiency for underpayment of taxes did not accrue until March 10, 2010, when the IRS sent Chua a notice of deficiency letter. Chua also claimed the two-year limitations period contained in section 13-214.4 of the Code was tolled under the doctrines of fraudulent concealment and equitable estoppel.

¶ 5 The trial court disagreed with Chua's arguments. After extensive briefing and oral argument the court granted defendants' motions and dismissed the claims against them with prejudice. In reaching its decision, the court rejected Chua's notion of two separate discovery dates – December 3, 2009 and March 10, 2010 – and instead determined that Chua's causes of action against defendants accrued, and the two-year statute of limitations in section 13-214.4 of the Code began to run, when Chua discovered its alleged injury upon receiving the letter from the IRS on July 28, 2008. The trial court further determined that the doctrines of fraudulent concealment and equitable estoppel did not apply because Chua had two full years, commencing on July 28, 2008, to file suit. This appeal followed. For the reasons set forth below, we affirm.

¶ 6 BACKGROUND

¶ 7 Dr. Chua and his wife Dr. Wendy Yeh formed an entity known as David C. Chua, M.D., S.C., Ltd. In 2002, Dr. Chua applied for and purchased the subject Plan, a 412(i) defined benefit plan issued by Pacific Life Insurance Company. Prior to purchasing the Plan, Dr. Chua was provided with a summary illustration of the Plan. He was informed that the materials provided

and the statements made regarding the Plan did not constitute legal or tax advice and that Chua should consult its attorneys and/or tax advisors if it had any legal or tax questions.

¶ 8 The Plan was funded by several life insurance policies and fixed annuities Chua purchased in 2002 and 2004. Chua alleged that Davis in 2002 and 2004, and Tong in 2004, signed the applications for the policies and fixed annuities as "soliciting producers."

¶ 9 In 2004, the IRS issued Revenue Ruling 2004-20, which held that a 412(i) plan funded with life insurance policies and fixed annuities containing excessive death benefits could constitute a prohibited listed transaction and abusive tax shelter under the IRC. See *Chua v. Shippee*, No. 13 C 383, 2013 WL 4846689, at *2 (N.D. Ill. September 10, 2013). In 2005, the IRS announced a Global Settlement Initiative under which taxpayers could disclose their 412(i) plans to the IRS for a determination of whether the plans constituted a listed transaction. See *Shippee*, No. 13 C 383, 2013 WL 4846689, at *3. The IRS announced that all such plans that did not come forward would be audited.

¶ 10 Chua did not disclose its Plan to the IRS. Chua alleged it was not made aware of Revenue Ruling 2004-20 or of the IRS announcement and was unaware that its Plan might constitute a listed transaction. Chua claimed that Davis and Tong, and the other defendants failed to advise it of the revenue ruling and IRS announcement. Chua asserted that at the time it purchased the life insurance policies and fixed annuities to fund the Plan in 2002 and 2004, it was unaware of any potential problems with the Plan.

¶ 11 In 2006, the IRS opened an audit of Chua's Plan. The IRS sent letters to Chua advising it of the audit. In 2007, Chua hired attorneys associated with the law firm of Reish & Reichter, P.C. who claimed to have expertise with 412(i) plans. In June 2007, after the IRS completed its

audit of the Plan, it sent Chua an IRS Agent Report finding that Chua had participated in, and failed to disclose, a reportable listed transaction during the tax years of 2004 and 2005.

¶ 12 On July 28, 2008, the IRS sent Chua a letter notifying it of proposed penalties under IRC §6707A for failing to disclose a reportable listed transaction. The proposed penalties were $200,000 for each of the tax years ending in 2004, 2005, and 2006. See *Shippee*, No. 13 C 383, 2013 WL 4846689, at *5. In the letter, the IRS informed Chua as to why the Plan constituted a prohibited listed transaction and provided a detailed explanation of the penalties.

¶ 13 Upon receipt of the July 28, 2008, letter from the IRS, Chua was advised by its attorneys that defendants Davis and Tong were potentially liable for their alleged actions and omissions regarding the Plan. Days later, Chua instructed its attorneys to send Davis and Tong proposed Tolling Agreements which would have suspended the statute of limitations on any causes of action Chua might have against them. Neither Davis nor Tong entered into a Tolling Agreement.

¶ 14 Chua's attorneys also sent a letter to the IRS appealing the penalties. In the letter, the attorneys argued that the Plan did not contain excessive death benefits. The appeal was ultimately denied. In its verified complaint, Chua alleged the appeal was frivolous and that the attorneys should have advised it to concede.

¶ 15 On January 12, 2011, the penalty amounts were reduced pursuant to a statutory change in the way certain IRC penalties were calculated. Chua paid the adjusted penalties.

