THIRD DIVISION
June 26, 2019

No. 1-18-1719

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FEDERAL INSURANCE COMPANY, a corporation, and MAYER BROWN LLP, a partnership,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellees,	)	
v.	)	No. 17 L 4961
DAVID TRESCH and NICHOLAS DeMARS,	)	
Defendants	)	
(David Tresch,	)	Honorable Thomas R. Mulroy,
Defendant-Appellant).	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County is affirmed; defendant failed to produce evidence plaintiffs knew or reasonably should have known their injury was wrongfully caused more than five years before filing their complaint, and plaintiffs produced evidence demonstrating the date of discovery of the cause of action was less than five years before the filing of the complaint, therefore, the trial court properly denied defendant's motion for summary judgment based on the statute of limitations; and defendant pled guilty and admitted the essential allegations of plaintiffs' cause of action in criminal proceedings based on the same conduct alleged in the complaint and is therefore estopped from denying those facts, therefore, the trial court properly granted summary judgment in favor of plaintiffs.

¶ 2 Plaintiffs, Federal Insurance Company (FIC), as assignee and subrogee of Mayer Brown LLP (Mayer Brown), and Mayer Brown, filed a complaint in the circuit court of Cook County against defendant-appellant David Tresch ("defendant") and Nicholas DeMars seeking to recover damages they caused Mayer Brown through a "kickback" scheme in which defendant, a Mayer Brown employee, directed business to DeMars' company, which performed services for Mayer Brown, in exchange for which DeMars gave defendant a share of his profits and later in which defendant submitted false invoices to Mayer Brown for work DeMars' company did not perform. FIC was Mayer Brown's insurer against employee theft. FIC paid Mayer Brown for its loss and was subrogated to Mayer Brown's claim against defendant and DeMars. Defendant pled guilty in criminal proceedings and FIC filed a civil suit to recover Mayer Brown's damages. Plaintiffs and defendant filed cross-motions for summary judgment (DeMars is not a party to this appeal). The circuit court of Cook County denied defendant's motion for summary judgment based on the expiration of the statute of limitations prior to plaintiffs' filing suit, and granted plaintiffs' motion for summary judgment based on collateral estoppel.

¶ 3 BACKGROUND

¶ 4 The following is taken from the complaint. FIC was a licensed insurer and issued an insurance policy to Mayer Brown covering employee theft. Defendant was an employee of Mayer Brown who worked in and eventually led their information technology (IT) department. Between 2004 and 2012 defendant and DeMars stole funds from Mayer Brown such that Mayer Brown was damaged in an amount in excess of $5,569,581. FIC paid Mayer Brown $5,469,581 under the employee theft policy it issued to Mayer Brown. Mayer Brown then assigned its action against defendant and DeMars to FIC. The complaint alleged FIC "is subrogated to the interest of Mayer Brown solely due to the misappropriation of funds by [defendant and DeMars] and subsequent payment to Mayer Brown LLP under the policy." The complaint further alleged

the government instituted criminal proceedings against defendant and DeMars in the United States District Court for the Northern District of Illinois and that defendant and DeMars both pled guilty to defrauding Mayer Brown. Plaintiffs' complaint alleged defendant and DeMars are estopped from denying the truth of the allegations in the complaint pursuant to 18 U.S.C. 3664(I), which states:

> "A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim." 18 U.S.C. § 3664.

¶ 5 The complaint alleged that to date, FIC and Mayer Brown had received $593,292.35 in restitution and sought a judgment against defendant and DeMars for $4,976,288.70.

¶ 6 Plaintiffs' attached the 10-count charging document (charge) in the federal court against defendant and DeMars to their complaint. Counts I through V of the charge alleged defendant recommended Mayer Brown use a company named NS Mater to perform work in Mayer Brown's IT department. DeMars was president of NS Mater. Defendant and DeMars were charged with participating in a scheme to defraud Mayer Brown whereby, in exchange for directing Mayer Brown's work to NS Mater, DeMars would "kick back" to defendant a portion of NS Mater's profits from that work. DeMars allegedly kicked back over $1,000,000 to defendant. Defendant also allegedly received more than $40,000 in kick backs from payments on invoices NS Mater submitted to Mayer Brown through defendant for legitimate work NS Mater performed for Mayer Brown from November 2004 to December 2005, and more than $1,100,000 in kickbacks on invoices NS Mater submitted to Mayer Brown between February

2006 and March 2011for legitimate work NS Mater performed. Count I alleged that as a result of this scheme, defendant obtained approximately $1,140,000 in kickbacks from DeMars.

