

2011 IL App (2d) 100884-UB
No. 2-10-0884
Order filed June 29, 2011
Modified Upon Denial of Rehearing October 19, 2011

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

JAGDISH MUZUMDAR and PRATIMA MUZUMDAR,)	Appeal from the Circuit Court
)	of Du Page County.
)	
Plaintiffs-Appellants,)	
)	
v.)	No. 09-L-832
)	
JOHN P. COONEY and JOHN P. COONEY)	
and ASSOCIATES,)	
Defendants-Appellees,)	Honorable
)	Joseph S. Bongiorno,
(Christopher L. Haas, Defendant.))	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

Held: Trial court properly dismissed plaintiffs' malpractice complaint against defendants where second extension to tolling agreement was ineffective to extend the date for filing suit and plaintiffs' complaint was filed beyond the date the statute of limitations expired.

¶ 1 Plaintiffs, Jagdish Muzumdar and Pratima Muzumdar, appeal from an order of the circuit court of Du Page County granting defendants', John P Cooney's and John P. Cooney & Associates',

section 2-619(5) (735 ILCS 5/2-619(a)(5) (West 2008)) motion to dismiss plaintiffs' first amended complaint. We affirm.

¶ 2

BACKGROUND

¶ 3 This is a legal malpractice action that arose from plaintiffs' 1989 purchase of a home in Oak Brook, Illinois, and their subsequent suit against the seller for fraudulent concealment of roof leaks. The trial court granted summary judgment in favor of the seller after plaintiffs' then attorney, Christopher L. Haas, who allegedly was associated with defendants, failed to file a response to the summary judgment motion. This court affirmed in *Muzumdar v. Casey*, Nos. 2-06-1087 & 2-07-0125 cons. (2008) (unpublished order under Supreme Court Rule 23) (*Mazumdar I*).

¶ 4 The trial court in the underlying fraudulent concealment case granted summary judgment against plaintiffs on June 27, 2006. Sometime in June 2008, plaintiffs requested Haas and defendants to enter into an agreement tolling the statute of limitations so that their new attorney could determine if a legal basis for a malpractice suit against Haas and defendants existed. The parties entered into a written tolling agreement that provided, *inter alia*: (1) that the agreement would terminate on December 15, 2008, or 14 days after any party gave written notice that it was terminating the agreement, whichever event occurred earlier; (2) plaintiffs had to commence suit within 30 days after termination; and (3) the parties could extend the term of the agreement in a writing executed by all parties. Plaintiffs, through their attorney, executed the agreement on June 21, 2008; Haas signed the agreement on June 22, 2008; defendants executed the agreement on June 23, 2008. The effective date of the agreement was June 13, 2008.

¶ 5 On December 15, 2008, the parties agreed in writing, in a letter executed by each of them, to extend the tolling agreement to March 31, 2009 (first extension).¹ On February 26, 2009, plaintiffs’ attorney sent the following letter to Haas and defendants:

“This letter confirms that all of the parties to the original Tolling Agreement (“Agreement”) effective as of June 13, 2008, which is attached hereto, agree to extend the Termination Date from Tuesday March 31, 2009 to October 1, 2009.

This extension is contingent upon Mr. Haas filing an appellate brief on the Muzumdars [*sic*] behalf by March 31, 2009.

The same terms and conditions of the Agreement remain.”

Plaintiffs’ attorney signed this letter (second extension), and it is undisputed that Cooney on behalf of defendants never signed it. Two different versions of this letter appear in the record. The first version was Exhibit E attached to defendants’ motion to dismiss. Exhibit E was a copy of the second extension signed by plaintiffs’ attorney, but not signed by either Haas or Cooney. The second version was Exhibit C attached to plaintiffs’ motion to reconsider the dismissal of their complaint. This version was signed by plaintiffs’ attorney, and a signature appears on the signature line for Haas. Plaintiffs represented in their motion to reconsider that Haas signed Exhibit C, but there is no affidavit or correspondence from Haas in the record attesting to this.

¶ 6 We digress here to explain the reference to Haas’s filing an appellate brief on plaintiffs’ behalf. Haas filed two appeals arising out of the underlying litigation, which were consolidated. This court unconsolidated the appeals in our order in *Mazumdar I* because we lacked jurisdiction

¹This extension contained a typographical error indicating the new termination date was March 31, 2008; the error was corrected in subsequent correspondence.

over the first appeal due to one of the defendants in that case never having been dismissed. As soon as this jurisdictional defect was taken care of, Haas was to refile the appeal. According to the second tolling extension dated February 26, 2009, Haas was to file the brief by March 31, 2009.

¶ 7 Haas did not file the appellate brief by March 31, 2009.

¶ 8 On March 31, 2009, plaintiffs' attorney faxed a letter to defendants asking them to confirm whether they agreed to the second extension. John P. Cooney on behalf of defendants handwrote the following on the letter: "Extension granted per original terms of the Tolling Agreement by amend [*sic*] par.7(b) to October 15, 2009." Paragraph 7(b) of the tolling agreement was the termination date. On June 1, 2009, plaintiffs' attorney served notice in writing to Haas and defendants that plaintiffs were terminating the tolling agreement effective 14 days from the date of the letter. The reason given for the termination was Haas's failure to file the appellate brief by March 31, 2009. Plaintiffs then filed suit against Haas and defendants on July 2, 2009. Plaintiffs filed a first-amended complaint on September 2, 2009.