¶ 16 This appeal was filed after the claims against Davis and Tong were dismissed with prejudice pursuant to section 2-619 of the Code. As mentioned, we affirm.

¶ 17 ANALYSIS

¶ 18 This appeal is before us following the grant of motions to dismiss pursuant to section 2-619 (a)(5) of the Code which allows a cause of action to be dismissed if it was not commenced

within the time limited by law. 735 ILCS 5/2-619 (a)(5) (2010); *Hoover v. Country Mutual Insurance Co.*, 2012 IL App (1st) 110939, ¶ 31. When ruling on a section 2-619 motion, a court accepts as true all well-pleaded facts in the complaint together with all reasonable inferences. *Id*. However, the court does not accept as true unsupported conclusions of law or conclusory allegations of fact. *Aliano v. Ferris*, 2013 IL App (1st) 120242, ¶ 20. Our review is *de novo*. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31.

¶ 19 The parties agree that the two-year statute of limitations found in section 13-214.4 of the Code applies in this case. Generally, a limitation period starts to run on the date the plaintiff suffers an injury and the right to bring a lawsuit accrues. *Wisniewski v. Diocese of Belleville*, 406 Ill. App. 3d 1119, 1150 (2011). However, our courts have recognized that a mechanical application of this general rule could bar a plaintiff from bringing suit before the plaintiff is aware he was injured. *Id*; *Golla v. General Motors Corp.*, 167 Ill. 2d 353, 360 (1995). To alleviate the potentially harsh consequences that could flow from a literal application of a relevant statute of limitations, the judiciary created the "discovery rule," which postpones commencement of the statute of limitations until the injured party knows or reasonably should know he has been injured and that the injury was wrongfully caused. *Golla*, 167 Ill. 2d at 360-61; *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 20.

¶ 20 Our supreme court has identified several factors that guide application of the discovery rule. The term "wrongfully caused" does not connote knowledge of negligent conduct or knowledge of the existence of a cause of action; rather, the term must be viewed as a general and generic term. *Khan*, 2012 IL 112219, ¶ 22 (citing *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 416 (1981)). A plaintiff who knows he has suffered from a wrongfully caused injury has a duty to investigate further concerning the existence of a cause of action. *Witherell v. Weimer*, 85 Ill.

2d 146, 156 (1981). "[W]hen a party knows or reasonably should know both that an injury has occurred and that it was wrongfully caused, the statute begins to run and the party is under an obligation to inquire further to determine whether an actionable wrong was committed." *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 171 (1981). "At some point the injured person becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved. At that point, under the discovery rule, the running of the limitations period commences." *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 416 (1981). In addition, it is not necessary for a plaintiff to know the full extent of his injuries before the statute of limitations begins to run. *Golla*, 167 Ill. 2d at 364.

¶ 21 In many cases, the time at which an injured party knows or reasonably should have known both of his injury and that it was wrongfully caused will be an issue of fact to be determined by the finder of fact. *Witherell*, 85 Ill. 2d at 156. However, the issue becomes one for the court if only one conclusion can be drawn from the undisputed facts. *Id*.

¶ 22 The record in this case supports only one conclusion. A review of the record shows that on July 28, 2008, when the IRS sent Chua a letter assessing tax penalties under IRC §6707A for failing to disclose a reportable listed transaction, Chua was aware of sufficient facts to put it on notice that it suffered an injury as a result of defendants' alleged wrongful actions and omissions regarding the Plan. Chua expressly acknowledged it knew it had suffered an injury and damages when, roughly within a week of receiving the July 28th letter from the IRS, Chua instructed its attorneys to send Davis and Tong proposed Tolling Agreements which would have suspended the statute of limitations on any causes of action Chua might have against them.

¶ 23 Chua knew it was injured and that the injury was wrongfully caused on July 28, 2008, thereby triggering the two-year statute of limitations set forth in section 13-214.4 of the Code.

However, Chua did not file its verified complaint until May 11, 2011, almost three years later. As a result, the trial court correctly dismissed Chua's claims against Davis and Tong as time-barred by the two-year statute of limitations in section 13-214.4 of the Code.

¶ 24 Chua attempts to invoke the doctrines of fraudulent concealment and equitable estoppel to toll the statute of limitations. However, neither of these doctrines applies.

¶ 25 The doctrine of fraudulent concealment set forth in section 13-215 of the Code tolls the running of the statute of limitations until plaintiff discovers the cause of action or discovers facts that reasonably put him on notice of it and provides a five-year extension to the limitations period if the defendant fraudulently conceals the action. Section 13-215 provides that "[I]f a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such cause of action, and not afterwards." 735 ILCS 5/13-215 (West 2010).