¶ 7 Count VI of the charge against defendant and DeMars alleged an additional scheme to defraud Mayer Brown in that, on or about February 28, 2011, Mayer Brown told defendant that NS Mater would no longer be permitted to perform work for Mayer Brown. Defendant learned Mayer Brown was going to stop using NS Mater in late 2010 at which point defendant and DeMars "agreed to create and submit false invoices to [Mayer Brown] claiming NS Mater was owed money for work performed at [Mayer Brown] when, in fact, [defendant and DeMars] knew that no such work was performed by NS Mater at [Mayer Brown]." Defendant allegedly agreed to submit the false invoices and DeMars agreed to kick back the majority of the money he received from Mayer Brown. In or around November 2010 and June 2012 NS Mater submitted invoices totaling more than $1,100,000 to defendant for work NS Mater had not performed and defendant submitted the invoices for payment knowing they were false. Mayer Brown paid all but one of these false invoices and mailed checks totaling approximately $1,100,000 to NS Mater. From these payments DeMars allegedly kicked back approximately $970,000 to defendant. Count VI of the charge alleged that as a result of this scheme DeMars obtained approximately $1,100,000 and kept approximately $130,000 and defendant obtained approximately $970,000.

¶ 8 The charge alleged that "any property, real or personal, which constitutes or is derived from proceeds traceable to the violations" stated in the charge is subject to forfeiture, including "funds in the amount of $4,819,253.69," several items of real and personal property, and funds seized from two bank accounts.

¶ 9 Plaintiffs also attached the criminal judgment against defendant to the complaint. Defendant pled guilty to Count I of the charge and all other counts were dismissed. The

judgment imposed monetary penalties. That portion of the judgment states the total loss to Mayer Brown was $1,112,000 and ordered defendant to pay restitution in that amount. The judgment also ordered defendant to forfeit all rights to certain property but the order of forfeiture against defendant was not included in the record.

¶ 10 The parties engaged in discovery in this case. In April 2018 defendant filed a motion for summary judgment on the ground the statute of limitations expired prior to plaintiffs' filing of the complaint. Defendant's motion for summary judgment asserted that "on May 1, 2012, Jason Najacht, the Global Network Operations Manager, employed at Plaintiff Mayer Brown LLP 'advised Mayer Brown that NS Mater was still billing' the Plaintiff." Defendant's motion also asserted that on May 1, 2012, Najacht and "Robert Drawer, a Director, *** 'noticed continuing payments to NS Mater.' " Defendant's motion argued that plaintiffs filed the complaint more than five years after May 1, 2012, on May 16, 2017, and, therefore, the complaint "was filed after the statute of limitations expired." Defendant attached to his motion for summary judgment a document apparently prepared by Mayer Brown and provided to defendant in discovery titled "Chronology of Events." The document lists dates and date ranges and a description of an event. The document contains two entries for May 1, 2012 that state "Jason Najacht advised Mayer Brown that NS Mater was still billing M/B" and "Robert Drawer seized control of IT budgeting." The next entry lists a date range of May 1, 2012 to June 1, 2012 and states "Jason Najacht & Robert Drawer started to drill down on IT expenditures for areas to cut costs & noticed continuing payment to NS Mater (after NS Mater contract was cancelled effective 2/28/2011)." Additional entries list a date range of May 1, 2012 to June 10, 2012, including one that states "Mayer Brown became aware that defendant authorized payments to NS mater after their contract with Mayer Brown was cancelled."

¶ 11 In May 2018 plaintiffs filed their motion for summary judgment. Plaintiffs' motion for summary judgment asserted as undisputed facts that (1) in his answer to the complaint defendant admitted he pled guilty to defrauding Mayer Brown, (2) in his deposition defendant understood that as part of his guilty plea he made admissions of fact, and (3) "Tresch admitted in his deposition that he agreed in his plea agreement that there were $4,819,253.00 in damages caused by [his] fraudulent conduct." Plaintiffs argued defendant and DeMars are collaterally estopped from relitigating issues of fact and law previously adjudicated in their criminal trial. Plaintiffs cited *Corporacion Insular de Seguros v. Reyes-Munoz,* 849 F. Supp. 126 (D. Puerto Rico 1994), for the proposition that when a defendant is ordered to pay restitution, the conviction of the defendant in the prior case precludes the defendant from denying any essential allegations of the crime in a subsequent civil proceeding brought by the victim. Plaintiffs also argued that "the four factors necessary for collateral estoppel to arise out of a criminal conviction" are all satisfied in this case.

¶ 12 Plaintiffs also filed a response to defendant's motion for summary judgment arguing that defendant's evidentiary support for his motion is hearsay and defendant forfeited his argument the complaint was filed after the expiration of the statute of limitations by failing to raise it as an affirmative defense.

¶ 13 Defendant filed a response to plaintiffs' motion for summary judgment in which he asserted that at DeMars' sentencing the federal criminal trial judge stated that market prices for the work NS Mater performed where charged and the loss in this case was $2.1 million not $4.8 million. Defendant also argued there is "no basis for the $5,469,581.11 [*sic*] loss claimed by the Plaintiffs."

