2016 IL App (1st) 150920-U

No. 1-15-0920

Fourth Division
March 24, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

DAVID RIDLEY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 13 CH 1025
	)	
QSR, INC., d/b/a TACO BELL	)	Honorable
#5751, a Wisconsin Corporation,	)	Thomas R. Allen,
	)	Judge Presiding.
Defendant-Appellee.	)	

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice McBride and Justice Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: Where plaintiff's claims are barred by the applicable five-year statute of limitations and laches, the trial court did not err in granting defendant's motion for summary judgment.

¶ 2 Plaintiff David Ridley appeals from orders of the trial court denying partial summary judgment in his favor and granting summary judgment in favor of defendant QSR, Inc., d/b/a Taco Bell #5751 (QSR) in his negligence, nuisance and trespass action seeking monetary and equitable relief against defendant. Plaintiff's claims center on allegations that his property, which

is located next to defendant's property, has suffered from an infestation of rats caused by defendant's manner of disposing of grease. On appeal, plaintiff contends that the trial court erred in (1) ruling that evidence he submitted in support of his motion for partial summary judgment was not competent evidence; (2) denying his motion for partial summary judgment; and (3) granting defendant's motion for summary judgment on the basis that his claims are barred by the applicable statute of limitations and laches. We affirm.

¶ 3 BACKGROUND

¶ 4 The record reveals that in 1993 plaintiff purchased a two-story, mixed use building located at 7818 S. Stony Island. In or around 1994 to 1995, a Taco Bell restaurant was built on property located at 7856 S. Stony Island, which is next to plaintiff's property. Defendant QSR purchased this Taco Bell franchise on July 23, 1997. Defendant's property and plaintiff's property are separated by an area that is 3 feet wide, 150 feet long, and which is currently filled with loose stones (the Strip). Defendant keeps its garbage dumpsters in a corral adjacent to the Strip, on the southeast side of the Taco Bell parking lot. Commencing in 1999, plaintiff's property was infested with rats, which plaintiff suspected was caused by Taco Bell's manner of disposing of grease.

¶ 5 On January 14, 2013, plaintiff filed a *pro se* complaint in which he alleged, *inter alia*, that from 1995 through 1999, as part of its normal waste disposal process, defendant regularly accumulated containers filled with waste grease, a by-product of its cooking process, and poured it onto the Strip. Plaintiff alleged that as part of the normal flow process, the waste grease migrated beyond the southern border of his property and under the foundation and subsoil of his building, and his property has been infested with rats from 1999 through the present as a result.

Plaintiff raised claims of negligence, nuisance and trespass and sought monetary damages as well as equitable relief in the form of numerous injunctions.

¶ 6 Defendant filed a motion to dismiss plaintiff's complaint in its entirety on the basis that his claims for monetary damages are barred by the applicable statute of limitations and his claims for injunctive relief are barred by the equitable doctrine of laches. The trial court granted the motion, but gave plaintiff leave to file an amended complaint.

¶ 7 On August 20, 2013, plaintiff filed a *pro se* amended complaint wherein he once again raised claims of negligence, nuisance and trespass based on his allegations that his property has been subjected to a rodent infestation as a result of defendant's manner of disposing of grease.[1] However, contrary to his allegations in his initial complaint, plaintiff alleged that defendant improperly disposed of grease on the Strip from October 7, 2011, to the present, and that the rat infestation on his property has been in existence from October 2011 through the present. Plaintiff once again sought to recover monetary damages and equitable relief in the form of numerous injunctions.