¶ 26 A plaintiff seeking to apply section 13-215 must show that the defendant engaged in affirmative acts or representations designed to prevent discovery of the cause of action or to induce the plaintiff to delay filing his claim. *Diotallevi v. Diotallevi*, 2013 IL App (2d) 111297, ¶ 37. Here, Chua alleged that defendants hid revenue rulings which would have revealed problems with the Plan and claims that defendants never advised it to seek the advice of an attorney or tax advisor. To accept Chua's arguments, this court would have to ignore the complaint's exhibits, which control over the allegations. *Bajwa v. Metropolitan Life Ins. Co.*, 208 Ill. 2d 414, 431 (2004).

¶ 27 The proposal that was submitted to Chua concerning the Plan specifically stated that no legal or tax advice was being given and that Chua should consult with its attorney and/or

accountant with any questions. In regard to the revenue rulings, they are public documents available on the internet. A lawyer or tax advisor could have found them. In short, there was no concealment or fraud on the part of Davis or Tong.

¶ 28 Moreover, courts in Illinois have declined to apply section 13-215 of the Code when a plaintiff has knowledge of his or her cause of action within the statute of limitations period. *J.S. Reimer, Inc. v. Village of Orland Hills*, 2013 IL App (1st) 120106, ¶ 51. In this case, Chua had knowledge of its causes of action against defendants with a reasonable amount of time left in the limitations period to file suit and therefore Chua cannot rely on the tolling provision in section 13-215 to save its claims.

¶ 29 In the same way that fraudulent concealment does not apply to toll the statute of limitations in this case, equitable estoppel also does not apply to toll the statute of limitations for Chua's claims against Davis and Tong. "Equitable estoppel occurs where a party is barred from asserting certain rights because of conduct which the other party relied upon in good faith and was thereby led to change its position." *J.S. Reimer, Inc.*, 2013 IL App (1st) 120106, ¶ 35. "A plaintiff claiming estoppel must have had no knowledge or means of discovering the true facts within the period of limitations." *Id*. at ¶ 36. Here, equitable estoppel does not apply because Chua had knowledge of its injury and causes of action against defendants in July 2008, and after that, had two years under section 13-214.4 of the Code to file suit.

¶ 30 Chua next posits several new arguments and theories it never raised before the trial court. Chua argues it did not discover its causes of action against Davis and Chua concerning the IRS penalty proceedings for failure to disclose a reportable listed transaction until the IRS sent it a letter on February 28, 2011, containing a revised calculation of penalties under IRC §6707A. In support of this argument, Chua raises yet another new argument. Chua now argues that its

claims against defendants were not "ripe" until September 27, 2010, when President Obama signed into law the Small Business Jobs Act (Jobs Act) which changed the way tax penalties under §6707A were calculated. The premise of Chua's new ripeness argument is that in July 2008, it had not yet suffered an injury with respect to the tax penalties under IRC §6707A, because its damages were contingent until the Jobs Act was enacted on September 27, 2010. Chua uses this new argument to bolster its new theory that it did not discover its causes of action regarding the §6707A penalties until February 28, 2011.

¶ 31 Chua also contends that its claims against Davis and Tong were not ripe in July 2008, because there "were bills before Congress to terminate applying 6707A penalties to 412(i) Plans." In June 2008, a bill was introduced to the Senate authorizing the Secretary of the Treasury to rescind or waive all or a portion of a §6707A penalty if certain criteria were met in an individual case. See S. 3121, 110th Cong. (2008) (enacted); 26 U.S.C. §6707A(d). However, this bill, which was enacted, did not attempt to, nor did it terminate all §6707A penalties in cases concerning 412(i) plans. The enacted measure had no effect on Chua's liability.

¶ 32 In any event, Chua's new arguments are not only forfeited because they were never raised in the trial court (*Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 413 (2002)), they are also meritless. In 2008, the IRS assessed monetary tax penalties against Chua under the then-existing version of §6707A. The Jobs Act did not suspend or modify Chua's liability under §6707A, it merely changed the way the IRS calculated penalties under §6707A. The Jobs Act resulted only in a change in the amount Chua owed in penalties.

¶ 33 Chua's arguments concerning ripeness fail to address the issue of whether it suffered an injury in the form of §6707A penalties as of July 28, 2008, and instead focuses on the extent of the penalties it was ultimately required to pay. But as our supreme court has held, "[t]here is no

requirement that a plaintiff must discover the full extent of her injuries before the statute of limitations begins to run." *Golla,* 167 Ill. 2d at 367; *Khan,* 2012 IL 112219, ¶ 22 (same).

¶ 34 Finally, we summarily reject Chua's allegations that counsel for defendant Davis engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(a)(5) of the Illinois Rules of Professional Conduct (Ill. Rs. Prof'l Conduct R. 8.4(a)(5) (eff. July 6, 2001)).

¶ 35 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 36 Affirmed.