¶ 14 Following a hearing, the trial court granted plaintiffs leave to file an affidavit by Robert Drawer. Drawer's affidavit states, in part, "[t]he first time I learned that there may be any issues

with N.S. Mater was in a meeting with Jason Najacht on May 22, 2012. At that meeting, Jason told me that in his review of the budgets I had given him, he noticed an invoice from N.S. Mater that billed Mayer Brown for work that Jason knew had been performed by Mayer Brown employees." The trial court denied defendant's motion for summary judgment. The court granted plaintiffs' motion for summary judgment and entered judgment against defendant for $4,819,253 plus costs.

¶ 15 This appeal followed.

¶ 16 ANALYSIS

¶ 17 On appeal defendant argues the order granting summary judgment in favor of plaintiffs should be reversed because the trial court erred in ruling as a matter of law that (1) no genuine question of fact exists as to whether plaintiffs' complaint was timely filed and (2) defendant is estopped by his guilty plea in the criminal case from challenging the amount of damages plaintiffs' claimed. "A motion for summary judgment should only be granted if the pleadings, depositions and affidavits on file demonstrate that no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law. [Citation.] In determining whether a genuine issue as to any material fact exists, a reviewing court must view the evidence in the light most favorable to the nonmoving party. [Citation.]" *Romito v. City of Chicago*, 2019 IL App (1st) 181152, ¶ 36. "Summary judgment should not be granted where the material facts are disputed or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." (Internal quotation marks omitted.) *Construction Systems, Inc. v. FagelHaber, LLC*, 2019 IL App (1st) 172430, ¶ 21. "Appellate review of an order granting summary judgment is *de novo*. [Citation.]" *Romito*, 2019 IL App (1st) 181152, ¶ 36.

¶ 18 Section 13-205 of the Code of Civil Procedure (Code) (735 ILCS 5/13-205 (West 2016)) "is a five-year statute of limitations, which applies to actions for common-law fraud and other tortious misrepresentations." *Khan v. BDO Seidman, LLP*, 2012 IL App (4th) 120359, ¶ 22.

> "Regardless, though, of when a cause of action accrues, the discovery rule postpones the running of the statute of limitations until the date when the plaintiff knows, or reasonably should know, that the injury has been wrongfully caused. [Citation.] This is not to say that the statute of limitations waits until the plaintiff knows, or reasonably should know, the full extent of the wrongfully caused injury. [Citation.] Rather, the statutory period begins running just as soon as the plaintiff becomes aware, or reasonably should become aware, of the existence of some wrongfully caused injury." *Id.* ¶ 23.

This "discovery rule" "postpone[s] the commencement of the relevant statute of limitations until the injured plaintiff knows or reasonably should have known that he has been injured and that his injury was wrongfully caused." *Workforce Solutions v. Urban Services of America, Inc.*, 2012 IL App (1st) 111410, ¶ 51. "It is at that point that the injured person assumes the burden of inquir[ing] further as to the existence of a cause of action and to bring any such actions within the limitations period." (Internal quotation marks omitted.) *Id.*

> "Discovering whether an injury was 'wrongfully caused' means the injured party must have (1) sufficient information that its injury was caused by the actions of another and (2) sufficient information 'to spark inquiry in a reasonable person as to whether the conduct of the party who caused [the] injury might be legally actionable.' [Citation.] As to the second element, the injured party must have more than a mere suspicion that wrongdoing might have occurred in order to trigger the limitations period. [Citation.] A suspicion of wrongful conduct, '

> "without examining the reasons underlying those suspicions, is not enough to constitute constructive knowledge that an injury was wrongfully caused." ' [Citations.] Thus, the limitations period 'is not triggered during that period in which the party is attempting to discover whether her injury is wrongfully caused.' [Citation.]
>
> On the other hand, the injured party need not have actual knowledge of negligent conduct or know that an actionable wrong was committed before the limitations period begins to run. [Citation.] Among other things, that ' "assumes a conclusion which must properly await legal determination." ' [Citations.] Rather,
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> > '[a]t 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.' [Citation.]" *Workforce Solutions*, 2012 IL App (1st) 111410, ¶¶ 52-53.

"When a plaintiff should have discovered an injury usually raises a question of fact but determining when the limitations period commences can be decided as a matter of law if the facts are undisputed and only one answer is reasonable." *Construction Systems, Inc.*, 2019 IL App (1st) 172430, ¶ 20. In this case, summary judgment in defendant's favor would have been proper only if the undisputed facts solely allow for the conclusion that more than five years elapsed between the time Mayer Brown knew or should have known of its cause of action and the date plaintiffs' filed their complaint. See *id*. ¶ 22.

