2016 IL App (1st) 141872-U

FIRST DIVISION
FEBRUARY 29, 2016

No. 1-14-1872

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LESLIE A. BLAU, P.C.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 11 M1 111020
	)	
ECLIPSE MANUFACTURING COMPANY,	)	Honorable
	)	Jessica O'Brien,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Liu and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly dismissed as untimely plaintiff law firm's breach of contract action, brought as an assignee of its former client, against defendant; section 13-217 of the Code of Civil Procedure did not apply to toll the statute of limitations.

¶ 2 This appeal arises from the November 22, 2013 order entered by the circuit court of Cook County, which dismissed with prejudice an action for breach of contract initiated by plaintiff Leslie A. Blau, P.C. (Blau), against defendant Eclipse Manufacturing Company (Eclipse). On appeal, Blau argues that the circuit court erred in dismissing with prejudice its timely filed action

against Eclipse. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 The pertinent facts set forth below are excerpted from this court's June 15, 2010 order resolving an earlier lawsuit filed by Blau against Eclipse. See *Leslie A. Blau, P.C. v. Eclipse Manufacturing Co.*, No. 1-09-0616 (2010) (unpublished order under Supreme Court Rule 23). In 1998, Blau, a law firm then doing business as Blau & Bonavich, represented Robert Okon (Okon) in an action against Eclipse (the underlying action). *Okon v. Eclipse Manufacturing Co.*, (Cir. Ct. No. 98 CH 5595). In the underlying action, Okon sued Eclipse for unpaid commissions and to enforce an alleged option agreement allowing Okon to purchase Eclipse stock. On August 2, 1999, prior to trial, Okon and Eclipse reached a limited settlement agreement on the sole issue of unpaid commissions (the 1999 settlement agreement). The 1999 settlement agreement, signed by Okon and Eclipse's president, Robert Hinman (Hinman), provided that "[d]efendant Eclipse shall pay [Okon] $25,000.00 within ten days by a check to [Blau] in exchange for a dismissal with prejudice limited to a release of commission claims." However, the 1999 settlement agreement did not contain any language regarding litigation expenses incurred and advanced by Blau on behalf of Okon, nor did it contain a provision stating that the $25,000 settlement proceeds were to be used to satisfy the debt that Okon owed Blau for the litigation costs it had incurred while representing Okon. It is undisputed that Eclipse never paid Okon $25,000 pursuant to the 1999 settlement agreement. The remaining issue on the alleged option agreement proceeded to trial in the underlying action in November 1999, at which Okon prevailed under the theories of breach of contract and injunctive relief against Eclipse. However, Eclipse appealed

and on March 23, 2001, the judgment was reversed on appeal. *Okon v. Hinman*, No. 1-99-4000 (2001) (unpublished order under Supreme Court Rule 23).

¶ 5 On October 10, 2001, Okon filed a *pro se* lawsuit against Eclipse, which sought to collect the unpaid commission that was the subject of the 1999 settlement agreement between Okon and Eclipse. Subsequently, Blau filed a motion to intervene. On March 6, 2002, Okon's *pro se* action was dismissed for want of prosecution.

¶ 6 On November 22, 2002, Okon filed for Chapter 7 bankruptcy in the United States Bankruptcy Court of the Northern District of Illinois. *In re Okon*, No. 02-46207 (Bank. N.D. Ill. 2004). Okon listed Blau as one of his creditors to whom he owed $34,970.51, but failed to schedule as an asset the proceeds from the 1999 settlement agreement as part of the bankruptcy estate. Okon also failed to list as part of his assets on the petition for bankruptcy any claims against Eclipse or its president, Hinman. On May 14, 2003, Blau made a written offer to the bankruptcy trustee to purchase any rights Okon had under the 1999 settlement agreement, for $1,000. However, the bankruptcy trustee rejected the offer. On December 2, 2004, the trustee filed a report stating that there were no assets in the bankruptcy estate to be administered for the benefit of creditors. On December 15, 2004, Okon's bankruptcy proceedings closed and the trustee was discharged.