¶ 8 In his amended complaint, plaintiff further alleged that defendant was cited on numerous occasions for violations of certain ordinances designed to prevent the burrowing, breeding, and establishment of permanent habitation for rodents. In support of this allegation, plaintiff attached a Notice to Abate dated October 7, 2011, which was issued to defendant from the Department of Streets and Sanitation (Department). The Notice to Abate reflects that on that date, an inspector noted that there were rodent burrows in the soft exterior area of defendant's premises along the fence line and dumpster, as well as rat droppings and rat activity in the corral around the dumpster. The Notice to Abate notified defendant that if it did not rectify the situation within 15

[1] Plaintiff attached a series of photographs to his complaint which he alleged depicted spilled grease on and around the Strip at various points throughout 2013, however the copies of the photographs contained in the record are almost entirely dark and it is impossible to discern any images whatsoever.

days, it would be deemed guilty of a violation of section 7-38-020 of the Municipal Code of Chicago. Plaintiff also attached an August 14, 2013, letter to him from Janet Gray with the Department. Therein, Ms. Gray states that she is responding to plaintiff's Freedom of Information Act Request for information pertaining to an inspection at the Taco Bell at issue conducted by the Department on January 31, 2013. Ms. Gray states, *inter alia*, that during that inspection, two rodent holes were found on the property line between Taco Bell and plaintiff's property. Ms. Gray further states that upon re-inspection, the area was clean and clear of debris.

¶ 9 At his discovery deposition, plaintiff testified, *inter alia*, that sometime in 1999, he noticed a thick white substance in the Strip. There was quite a bit of the substance, and, upon examining it, he determined that it was grease that had solidified. At that point, he spoke with a manager of the nearby Taco Bell and showed the grease to him. It was his understanding that someone from the City of Chicago visited the Taco Bell shortly thereafter, suspended its license and ordered it to abate the area. From what he saw, Taco Bell removed the bushes and landscaping that had been in the Strip and replaced it with rocks.

¶ 10 Plaintiff further testified that he first noticed rats on his property in 1999. At that time he looked out of one of the upstairs windows in the rear of his building and saw that his backyard looked like a "resort for rats." Plaintiff further testified as follows:

> "Q. And as you said in your complaint, the rodent infestation has been continuous from 1999 to the present, correct?
> A. Yes.
> Q. And you believe that the rodent infestation was the result of their dumping grease from – Do you know how long they were dumping grease from up until 1999?
> A. From what I could ascertain, they had to have been dumping grease from the inception when they opened up until the time the city cited them.
> Q. What's your basis for this statement?
> A. Because there was no grease trap.
> Q. So that initial dumping of grease was what caused the rodent infestation, correct?
> A. I would say it probably caused the first initial infestation, yes."

Plaintiff further testified that in an attempt to get rid of the rats on his property, he "dug up" his yard in order to construct a building on it. This occurred from 2004 to 2006. When excavation commenced, he saw "rats just jumping out and running." Plaintiff acknowledged that this showed that the rat infestation on his land was continuous.

¶ 11 On September 16, 2014, plaintiff, who was now represented by counsel, filed a motion for partial summary judgment. Therein he argued that on October 7, 2011, defendant received a Notice to Abate from the Department for violations of a municipal ordinance of the City of Chicago which requires that areas outside of restaurants be protected against rodent infestation. Plaintiff argued that the violation of this ordinance was *prima facie* evidence of negligence or other fault, as well as nuisance *per se*, thereby entitling him to partial summary judgment in his favor on the issue of negligence and nuisance in Counts I and II of his first amended complaint.

¶ 12 In support of his motion, plaintiff attached his affidavit wherein he averred, *inter alia*, that beginning at least six months prior to October 2011, his property has experienced a large invasion of rodents. He further averred that he was personally present on October 7, 2011, when the Department inspected the Taco Bell located next to his property and is thus qualified to swear that the conditions noted in the Department's report of that inspection accurately reflect the conditions of the premises on that date. In support of his motion, plaintiff also attached the aforementioned Notice to Abate, as well as the August 14, 2013, letter from Ms. Gray.

¶ 13 On September 30, 2014, defendant filed a motion for summary judgment in its favor. Therein, defendant argued that plaintiff's claims for monetary damages were barred by the applicable five-year statute of limitations and his claims for injunctive relief were barred by the equitable doctrine of laches. In support of this motion, defendant attached excerpts of plaintiff's deposition testimony, relying in particular on his testimony that the initial dumping of grease in

1999 was what caused the rat infestation on his property, and that this infestation has been continuous since 1999.