¶ 19 Defendant argues Mayer Brown was put on notice of its cause of action when the fraudulent invoices from NS Mater were discovered by Jason Najacht not when Najacht passed the information on to Robert Drawer. Defendant claims Jason Najacht was, at the time, Mayer Brown's Global Network Operations Manger and "a senior officer of the company in an authoritative, decision-making position, the same as Robert Drawer." Defendant asserts: "Plaintiffs have provided evidence that the invoices were discovered no later than May 22 by Drawer, but they were known of before that by Najacht." In support of that assertion defendant cites Drawer's affidavit, which reads, in pertinent part, as follows: "The first time I learned that there may be any issues with N.S. Mater was in a meeting with Jason Najacht on May 22, 2012. At that meeting, Jason told me that in his review of the budgets I had given him, he noticed an invoice from N.S. Mater that billed Mayer Brown for work that Jason knew had been performed by Mayer Brown employees. A true and correct copy of the calendar entry for this meeting is attached as Exhibit 1." The only date listed in Exhibit 1 is May 22, 2012.

¶ 20 Defendant cites *Joyce v. Morgan Stanley*, 538 F.3d 797, 803 (7th Cir. 2008), to support his argument that "notice" for purposes of the discovery rule occurs when the first officer of a company discovers the root of a cause of action. This court does not need to address that assertion by defendant because neither Drawer's affidavit nor the exhibit attached thereto establish that Najacht had notice of the fraudulent invoices on or before May 16, 2012, five years before plaintiffs' filed their complaint. The affidavit itself states Drawer first became aware of the issue on May 22, and the "calendar entry" states Najacht sent the entry to Drawer on May 22, 2012 and Drawer accepted it the same day.

¶ 21 We accept that it is logical to presume that Najacht received the budgets Drawer refers to in his affidavit, which led to Najacht's discovery of the invoices, sometime before May 22, 2012, but that does not help defendant. Nothing defendant has pointed to in the record establishes

when Najacht received the budgets and more accurately when, after receiving the budgets, he discovered the invoices; thus, defendant can only presume that it was before the day Najacht met with Drawer. Then, to support his argument, defendant must also presume that Najacht received the budgets and discovered the invoices before May 16, 2012. The rules pertaining to summary judgment require that "if any facts upon which reasonable persons may disagree are identified, or inferences which may be drawn from those facts lead to different conclusions, the court must *** direct that resolution of those facts and inferences be made at trial." *Certified Mechanical Contractors, Inc. v. Wight & Co.*, 162 Ill. App. 3d 391, 400 (1987). Nonetheless, "[i]nferences may only be drawn from undisputed facts." *Giannetti v. Angiuli*, 263 Ill. App. 3d 305, 312 (1994). "A presumption cannot be based upon a presumption or an independent inference on another inference." *Zide v. Jewel Tea Co.*, 39 Ill. App. 2d 217, 226 (1963). Here, the only "inference" that would defeat summary judgment—that Najacht discovered the invoices before May 16, 2012—would have to be based on the presumption Najacht received the budgets and discovered the invoices before the day he met with Drawer. Here, we are left without factual support for defendant's necessary inference. *Cf. Certified Mechanical Contractors, Inc.*, 162 Ill. App. 3d at 404.

¶ 22 Defendant's additional argument for finding that Mayer Brown was put on notice of its cause of action more than five years before plaintiffs' filed their complaint does not fare any better. First, defendant points to the following averments in Drawer's affidavit:

> "3. For several weeks after April 27, 2012, I made requests of defendant Tresch to relinquish control of various IT budget items because, as part of my new role, it was my responsibility to assess the budgets to determine areas for savings. During this time period, defendant Tresch refused to relinquish control over these IT budget items.

> 4. In May 2012, I directed the accounting department at Mayer Brown to designate me as the person controlling the budgets. I then distributed the budgets to my direct reports, including Jason Najacht, and requested that they assess the budgets to determine areas for savings."

Defendant notes the "Chronology of Events" states that on May 1, 2012 Drawer "seized control of IT budgeting." From this, on appeal defendant argues "[i]t would be more than reasonable to suspect after these events that there was a potential injury which would require further inquiry to find a cause of action.[1] The affidavit maintains that the financial reports were distributed by Drawer to investigate budget cuts, however that does not mean the cuts were the only reason for interest in the budget." Second, defendant asserts Mayer Brown "should have noticed the injury" given the contract with NS Mater was cancelled at the end of February 2011 and invoices continued to be submitted until May 2012. This second argument is purely speculative and is not supported by any fact of record or any fact asserted by defendant on appeal. It also ignores defendant's own admission in his guilty plea that defendant submitted the false invoices to Mayer Brown for payment and "[b]ecause [Mayer Brown] has not authorized NS Mater to do the work that was being billed, TRESCH attempted to conceal the bills and avoid detection by spreading them out among various cost centers set aside for particular IT projects at the firm. With each invoice, TRESCH billed cost centers that TRESCH knew had money available to pay the invoices."