¶ 7 On November 22, 2006, Blau filed an action in the circuit court against Eclipse, alleging breach of contract, promissory estoppel, unjust enrichment, and fraudulent inducement (case No. 06 M1 192312) (the 2006 action). The basis of Blau's claims stemmed from Eclipse's failure to pay the $25,000 under the 1999 settlement agreement. The circuit court dismissed without prejudice the complaint. Blau then amended its complaint to include an additional claim for enforcement of attorney's lien under the Attorney's Lien Act (770 ILCS 5/1 (West 2006)). The

circuit court again dismissed without prejudice the amended complaint. On August 21, 2008, Blau filed a second amended complaint, which asserted a new theory of recovery—that Eclipse owed the proceeds of the 1999 settlement agreement to Blau based on an equitable attorney's lien. Blau's equitable attorney's lien claim survived Eclipse's motion to dismiss, and, on February 4, 2009, a bench trial was held during which a principal at Blau testified that Blau had paid $34,970.51 in expenses on behalf of Okon in the underlying action, but admitted that Blau was aware that Okon had never listed the $25,000 settlement proceeds as an asset of the bankruptcy estate. Following trial, the trial court entered judgment in the amount of $25,000 in favor of Blau under the equitable lien theory, but directed the parties to submit briefs on the issue of whether prejudgment interest and costs should also be awarded. On May 13, 2009, the trial court entered an order awarding Blau 5% annual compound interest in the amount of $15,228.67 and $364 in fees and costs, in addition to the $25,000 judgment previously awarded at the close of trial on February 4, 2009.

¶ 8 On June 15, 2010, in reversing the judgment of the trial court, this court held that Blau had no equitable lien over the proceeds of the 1999 settlement agreement because there was no written assignment or an attorney-client agreement between Blau and Okon to clarify what rights, if any, Blau had under the 1999 settlement agreement. See *Leslie A. Blau, P.C. v. Eclipse Manufacturing Co.*, No. 1-09-0616 (2010) (unpublished order under Supreme Court Rule 23).

¶ 9 On June 28, 2010, after losing the appeal, Blau obtained a written assignment from Okon, which provides in pertinent part that "Robert E. Okon hereby assigns to [Blau]: Any and all claims, rights to sue, or causes of action that could be asserted by [Okon] against [Eclipse] and/or against [Hinman], including without limitation any claims for failure to pay the [1999 settlement agreement proceeds]."

¶ 10 On February 14, 2011, Blau, as an assignee of Okon, filed a "verified complaint" against Eclipse in the instant action (case No. 11 M1 111020), alleging one count of breach of contract. The premise of the cause of action alleges that Blau had, under the June 28, 2010 written assignment, all legal rights to recover the $25,000 proceeds from the 1999 settlement agreement that Eclipse had failed to pay Okon.

¶ 11 On April 20, 2011, Eclipse moved to dismiss the instant action under section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2010)), arguing that the action was time-barred; that Okon's bankruptcy proceedings extinguished his, and therefore Blau's, claim to the settlement proceeds; and that the action was barred by the doctrine of *res judicata*.

¶ 12 On October 17, 2011, the circuit court granted Eclipse's motion to dismiss, without prejudice.

¶ 13 In March 2012, Blau sought and was granted permission by the bankruptcy court to reopen Okon's bankruptcy estate. He then filed a motion to compel the bankruptcy trustee to abandon the unscheduled asset—Okon's causes of action and rights to sue Eclipse relating to the 1999 settlement agreement—from the bankruptcy estate. On June 1, 2012, the bankruptcy court granted Blau's motion to compel abandonment of the 1999 settlement agreement from the bankruptcy estate. Thereafter, Blau sought and was granted leave from the circuit court to amend its complaint against Eclipse.

¶ 14 In November 2012,[1] Blau filed a first amended complaint against Eclipse, which included allegations of the bankruptcy court's June 1, 2012 disposition. On February 7, 2013, Eclipse filed a section 2-619 motion to dismiss the first amended complaint, arguing again that the action

[1] Blau submitted the first amended complaint to the circuit court on July 6, 2012, along with its motion for leave to file the first amended complaint, which was granted by the court in November 2012.

was time-barred; that it was barred by the doctrine of *res judicata*; and that Okon's bankruptcy proceedings extinguished his, and therefore, Blau's, claim to the settlement funds.

¶ 15 On November 22, 2013, the circuit court granted Eclipse's motion to dismiss with prejudice, finding that Blau's sole basis for recovery is as Okon's assignee under the 1999 settlement agreement. The circuit court found that although Okon's rights under the 1999 settlement agreement were not extinguished by his 2004 bankruptcy, the bankruptcy proceedings did not toll the statute of limitations on his own breach of contract claim (which expired in 2009) against Eclipse under the 1999 settlement agreement. Thus, the circuit court found, any rights by Okon to a breach of contract claim against Eclipse was time-barred at the time Okon executed the June 28, 2010 written assignment purportedly granting to Blau his rights to sue Eclipse under the 1999 settlement agreement. As such, the circuit court found, Blau, as Okon's assignee, cannot assert a breach of contract claim against Eclipse in the instant action, which was filed on February 14, 2011. In dismissing the instant action with prejudice, the circuit court also found Blau's arguments relating to section 13-217 of the Code (735 ILCS 5/13-217 (West 2010)), to be unpersuasive, noting that it did not relate back to Blau's 2006 action because the two actions did not assert the same claim or cause of action, where Blau sued Eclipse in a different capacity in each action.