¶ 9 Plaintiffs' Side Agreements With Haas

¶ 10 On April 8, 2009, plaintiffs' attorney wrote to Haas, asking him whether the appellate brief was filed on March 31, 2009, "pursuant to the latest extension of the tolling agreement." On April 13, 2009, Haas replied by email that the brief had not been filed, but that it would be completed by April 30, 2009. On April 16, 2009, plaintiffs' attorney replied to Haas, "I will look for a copy of the appeal by April 30, 2009." On May 1, 2009, Haas emailed plaintiffs' attorney: "I have been advised to make sure the [plaintiffs] agree Ms. Anderson should be dismissed [.] [D]ismissal must be with prejudice in order to give the Appellate Court jurisdiction. Ms. Anderson is deceased [.] [L]ikelihood of proving-up a claim against her are [*sic*] less than 1%." No reply to this email appears in the record. ¶ 11 The Motion To Dismiss

¶ 12 Defendants and Haas moved to dismiss the first-amended complaint on the grounds it failed to state a cause of action and it was barred by the two-year statute of limitations applicable to legal malpractice claims. On March 10, 2010, the trial court granted the motion to dismiss as to defendants, reasoning that Haas's filing the appellate brief was a condition precedent to the second extension that was not fulfilled, or alternatively that defendants' notation that the extension was granted pursuant to the terms of the original tolling agreement by amending the termination date to October 15, 2009, was a counter-offer that was not accepted. In its order, the trial court included a finding pursuant to Supreme Court Rule 304(a) (eff. Feb. 26, 2010) that there was no just reason to delay enforcement or appeal, and then denied the motion to dismiss as to Haas. Following the trial court's denial of a motion to reconsider, plaintiffs filed this timely appeal.

¶ 13 ANALYSIS

¶ 14 Plaintiffs contend that the trial court erred in dismissing the complaint because there were factual issues as to whether defendants agreed to the second extension without conditions; whether plaintiffs' conduct subsequent to defendants' counter-offer constituted acceptance; and whether plaintiffs waived any condition precedent in the second extension. A defendant is entitled to dismissal under section 2-619(a)(5) of the Code of Civil Procedure (Code) if the action was not commenced within the time limited by law. *Lamar Whiteco v. City of West Chicago*, 355 Ill. App. 3d 352, 359 (2005). A section 2-619 motion to dismiss admits the legal sufficiency of the complaint but asserts affirmative matter to avoid or defeat the claim. *Lamar*, 355 Ill. App. 3d at 359. The court may consider all facts presented in the pleadings, affidavits, and depositions contained in the record. *Gonnella Baking Co. v. Clara's Pasta di Casa, Ltd.*, 337 Ill. App. 3d 385, 388 (2003). The decision to dismiss a complaint under section 2-619 is subject to *de novo* review. *Lamar*, 355 Ill. App. 3d at 359. On appeal, the question is whether the existence of a genuine issue of material fact

should have precluded the dismissal or, absent an issue of fact, whether dismissal is proper as a matter of law. *Tkacz v. Weiner*, 368 Ill. App. 3d 610, 612 (2006).

¶ 15 Section 214.3(b) of the Code provides that an action for damages against an attorney based on tort, contract, or otherwise arising out of an act or omission in the performance of professional services must be commenced within two years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought. 735 ILCS 5/13-214.3(b) (West 2008). Plaintiffs' amended complaint alleged that the trial court denied Haas's motion to extend the time to file a response to the motion for summary judgment in the underlying case on June 27, 2006, placing plaintiffs on notice of their malpractice cause of action on that date. On appeal, plaintiffs do not dispute that the statute of limitations commenced on that date. Consequently, the statute of limitations would have expired on June 27, 2008, were it not for the tolling agreement. There is no dispute that the tolling agreement held the statute of limitations in abeyance until December 15, 2008. There is likewise no dispute that all parties consented to the first extension of the tolling agreement under which the tolling agreement would terminate on March 31, 2009. The dispute arose over the meaning and/or existence of the purported second extension. Defendants maintained that Haas's filing the appellate brief was a condition precedent to the granting of the second extension, which never occurred, so that the tolling agreement terminated on March 31, 2009, pursuant to the first extension. In the alternative, defendants asserted that Cooney's response to the plaintiffs' second extension was a counter-offer that was not accepted.