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[1] The "Chronology of Events" documents in the record are unsigned charts. Nothing in the record indicates who prepared them, or when, or for what purpose. "Hearsay is an out of court statement offered to prove the truth of the matter asserted and is inadmissible unless it falls within one of the recognized exceptions to the rule. [Citation.] Evidence, such as hearsay, which is inadmissible at trial is not admissible in support of or in opposition to a motion for summary judgment." *Prodromos v. Everen Securitties, Inc.*, 341 Ill. App. 3d 718, 728 (2003). Defendant does not rely directly on the Chronology of Events document nor does he argue the statements therein are admissible evidence.

¶ 23 The fault in defendant's first argument lies in its lack of factual support. Drawer's averments provide the facts that Drawer asked defendant for control of the budgets, defendant refused, and Drawer obtained the budgets sometime in May 2012 (notably, we do not know exactly what day, which is crucial to the issue on appeal). It is reasonable to infer from those facts that defendant did not want to give Drawer access to the budgets. Defendant would have this court find these facts constitute sufficient information concerning (1) an injury and (2) its cause "to put a reasonable person on inquiry to determine whether actionable conduct is involved." *Workforce Solutions*, 2012 IL App (1st) 111410, ¶ 53 (quoting *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 416-17 (1981)). Assuming, *arguendo*, it is reasonable to infer that these facts would have put a reasonable entity on notice that something might be amiss in the IT budgets that is not the same as knowledge of an injury. But regardless, there are no facts from which to reasonably infer that a reasonable entity would also be put on notice that whatever might be wrong in the budgets was also wrongfully caused, especially without knowing what defendant was trying to hide. "[T]he injured party must have more than a mere suspicion that wrongdoing might have occurred in order to trigger the limitations period." *Id.* ¶ 52 (citing *Mitsias v. I-Flow Corp.*, 2011 IL App 91st) 101126, ¶ 24). The evidence presented does not create a situation in which Mayer Brown was in possession of "the critical facts that [it had] been hurt and who has inflicted the injury" and it needed only to determine its legal rights. *Cf. Mitsias*, 2011 IL App (1st) 101126, ¶ 26. Whether Mayer Brown had been "injured in fact" was at best speculative and there are no facts to conclude or infer that Mayer Brown had "sufficient information to conclude that [its] injury[, if any,] was caused by the acts of another." *Id.* ¶ 22 (citing *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 169 (1981)).

¶ 24 Nor do the facts raise a question of fact as to Mayer Brown's knowledge of an injury and its cause. "If the party moving for summary judgment supplies facts which, if not contradicted,

would entitle such a party to a judgment as a matter of law, the opposing party cannot rely upon his complaint or answer alone to raise genuine issues of material fact." *Carlson v. Chicago Transit Authority*, 2014 IL App (1st) 122463, ¶ 23. Plaintiffs have come forward with evidentiary facts to establish when it had notice of the injury and its cause and those facts entitle plaintiffs to judgment as a matter of law on defendant's claim that this case was filed after the expiration of the statute of limitations. Drawer averred: "The first time I learned that there may be any issues with N.S. Mater was in a meeting with Jason Najacht on May 22, 2012 [(less than five years before plaintiffs filed their complaint)]. At that meeting, Jason told me that in his review of the budgets I had given him, he noticed an invoice from N.S. Mater that billed Mayer Brown for work that Jason knew had been performed by Mayer Brown employees." Thus according to Drawer's affidavit, the first time Mayer Brown learned of a legal injury—*i.e.*, that it had paid fraudulent invoices—was May 22, 2012. On appeal plaintiffs argue that at this point Mayer Brown still did not know the injury was wrongfully caused rather than simply the result of an error and therefore the statute of limitations had not begun to run until sometime after May 22, 2012. See *Knox College*, 88 Ill. 2d at 415-16 ("when a party knows or reasonably should know *both* that an injury has occurred *and* that it was wrongfully caused, the statute begins to run" (Internal quotation marks omitted and emphases added.) quoting *Nolan*, 85 Ill. 2d at 171). We need not address that contention because even assuming the statute of limitations began to run on May 22, 2012, plaintiffs filed their complaint less than five years later on May 16, 2017. As to whether defendant has raised a genuine question of material fact, defendant's conclusions are not based on evidentiary facts or reasonable inferences based on evidentiary facts. There are at best inferences based on inferences (see *supra*, ¶ 24) or at worst nothing more than mere speculation, conjecture or guess which is insufficient to achieve summary judgment. *Salinas v. Werton*, 161 Ill. App. 3d 510, 515 (1987) ("Although a plaintiff may rely on reasonable

inferences which may be drawn from the facts considered on a motion for summary judgment, an inference cannot be established on mere speculation, guess or conjecture.").