¶ 14 Defendant also submitted the affidavits of Jim Davis and Ralph Freitag. Davis, defendant's market manager in 2011, averred, *inter alia*, that on October 27, 2011, the Department conducted a follow-up inspection of the Taco Bell at issue and found it to be in compliance with the Notice to Abate that had been issued on October 7, 2011. Freitag further averred that accordingly, the Department did not issue a citation to QSR or Taco Bell for a violation of any ordinance relating to the inspections conducted in October 2011. In turn, Freitag averred that he is the former CEO of defendant QSR, which is now dissolved. He further averred that QSR purchased the Taco Bell franchise that is the subject of this lawsuit on July 23, 1997, and sold it on April 22, 2014, and, accordingly, QSR no longer has any ownership interest or control of the subject Taco Bell, its employees or agents.

¶ 15 Following a hearing held on February 24, 2015, the court denied plaintiff's motion for partial summary judgment. In doing so, the court found, *inter alia*, that the evidence plaintiff had submitted in support of his motion was not competent evidence for purposes of summary judgment or even trial. The court then addressed defendant's motion for summary judgment and asked defense counsel why the motion that had been filed was one for summary judgment on the basis of statute of limitations and laches, as opposed to a motion to dismiss on the same basis, as was the case when defendant attacked the initial complaint. Defense counsel replied that defendant wanted to confirm, by way of plaintiff's deposition testimony, that the relevant time period was actually what plaintiff alleged in his initial complaint, as opposed to the time period he alleged in his amended complaint. After having done so, defense counsel felt that a motion for summary judgment was the best way, procedurally, to proceed.

¶ 16 Following substantive argument on the motion, the court granted defendant's motion for summary judgment and dismissed plaintiff's amended complaint with prejudice in its entirety. In doing so, the court stated, *inter alia*, that plaintiff signed the original complaint and that the allegations contained therein regarding the relevant timeframe serve as judicial admissions. Plaintiff now appeals.

¶ 17 ANALYSIS

¶ 18 On appeal, plaintiff contends that the trial court erred in finding that the evidence he submitted in support of his motion for partial summary judgment was not competent evidence, in denying his motion for partial summary judgment, and in granting defendant's motion for summary judgment. However, because we find that the court's ruling on defendant's motion for summary judgment is dispositive, it is the only issue we need to address.

¶ 19 Summary judgment is proper where the pleadings, admissions, affidavits and depositions on file reveal that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012); *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. In determining whether an issue of material fact exists, the court must construe the pleadings and evidentiary materials in favor of the non-moving party. *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986). We review the circuit court's entry of summary judgment *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 20 Counts I through III of plaintiff's first amended complaint seek monetary damages for the diminution in value of his property as a result of the rat infestation. Section 13-205 of the Code of Civil Procedure (Code) (735 ILCS 5/13-205 (West 2012)) provides that actions "to recover damages for injury done to property, real or personal *** shall be commenced within 5 years next after the cause of action accrued." Thus, to determine whether plaintiff's claims for

monetary damages are barred by this statute of limitations, we must first decide when plaintiff's causes of action accrued.

¶ 21 In general, a statute of limitations begins to run when facts exist that authorize one party to maintain an action against another, however equitable exceptions to this principle exist. *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 278, 285 (2003). Pursuant to the continuing tort doctrine, where a tort involves a continuing or repeated injury, the statute of limitations does not begin to run until the date of the last injury or the date the tortious acts cease. *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 345 (2002). In contrast, pursuant to the discovery rule, a cause of action accrues, and the limitations period begins to run, when the party seeking relief knows or reasonably should know of an injury and that it was wrongfully caused. *Feltmeier*, 207 Ill. 2d at 285.

¶ 22 Plaintiff argues that we should use the continuing tort theory in determining when his causes of action accrued. However, a continuing violation or tort is occasioned by continuing unlawful acts and conduct, not by continual ill effects from an initial violation. *Pavlik v. Kornhaber*, 326 Ill. App. 3d 731, 745 (2001) (citing *Hyon Waste Management Services, Inc. v. City of Chicago*, 214 Ill. App. 3d 757, 762 (1991)).