¶ 16 On December 23, 2013, Blau filed a "motion for reconsideration or alternatively, to vacate" the November 22, 2013 judgment (motion to reconsider), which was denied by the circuit court on May 19, 2014.

¶ 17 On June 16, 2014, Blau filed a timely notice of appeal. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 (eff. Feb. 1, 1994) and 303(a) (eff. June 4, 2008).

¶ 18 ANALYSIS

¶ 19 The relevant inquiry on appeal before us is whether the circuit court erred in dismissing with prejudice Blau's breach of contract lawsuit against Eclipse, which we review *de novo*. See *Duffy v. Orlan Brook Condominium Owners' Ass'n*, 2012 IL App (1st) 113577, ¶ 14.

¶ 20 Blau argues that the circuit court erred in dismissing the instant action as untimely, arguing that, pursuant to section 13-217 of the Code, the instant February 14, 2011 action was brought within one year after this court's June 15, 2010 order reversing judgment entered by the trial court in the 2006 action. Blau contends that although Okon's own rights under the 1999 settlement agreement expired in 2009—10 years after the cause of action accrued—Blau's right to recover under the 1999 settlement agreement was not time barred because Blau "had already fully prosecuted [the 2006 action] to recover the settlement proceeds well within the period provided by the ten-year statute of limitations." Blau further argues that its February 2011 action also properly qualifies as a refiling under section 13-217 because it contains the same cause of action, involving the same group of operative facts, as the 2006 action. Blau also argues that in making its ruling, the circuit court erred in conflating section 2-616(b), which governs the amendments of pleadings, with section 13-217 of the Code.

¶ 21 Eclipse counters that the circuit court properly dismissed the action with prejudice, where the action was barred by the statute of limitations and section 13-217 did not apply to allow the filing of the instant action. Even if section 13-217 did apply, Eclipse argues, the first amended complaint filed by Blau in the instant action did not relate back to the original February 2011 complaint under section 2-616(b) of the Code because it was based on new facts that developed after the February 2011 filing and, thus, it was an impermissible second "refiling" under section 13-217. Eclipse further argues that, even if the instant action was considered the "same" cause of

action as Blau's 2006 action, the instant action would be barred by the doctrine of *res judicata*. Eclipse contends that, even if the statute of limitations and *res judicata* did not bar the instant action, the action was barred for the independent reason that Okon's bankruptcy proceedings extinguished his, and therefore Blau's, claim to the settlement funds and that the subsequent June 2012 "abandonment" of the claim by the bankruptcy trustee did not allow Blau to possess the claim because Okon never scheduled it as part of the bankruptcy estate.

¶ 22 A section 2-619 motion to dismiss admits the legal sufficiency of the plaintiff's complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiff's claim. *Barber v. American Airlines, Inc.*, 241 Ill. 2d 450, 455 (2011). A section 2-619 motion admits as true all well-pleaded facts, as well as all reasonable inferences that may arise from those facts. *Bjork v. O'Meara*, 2013 IL 114044, ¶ 21. Further, in ruling on a section 2-619 motion, a court must interpret all pleadings and supporting documents in favor of the nonmoving party. *Id.* We can affirm the circuit court's dismissal on any proper basis supported by the record. See *CNA International, Inc. v. Baer*, 2012 IL App (1st) 112174, ¶ 31.

¶ 23 The case at bar pertains to the circuit court's dismissal with prejudice of the breach of contract action filed by Blau, as Okon's assignee, against Eclipse. It is well settled that an assignment transfers to the assignee all the right, title, or interest of the assignor in the thing assigned; thus, the assignee stands in the shoes of the assignor. *Apollo Real Estate Investment Fund, IV, L.P. v. Gelber*, 398 Ill. App. 3d 773, 779 (2009). The assignee can obtain no greater right or interest than that possessed by the assignor. *Id.* An assignee's rights cannot go beyond what it was assigned. *Id.* Further, an assignee's claims are subject to the defenses which existed against the assignor at the time of the assignment. *Allis-Chalmers Credit Corp.*, 30 Ill. App. 3d

423, 424 (1975). Moreover, an assignor cannot assign a claim that he no longer possesses. *Loyola University Medical Center v. Medicare HMO*, 180 Ill. App. 3d 471, 479 (1989).