¶ 25 Finally, defendant argues the trial court should have allowed discovery of an alleged prior affidavit of Drawer. Defendant relies on a "second" "Chronology of Events" document that contains an entry dated April 25, 2013 and reads "Robert Drawer signs an affidavit setting forth certain events which lead to discovery of this loss." On appeal defendant argues the "existence of this 2013 affidavit raises multiple questions as it shows yet another factual conflict with the 2018 affidavit and other discovery documents." Defendant then alleges discrepancies between Drawer's 2018 affidavit and the "first" Chronology of Events.[2] The alleged discrepancy is not clear from the face of the documents. Further, regardless of whether they were produced in discovery or not, the Chronology of Events documents are hearsay and cannot be considered. *Lemmon v. City of Akron*, No. 5:16-CV-2356, 2018 WL 2289865, at *7 (N.D. Ohio May 18, 2018) ("the fact that the unsworn transcripts were produced during discovery does not cure the fact that they may contain inadmissible hearsay"). Defendant asserts "the trial court erred in not ordering discovery of the affidavit" but has pointed to nothing in the record that demonstrates defendant raised this issue in the trial court or obtained a ruling on a request for additional discovery. New arguments may not be raised for the first time on appeal, and any arguments not raised in the trial court are forfeited. *Tebbens v. Levin & Conde*, 2018 IL App (1st) 170777, ¶ 25 (citing *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 413 (2002)). If defendant did raise the issue below, the ruling thereon is not in the record. "[I]n the absence of such a record

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[2] The record contains two different documents titled "Chronology of Events." The first of the two to appear sequentially in the record ("the first Chronology of Events") spans December 2, 2011 to August 30, 2012, but the document states it is page 2 of 6. The second of the two to appear in the record begins with an entry dated August 30, 2012, with a description that is different than the August 30, 2012 entry on the "first" Chronology of Events, and ends on an unknown date in May 2013, but the document states it is page 3 of 6.

on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." (Internal quotation marks omitted.) *Romito v. City of Chicago*, 2019 IL App (1st) 181152, ¶ 23. We must therefore presume that if the trial court did deny a request for additional discovery its order was proper.

¶ 26 We hold the trial court properly denied defendant's motion for summary judgment based on the alleged expiration of the statute of limitations prior to plaintiffs' filing of the complaint.

¶ 27 Turning to the order granting plaintiffs' motion for summary judgment on the ground defendant is collaterally estopped from relitigating issues of fact and law previously adjudicated in the criminal proceedings, defendant argues on appeal that (1) the trial court erred in applying the test for collateral estoppel from *Reyes-Munoz*, 849 F. Supp. 126 (D. Puerto Rico 1994), because that case "assumed that restitution awarded as the result of a guilty plea in a criminal case will be reduced if charges were dropped in exchange for the agreement," and the amount of the restitution order in the criminal case here was not reduced as the results of the plea bargain; (2) the court should have applied the test for collateral estoppel outlined in *Groves of Palatine Condominium Ass'n v. Walsh Construction Co.*, 2017 IL App (1st) 161036, ¶ 53; and (3) collateral estoppel should have been denied because the specific finding in the criminal proceedings that was material and controlling in this case was that the damages incurred by plaintiffs were less than the $4,819,253.69 claimed in plaintiffs' complaint.

¶ 28 In *Reyes-Munoz*, 849 F. Supp. at 132, the United States District Court for the District of Puerto Rico found the codefendants in that case were collaterally estopped from relitigating issues of fact and law previously adjudicated in their criminal trial which resulted in their conviction. The court cited 18 U.S.C. § 3664(e) (1984) and stated that "[b]ecause in their plea agreements codefendants Rivera and Fuentes agreed to make restitution to CIS, the conviction of

defendants precludes defendants from denying any essential allegations of the crime in a subsequent civil proceeding brought by the victim." *Reyes-Munoz*, 849 F. Supp. at 132 (citing 18 USC § 3664(e) (1984)). The court then immediately stated that:

> "Four factors must be present in order to invoke collateral estoppel in this action. First, the issues presented must be the same as those presented in the previous proceeding. Second, the issues must have been actually litigated in the prior action. Third, the issues in the previous litigation must have been necessary to the judgment in that suit. And fourth, the defendants in the prior action must have had a full and fair opportunity to litigate the issues." *Id*.

The court found those "four factors necessary for collateral estoppel" were present in that case. The court then applied the facts of the case to each factor and concluded that "because all the prerequisites for collateral estoppel are met, [the codefendants] are estopped from relitigating or denying the facts concerning" the criminal offense. *Id*. at 133.

¶ 29 Defendant argues the court's reasoning in *Reyes-Munoz* "assumed that restitution awarded as the result of a guilty plea in a criminal case will be reduced if charges were dropped in exchange for the agreement." The only reference to a reduction in exchange for pleading guilty we can glean from the cited portion of the *Reyes-Munoz* decision is a statement by the court that "[b]y pleading guilty, [two] codefendants *** received the dismissal of several charges against them." *Id*. However, the court made that observation in connection with its holding that the codefendants "had a full and fair opportunity to litigate this issue during their criminal case." *Id*. The court found that "even though there was no actual litigation of the criminal charges, the decision to plea [*sic*] guilty is sufficient to satisfy the requirement of a full and fair opportunity to litigate the issue." *Id*.