¶ 16 In this appeal, defendants contend that plaintiffs forfeited their arguments that factual issues should have precluded the grant of the motion to dismiss because plaintiffs did not raise those issues in the trial court. Plaintiffs raised only one factual issue before the trial court, contending that an issue of fact existed as to the date on which the statute of limitations commenced. Plaintiffs have

abandoned that issue before this court, but now assert that there are genuine issues of material fact concerning whether defendants accepted the second extension without conditions, whether plaintiffs' subsequent conduct constituted acceptance of defendants' counter-offer, and whether plaintiffs waived the condition precedent. Additionally, defendants contend that plaintiffs invited the trial court's error in ruling on the motion to dismiss as a matter of law when they did not argue the issues of fact they raise on appeal. First, we disagree that plaintiffs' arguments are forfeited because, in performing our *de novo* review, this court must consider whether the existence of a genuine issue of material fact should have precluded the dismissal, or, absent such an issue of fact, whether dismissal is proper as a matter of law. *Tkacz*, 368 Ill. App. 3d at 612. Second, the doctrine of invited error prohibits a party from taking one course of action at trial and then contending on appeal that the course was erroneous. *Sakellariadis v. Campbell*, 391 Ill. App. 3d 795, 800 (2009). For instance, in *Sakellariadis*, one of the defendants argued that the plaintiff was precluded from challenging the trial court's disposition of liens because the plaintiff affirmatively represented to the lienholders that she would accept the judgment. *Sakellariadis*, 391 Ill. App. 3d at 800. We do not believe the doctrine of invited error applies in our case. As we explained above, in conducting a *de novo* review, we must consider whether there are genuine issues of material fact that should have precluded dismissal. We review for genuine issues of fact independently of what was presented to the trial court.

¶ 17 Substantively, defendants argue that the second extension was not signed by all the parties and was, therefore, of no effect; the terms of the tolling agreement, which were incorporated into any extensions, did not allow for a counter-offer to be made in the fashion defendants tendered it; plaintiffs did not acquiesce in the counter-offer; and plaintiffs did not waive, if waiver occurred at all, the condition precedent until June 1, 2009, after the statute of limitations expired.

¶ 18 We review the parties' tolling agreement in accordance with contract principles. *Joyce v. DLA Piper Rudnick Gray Cary LLP*, 382 Ill. App. 3d 632, 636 (2008). The primary goal of contract construction is to give effect to the parties' intent by interpreting the contract as a whole and applying the plain and ordinary meaning to unambiguous terms. *Joyce*, 382 Ill. App. 3d at 636-37. Paragraph 13 of the tolling agreement provided as follows: "The parties may agree to extend the term of this Agreement, but any such extension must be in writing and executed by all parties who have originally signed this Agreement."

¶ 19 Plaintiffs, through their attorney, defendants, and Haas all signed the tolling agreement. In accordance with paragraph 13, the first extension was in writing and signed by all the parties. The second extension was in writing and was signed by plaintiffs' attorney. Cooney, on behalf of defendants, did not sign it, and one version in the record was not signed by Haas, while another version appears to have been signed by Haas. Even if we assume that Haas signed the second extension, defendants did not agree to its terms. Defendants argue that paragraph 13 of the tolling agreement requiring any extension to be in writing and executed by the parties was part of the extension agreements pursuant to *Joyce*, and, since it was not complied with, the second extension never was executed and never became effective. In *Joyce*, the court held that each of five amendments to a tolling agreement modified those terms that differed from the prior agreement, yet did not alter the force and effect of the unaltered terms. *Joyce*, 382 Ill. App. 3d at 638. The amendments in *Joyce*, like the first extension and the purported second extension in our case, modified only the date for filing suit. According to the executed first extension in our case, except for the termination date "[t]he same terms and conditions of the Agreement remain." Consequently, paragraph 13 was a requirement of the purported second extension.

¶ 20 Plaintiffs argue that “all parties expressly acquiesced” in the second extension. Specifically, plaintiffs assert that Cooney’s handwritten notation “Extension granted” was effective. With respect to the rest of the notation where Cooney amended the termination date, plaintiffs maintain that this “merely changed the date.” Plaintiffs seem not to understand that the date change was the important change. The purported second extension modified the termination date of the tolling agreement to October 1, 2009. Cooney’s unilateral agreement to extend the date to October 15, 2009, was, therefore, not an acceptance of the second extension. Acceptance must comply strictly with the terms of the offer. *Zeller v. First National Bank & Trust Co. of Evanston*, 79 Ill. App. 3d 170, 172 (1979).

¶ 21 The provision of paragraph 13 of the tolling agreement, requiring any extension to be in writing and executed by all the parties, was clear and unequivocal. Plaintiffs, who drafted both the first extension to the tolling agreement and the purported second extension, were aware of paragraph 13 and expressly incorporated it into the extensions with the language “[t]he same terms and conditions of the Agreement remain.” Because we hold that the parties did not comply with paragraph 13 of the tolling agreement, and the second extension never became effective, we do not reach the alleged factual issues relating to the condition precedent or waiver of it, or issues relating to the counter-offer. We may sustain the trial court’s section 2-619 dismissal for any basis found in the record. *Webb v. Damisch*, 362 Ill. App. 3d 1032, 1037 (2005). We hold that the tolling agreement terminated on March 31, 2009, which required plaintiffs to file suit on or before April 30, 2009. Suit was not filed until July 2, 2009, after the expiration of the statute of limitations. Accordingly, we affirm the judgment of the circuit court of Du Page County.

¶ 22 Affirmed.