¶ 24 In the case at bar, the settlement agreement between Okon and Eclipse in the underlying action was executed on August 2, 1999. The settlement agreement provided that Eclipse shall pay Okon $25,000 within 10 days, in exchange for a dismissal with prejudice of Okon's claim for unpaid commissions against Eclipse in the underlying action. Eclipse does not dispute that it was obligated to pay Okon $25,000 under the 1999 settlement agreement and that it failed to pay Okon any amount within the 10-day window. As such, Okon's breach of contract claim against Eclipse accrued 10 days after the execution of the settlement agreement—on August 12, 1999. Under Illinois law, the statute of limitations on written contracts is 10 years from the date the breach of contract claim accrued. See 735 ILCS 5/13-206 (West 2014). Thus, any claim by Okon for breach of contract against Eclipse expired 10 years later on August 12, 2009. It is important to note that Okon *did* file a *pro se* breach of contract action against Eclipse on October 10, 2001, within the 10-year statute of limitations period, which was dismissed for want of prosecution on March 6, 2002. However, the record does not indicate that Okon made any other attempts to sue Eclipse for breach of the 1999 settlement agreement. Because Okon's right to sue Eclipse for breach of contract expired on August 12, 2009, his breach of contract claim was time-barred at the time he purportedly assigned to Blau, via the June 28, 2010 written assignment, any rights he had under the 1999 settlement agreement. As an assignee, Blau stands in the shoes of its assignor, Okon, and did not have any greater rights than that possessed by Okon at the time of the purported assignment. Further, we find that Okon could not have assigned to Blau, the rights to a claim he no longer possessed. Thus, because Okon's right to sue Eclipse under the 1999 settlement agreement expired on August 12, 2009, we find that Blau, as an assignee of Okon, did

not have any right to sue Eclipse after August 2009. Therefore, Blau's instant action for breach of contract against Eclipse (case No. 11 M1 111020), which was brought in the capacity of Okon's assignee on February 14, 2011, was barred by the statute of limitations. In arriving at this holding, we note that Okon's 2004 bankruptcy proceedings did nothing to toll the statute of limitations on his breach of contract claim against Eclipse. Automatic stay provisions under the United States Bankruptcy Code (11 U.S.C. § 362) apply to *creditors* seeking to recover a claim against the debtor, and are inapplicable to lawsuits held by the *debtor*. See *Martin-Trigona v. Champion Federal Savings & Loan Ass'n*, 892 F.2d 575, 577 (7th Cir. 1989). The Seventh Circuit in *Martin-Trigona* explained that the "policy behind the statute *** is to protect the bankrupt's estate from being eaten away by creditors' lawsuits and seizures of property before the trustee has had a chance to marshal the estate's assets and distribute them equitably among the creditors." *Id.* Here, Blau, acting as an assignee of Okon the debtor, was not a *creditor* within the meaning of the automatic stay provisions under the Bankruptcy Code. Therefore, we hold that the bankruptcy proceedings did not toll the 10-year statute of limitations period and Blau's instant action against Eclipse was untimely. Accordingly, the circuit court did not err in dismissing the action with prejudice.

¶ 25 Nevertheless, Blau argues that the instant action against Eclipse, filed on February 14, 2011, was timely under section 13-217 of the Code. Blau claims that section 13-217 applies to the instant action because it was a proper refiling within one year of the adjudication of its earlier 2006 action on appeal on June 15, 2010, and the instant 2011 action was the same basic cause of action as Blau's 2006 action against Eclipse. Blau argues that regardless of whether Okon himself would have been barred from bringing an action for breach of contract against Eclipse in 2011, Blau was not barred from bringing the instant 2011 action because it had "fully prosecuted

[the 2006 action] to recover the settlement proceeds" well within the 10-year statute of limitations period.

¶ 26 Section 13-217 of the Code provides in pertinent part the following:

> "[*I*]*f judgment is entered for the plaintiff but reversed on appeal*, or if there is a verdict in favor of the plaintiff and, upon a motion in arrest of judgment, the judgment is entered against the plaintiff, or the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, *** *then, whether or not the time limitation for bringing such action expires during the pendency of such action*, the plaintiff, his or her heirs, executors or administrators *may commence a new action within one year or within the remaining period of limitation, whichever is greater, after such judgment is reversed or entered against the plaintiff*, or after the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want to prosecution ***." (Emphases added.) 735 ILCS 5/13-217 (West 1994).[2]