¶ 30 We construe defendant to argue that the trial court in this case erred in entering judgment in favor of plaintiffs for the full loss stated in the plea agreement (approximately $4.8 million) because here, unlike in *Reyes-Munoz*, the "reduction" in restitution he was ordered to pay in the criminal proceedings—from the $4.8 million loss stated in the plea agreement to the $1.1 million in restitution defendant was ordered to pay—was not the result of his plea but instead was the result of a review of the evidence by the judge in the criminal proceedings. Both the complaint at issue in *Reyes-Munoz* and the underlying criminal case were based on a scheme to defraud involving the issuance of checks for false insurance claims. *Id*. at 128-30. The scheme resulted in the issuance of 11 checks but four checks were not included in the criminal case. *Id*. at 132. The court held that collateral estoppel applied to prevent the codefendants from relitigating or denying the facts "concerning the fraudulent seven checks." *Id*. at 133. However, this finding was not based on a reduction in restitution in exchange for pleading guilty. The court made clear that only seven checks were included in the criminal case. The court specifically wrote:

> "Each defendant pled guilty to mail fraud and to aiding and abetting each other in the commission of said offense. The amended version of the facts state that defendants' defrauding of CIS included the issuance of seven checks totaling $1,401,000.00." *Reyes-Munoz*, 849 F. Supp. at 130.

We find nothing in the *Reyes-Munoz* decision to support defendant's argument.

¶ 31 Moreover, in *Groves of Palatine Condominium Ass'n v. Walsh Construction Co.*, 2017 IL App (1st) 161036, on which defendant argues the trial court in this case should have relied, this court wrote as follows:

> "The doctrine of collateral estoppel applies when a party, or someone in privity with a party, participates in two separate and consecutive cases arising on different causes of action and some controlling fact or question material to the

> determination of both causes has been adjudicated against that party in the former suit by a court of competent jurisdiction. [Citation.] The adjudication of the fact or question in the first cause will, if properly presented, be conclusive of the same question in the later suit, but the judgment in the first suit operates as an estoppel only as to the point or question actually litigated and determined and not as to other matters which might have been litigated and determined. [Citation.] *** [T]he minimum threshold requirements for the application of collateral estoppel are: (1) the issue decided in the prior adjudication is identical with the one presented in the suit in question, (2) there was a final judgment on the merits in the prior adjudication, and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication. [Citations.] Application of the doctrine of collateral estoppel must be narrowly tailored to fit the precise facts and issues that were clearly determined in the prior judgment. [Citation.] Additionally, [e]ven where the threshold elements of the doctrine are satisfied and an identical common issue is found to exist between a former and current lawsuit, collateral estoppel must not be applied to preclude parties from presenting their claims or defenses unless it is clear that no unfairness results to the party being estopped. [Citation.]" (Internal quotation marks omitted.) *Groves of Palatine Condominium Ass'n v. Walsh Construction Co.*, 2017 IL App (1st) 161036, ¶ 53.

Although phrased differently, we find no material difference in the *Reyes-Munoz*'s articulation of the collateral estoppel rule and the *Groves of Palatine Condominium Ass'n*'s statement of the rule. See *id*. ¶ 54 ("the purpose of the doctrine *** is to prevent relitigation of issues previously decided by the court. See *Nowak*, 197 Ill. 2d at 389-90 ('The doctrine of collateral estoppel applies when a party, or someone in privity with a party, participates in two separate and

consecutive cases arising on different causes of action and some controlling fact or question material to the determination of both causes has been adjudicated against that party in the former suit by a court of competent jurisdiction.' ")). To the extent defendant independently argues the trial court applied the wrong legal standard that argument fails.

¶ 32 Defendant also argues the trial court erred in granting plaintiffs' summary judgment motion as to the $4.8 million in damages because the "specific finding" in the former proceeding that controls for purposes of collateral estoppel "was that the damages incurred by Plaintiffs' were less than $4,819,253.69." The record contains excerpts from the district court's statements at the sentencing hearing for DeMars. In response to an assertion by DeMars' attorney that "the firm had no reason to think that they were being taken advantage of because they were paying the price they expected and they were getting the services they expected," the judge stated:

> "It is true, is it not, that even if the prices were—and I think based on the record we have now, the prices were market prices charged. At least the 2.1 million that went to Mr. Tresch, right, those savings, that dollar amount could have been savings that the firm realized."