¶ 23 In his initial complaint, plaintiff alleged that defendant dumped grease from 1995 through 1999, that this dumping of grease caused a rat infestation on his property in 1999, and that the rat infestation has been ongoing since that time. Although in his amended complaint, plaintiff changed the timeframe of the grease dumping to 2011, and also alleged that the rat infestation did not commence until 2011, his allegations from his initial complaint serve as judicial admissions. *Coghlan v. Beck,* 2013 IL App (1st) 120891, ¶ 24 ("[A]party's admissions contained in an original verified pleading are judicial admissions that bind the pleader throughout the

litigation, even after the filing of an amended pleading that supercedes the original."). Moreover, at his deposition, plaintiff confirmed that the rodent infestation on his property has been continuous since 1999 and that it was caused by defendant dumping grease onto the Strip in 1999 and earlier. We thus find that the continuing tort theory is inapplicable in this case where plaintiff is seeking monetary damages for continual ill effects in the form of a continuous rat infestation that was caused by the initial dumping of grease from 1995 through 1999.

¶ 24 In reaching this determination we observe that in *Belleville*, upon which plaintiff relies, the court noted the continuing tort theory, but declined to apply it in the case before it, which involved alleged breaches of car dealership agreements. *Belleville*, 199 Ill. 2d at 329, 347. In doing so, the court stated, *inter alia*, that there is no rule that the continuing tort theory is generally applicable in all tort cases, and that in the case before it, there were no unjust results that it could discern that would militate in favor of applying a continuing violation rule. *Id.* at 347. Similarly, here we discern no unjust results that would militate in favor of applying such a rule.

¶ 25 Defendant argues, and we agree, that pursuant to *Powell v. City of Danville*, 253 Ill. App. 3d 667, 670 (1993), the discovery rule applies in determining when plaintiff's causes of action accrued. In *Powell*, plaintiffs sued defendant, who operated a city-owned landfill, for trespass, nuisance and negligence in relation to toxic waste that defendant dumped into the landfill for a period of five years and which leached onto plaintiff's land, located next to the landfill. *Id.* at 668. The circuit court found that all of plaintiffs' claims were barred by the five-year statute of limitations in section 13-205 of the Code, and the reviewing court affirmed that judgment on appeal. *Id.* at 668, 670. In doing so, the court found that plaintiffs' claims accrued when the effects of the tortious act of dumping were either known, or should have been known, by

plaintiffs and noted that the evidence presented showed that plaintiffs were aware of the toxic waste dumping and resulting leaching for more than five years prior to filing their action. *Id.* at 669-70. The court reasoned that the concept of a continuing tort should not be confused with that of a continuing injury, and rejected plaintiffs' argument that the continuing tort doctrine should apply to the case before it and that they should be allowed to recover for damages that took place during the five-year time period immediately prior to filing their complaint. *Id.* at 668-69. The court emphasized the importance of plaintiff's knowledge of the wrongdoing. *Id.* at 670.

¶ 26 Here, as discussed above, plaintiff's allegations in his initial complaint, along with his deposition testimony, show that (1) he knew that defendant was dumping grease onto the Strip in 1999, (2) he was aware that his property was suffering from an infestation of rats in 1999, (3) he believed at that time that the rat infestation was caused by defendant dumping grease onto the Strip, and (4) he was aware that the rat infestation on his property has been continuous from 1999 to present. Based on the foregoing, we find that there is no question of material fact that as of 1999, plaintiff knew that defendant had dumped grease and that it had resulted in an infestation of rats on his property, and thus the five-year statute of limitations began to run at that time. Given that plaintiff did not file suit until 2013, well after the statute of limitations had expired, we find that the trial court did not err in granting defendant's motion for summary judgment on the basis that plaintiff's actions seeking monetary damages are untimely.

¶ 27 In so finding, we reject plaintiff's contention that his reference to "the first initial infestation" at his deposition establishes that there was a subsequent infestation which was caused by "a second tortious conduct" that occurred within the last five years, and thus his claims are not time barred. The fact remains that plaintiff's judicial admissions in his initial complaint establish that the rat infestation commenced in 1999 and was continuous. Further, although

plaintiff did use the phrase "first initial infestation" at his deposition, prior to doing so, and after having done so, he acknowledged that the infestation was continuous. Accordingly, plaintiff's argument fails.