¶ 27 Blau points to the italicized portions of the statute above and argues that the instant 2011 action was a proper refiling within the meaning of section 13-217 because it was filed within one year after this court reversed judgment that was entered in favor of Blau by the trial court in the 2006 action. We find unpersuasive Blau's arguments that section 13-217 applies to the instant

[2] This version of section 13-217 is currently in effect because it preceded the amendments of Public Act 89-7, § 15, eff. March 9, 1995, which our supreme court found unconstitutional in its entirety. See *Hudson v. City of Chicago*, 228 Ill. 2d 462, 469 n. 1 (2008) (citing *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997)).

action such that the instant action was timely filed. In *Hamilton v. Chrystler Corp.*, 281 Ill. App. 3d 284 (1996), the plaintiff, in his capacity as shareholder of a corporation, filed a timely complaint against the defendant. *Id.* at 285-86. The plaintiff voluntarily dismissed that action. *Id.* at 286. Subsequently, the plaintiff, in his individual capacity, filed another action outside the statute of limitations, naming the same parties as defendants. *Id.* at 285-86. The defendant moved for judgment on the pleadings, contending the second complaint was time-barred. *Id.* The circuit court denied the motion. *Id.* at 286. On appeal, the defendant argued the second complaint did not assert the same cause of action as the first complaint, and consequently, the savings provision of section 13-217 of the Code did not apply. *Id.* at 288. The *Hamilton* court agreed and found that although the two complaints arose out of the same transaction or occurrence and named the same defendants, the causes of action were not identical because the first complaint was brought by the plaintiff in his capacity as shareholder on behalf of a corporation, and the second complaint was brought by the plaintiff as an individual. *Id.* at 289-90.

¶ 28 Applying the principles of *Hamilton*, we find that section 13-217 did not apply to save Blau's 2011 action, which was filed outside the 10-year statute of limitations period. In the 2006 action, Blau asserted its *own* right to recover the settlement proceeds under the theory of equitable attorney's lien. After a bench trial on the merits, the trial court in the 2006 action entered judgment for Blau. However, this court reversed that judgment on the merits on June 15, 2010, finding that Blau failed to establish an equitable attorney's lien over the settlement proceeds. It was only after losing the appeal in the 2006 action that Blau obtained a purported written assignment from Okon. By contrast, Blau's instant 2011 action sued Eclipse in a different capacity by asserting *Okon's* right, as Okon's *assignee*, to recover the settlement

proceeds from Eclipse. Like *Hamilton*, the 2006 and 2011 actions were brought by Blau in two different capacities and, thus, section 13-217 did not apply because they did not assert the same causes of action.

¶ 29 In arguing that section 13-217 applied to the instant case, Blau cites to *Mabry v. Boler*, 2012 IL App (1st) 111464, *Gonzalez v. Thorek Hospital & Medical Center*, 143 Ill. 2d 28 (1991), and *Gelber*, 398 Ill. App. 3d 773. We find these cases to be distinguishable, as they do not involve actions brought by plaintiffs in different capacities, but simply successive pleadings by the same plaintiff in the same capacity.

¶ 30 Blau further points to the part of section 13-217 that provides "if judgment is entered for the plaintiff but reversed on appeal," then a plaintiff can refile a new action within one year of the reversal, arguing that this part of the statute would be meaningless if Blau was not permitted to fix the problems which this court had deemed deficient on appeal in June 2010. We reject this contention, as Blau has cited no authority showing that Blau can bring an action in one capacity against Eclipse after the 10-year statute of limitations had expired and bootstrap that untimely action to an earlier filed action, which was brought in a completely different capacity, to toll the statute of limitations. Moreover, the purpose of section 13-217 is to facilitate the disposition of litigation upon the merits and to avoid its frustration upon grounds that are unrelated to the merits. *Gendek v. Jehangir*, 119 Ill. 2d 338, 343 (1988); *Mabry*, 2012 IL App (1st) 111464, ¶ 16 (section 13-217 operates as a " 'savings statute, with the purpose of facilitating the disposition of litigation on the merits and to avoid frustration upon grounds unrelated to the merits' ") (quoting *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, 794 (1998)). Here, however, Blau's 2006 action already had the benefit of a bench trial and was resolved on the merits on appeal in 2010. To allow Blau to file a new action in 2011 as Okon's assignee, *after*

Okon's own rights to sue Eclipse under the 1999 settlement agreement had expired in 2009, by piggybacking the newly filed claim as if it were the same as the 2006 action, would essentially alter Illinois' well-settled laws on assignment. We decline to deviate from these time-honored principles.

¶ 31 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County. In light of our holding, we need not address Eclipse's alternative arguments.

¶ 32 Affirmed.