Later in that sentencing hearing the judge stated:

> "This was a kickback which robbed the victim of money and—I don't really have to speculate much about the economic interest. I know how much money went to Mr. Tresch, and that money should have been money that the firm saw. So we don't have to guess about that. It is not 4.8, but there was real financial harm to the victim here."

¶ 33 Defendant admits the statement by the federal judge was in DeMars' sentencing hearing and not his own. Further, defendant has only provided us excerpts of statements by the judge in that sentencing hearing (thus depriving this court of their full context) and not the judge's

findings and conclusions. These documents are insufficient to create a genuine issue of material fact to preclude summary judgment. "[T]he party opposing summary judgment must produce some competent, *admissible* evidence which, if proved, would warrant entry of judgment for the opposing party." (Emphasis is original.) *Brown, Udell & Pomerantz, Ltd. v. Ryan*, 369 Ill. App. 3d 821, 824 (2006). "The transcript of a witness's testimony in a different legal proceeding is not admissible, because it is hearsay if offered for the truth of the testimony recorded in it unless the party against whom it is being offered had a chance to test that testimony, as by cross-examination, in that proceeding." *United States v. Morales*, 994 F.2d 386, 389 (7th Cir. 1993). On the contrary, the record does contain the final judgment in the criminal proceeding as to the damage caused by defendant's fraudulent conduct in the form of defendant's plea agreement. Defendant's plea agreement states: "The improper benefit to be conferred by the kickbacks was approximately $4,819,253." Plaintiffs also respond defendant admitted in his deposition in this case that he agreed in his plea agreement that there were $4.8 million in damages caused by his fraudulent conduct. On May 9, 2019, the trial court certified a Bystander's Report of the hearing on plaintiffs' motion for summary judgment. See Ill. S. Ct. R. 323(c) (eff. July 1, 2017). This court allowed plaintiffs to supplement the record on appeal with that Bystander's Report. The Bystander's Report states that during the hearing the trial court asked defendant "if he [(defendant)] admitted that the amount of damages caused by his fraudulent conduct was $4,819,253.00 as asserted by the plaintiffs." The report also states that "[i]n response to the question asked of him by the Court, Defendant David Tresch responded that he had admitted that the sum of $4,819,253.00 was the amount of damages caused by his fraudulent conduct."

¶ 34 Defendant's guilty plea in the criminal case satisfies the requirements for collateral estoppel to apply in this case. The issue of the damage to Mayer Brown from defendant's fraudulent conduct is identical to the issue presented in this case. The guilty plea satisfies the

"adjudicated on the merits" requirement for collateral estoppel to apply. "It is generally accepted that a criminal conviction collaterally estops a defendant from contesting in a subsequent civil proceeding the facts established and the issues decided in the criminal proceeding." *Talarico v. Dunlap*, 177 Ill. 2d 185, 193 (1997). Defendant has pointed to nothing to show that his admission to the damage caused to Mayer Brown in his guilty plea was not "treated with entire seriousness." See *id*. at 196. Further, it has been found:

> "In light of these cases and the recognition that Illinois has tended to follow the modern trend of broadening the application of collateral estoppel, [citations], it is found that Illinois law presently makes no absolute distinction between convictions based on pleas and those based on a trial on the merits, but that the particulars of the plea or trial may still be considered in determining whether an issue was fully and fairly litigated and whether it is just to permit estoppel based on the conviction." *Smith v. Sheahan*, 959 F. Supp. 841, 844 (N.D. Ill. 1997)

¶ 35 Defendant argues for the first time in his reply brief that the plea agreement in the record is not signed and therefore does not provide a proper evidentiary basis for the amount of damages. "[A]n appellant's arguments must be made in the appellant's opening brief and cannot be raised for the first time in the appellate court by a reply brief." *In re Marriage of Winter*, 2013 IL App (1st) 112836 ¶ 29. Further, defendant did not provide a transcript of the hearing on the parties' motions for summary judgment nor did he include this matter in the Bystander's Report,[3] and we do not know if defendant raised this matter before the trial court. "[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that

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[3] Rule 323(c) provides that "Within 14 days after service of the proposed report of proceedings, any other party may serve proposed amendments or an alternative proposed report of proceedings."

the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶ 36 We hold the trial court did not apply an incorrect standard in ruling on plaintiffs' motion for summary judgment. Defendant's claim that the trial judge in the criminal case found "no factual basis supporting damages in excess of approximately $2.1 million" is not adequately supported by the record to defeat plaintiffs' motion for summary judgment which is supported by defendant's guilty plea admitting damage of $4.8 million to Mayer Brown. The record is sufficient to demonstrate that defendant is collaterally estopped from challenging the amount of damages resulting from his fraud as stated in his guilty plea in the criminal case based on the same acts. Therefore, plaintiffs are entitled to summary judgment.

¶ 37 Accordingly, the trial court's judgment is affirmed.

¶ 38 CONCLUSION

¶ 39 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 40 Affirmed.