¶ 28 Defendant further argues that plaintiff's claims for injunctive relief are barred by the equitable doctrine of laches. This doctrine precludes a litigant from asserting a claim when the opposing party is prejudiced due to the litigant's unreasonable delay in raising the claim. *Madigan v. Yballe*, 397 Ill. App. 3d 481, 493 (2009). The factors to consider in determining if laches applies include: " '(1) [c]onduct on the part of the defendant giving rise to the situation of which complaint is made and for which the complainant seeks a remedy; (2) delay in asserting the complainant's rights, the complainant having had notice or knowledge of defendant's conduct and the opportunity to institute a suit; (3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit[;] and (4) injury or prejudice to the defendant in the event relief is accorded to the complainant or the suit is held not to be barred.' " *LaSalle National Bank v. Dublin Residential Communities Corp.*, 337 Ill. App. 3d 345, 351 (2003) (quoting *Pyle v. Ferrell*, 12 Ill. 2d 547, 553 (1958)).

¶ 29 Here, as discussed above, no question of fact exists that plaintiff was aware in 1999 that there was a rat infestation on his property, that it was due to defendant's manner of disposing of grease, and that the infestation has been continuous since that time. Not only did plaintiff allege these facts in his initial complaint, but he confirmed them at his deposition. Also at his deposition, plaintiff testified that when he began the excavation process on his property in 2004, he saw rats jumping out of the ground and he acknowledged that this further illustrated that the rat infestation was a continuous one. Thus, although plaintiff was aware in 1999 of defendant's conduct pertaining to the dumping of grease, and the ill effects it was having on his property by

way of a rat infestation, not only did he not file suit at that time, but he also failed to file suit in 2004, when he saw that the rat infestation remained continuous. Instead, plaintiff waited 14 years from the time he first learned of his injury, and 9 years from the time he confirmed that his injury remained ongoing, to file suit. Plaintiff has offered no explanation for why he waited so long to file suit, and we conclude that he lacked the required diligence in pursuing his claims. See *Osler Institute, Inc. v. Miller*, 2015 IL App (1st) 133899, ¶ 25.

¶ 30 Further, where a legal remedy is available for the same claim, courts may rely on the legal limitation period in determining if laches applies. *Golden v. McDermott, Will & Emery*, 299 Ill. App. 3d 982, 994 (1998). Here, plaintiff is seeking both legal and equitable relief in Counts II and III of his amended complaint, which raise claims of nuisance and trespass, respectively. As previously discussed, plaintiff filed suit well after the five year statute of limitations had passed. Under such circumstances, where a plaintiff has not filed suit until after the legal statute of limitations period has expired, the defendant is not required to demonstrate prejudice resulting from plaintiff's delay in filing suit. *Id.* (citing *Schlossberg v. Corrington*, 80 Ill. App. 3d 860, 865 (1980)). That said, we note that a marked appreciation or depreciation in the value of the property which is the object of controversy, such that granting of relief would itself work an inequity, is evidence of injury or prejudice justifying the invocation of laches. *Schroeder v. Schlueter*, 85 Ill. App. 3d 574, 576 (1980). Here, plaintiff has alleged that his property has diminished in value as a result of the rat infestation. Allowing the infestation to continue for years without bringing suit certainly exacerbated the diminished value. We thus find that even if defendant were required to show prejudice, it has done so.

¶ 31 Based on the foregoing, we find that the trial court did not err in granting defendant's motion for summary judgment on the basis of laches given that there was no question of material

fact in this regard.[2] As previously noted, because we find that the trial court did not err in granting defendant's motion for summary judgment on the basis of statute of limitations and laches, we need not address plaintiff's remaining arguments.

¶ 32 CONCLUSION

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

¶ 34 Affirmed.

[2] We note that it would appear that plaintiff's claims for injunctive relief are also moot, given that Freitag averred that defendant QSR sold the Taco Bell franchise at issue on April 22, 2014, and thus currently has no ownership interest or control over the restaurant's employees or agents.