

NOTICE

Decision filed 08/23/13. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2013 IL App (5th) 120335-U
NO. 5-12-0335
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

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).

SAMANTHA BRIGHT,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Williamson County.
)	
v.)	No. 11-L-156
)	
CVS PHARMACY, INC.,)	Honorable
)	Brad K. Bleyer,
Defendant-Appellee.)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Goldenhersh and Cates concurred in the judgment.

ORDER

- ¶ 1 *Held:* Plaintiff's complaint was properly dismissed where it was filed beyond the statute of limitations and the facts alleged were not sufficient to allow the court to find it timely under a continuing tort theory, the doctrine of equitable tolling, or tolled under the discovery rule.

- ¶ 2 The plaintiff, Samantha Bright, attempted to fill a prescription for Vicodin. Employees of the defendant, CVS Pharmacy, Inc., suspected that she was attempting to obtain the drug through fraud or forgery and reported their suspicions to the police. The plaintiff was arrested when she arrived at the pharmacy to pick up her prescription. She filed a complaint alleging that the defendant's employees were negligent in failing to confirm that the prescription was legitimate. The trial court dismissed the complaint on the grounds that the statute of limitations ran before the plaintiff filed her suit. The plaintiff appeals, arguing that her complaint was timely because (1) the statute of limitations did not begin to run until she was released from

jail because the defendant's actions constituted a continuing tort that did not stop until that point, (2) the doctrine of equitable tolling is applicable to the facts alleged, and (3) the statute of limitations was tolled until her release from jail pursuant to the discovery rule. We affirm the ruling of the trial court.

¶ 3 The incident at issue occurred on Friday evening, November 13, 2009. According to the allegations in the complaint, the plaintiff's dentist called in a prescription for Vicodin to a CVS pharmacy in West Frankfort earlier that day. Employees of the pharmacy questioned the validity of the prescription and called the West Frankfort police department to report their suspicion that the plaintiff was attempting to obtain Vicodin through fraud or forgery. The plaintiff was arrested for unlawful possession of a controlled substance when she went to the West Frankfort CVS to pick up her prescription. She was incarcerated at the Williamson County jail and released the following Monday, November 16, 2009.

¶ 4 The plaintiff filed her initial complaint in this matter on November 15, 2011. She alleged that the defendant's employees were negligent in failing to contact her dentist to confirm the validity of the prescription, contacting the wrong dentist, and failing to provide adequate training to employees.

¶ 5 The defendant filed a motion to dismiss, arguing that the statute of limitations on the plaintiff's cause of action ran on November 13, 2011. See 735 ILCS 5/13-202 (West 2010). The defendant argued that the plaintiff knew when she was arrested that she had a valid prescription for Vicodin. Thus, the defendant contended, she had sufficient information at that time to know that her incarceration was wrongfully caused.

¶ 6 In her response to the motion to dismiss, the plaintiff alleged without explanation that "each and every day that the plaintiff was incarcerated constituted

acts of negligence by the defendant." She argued that pursuant to the continuing tort theory, the statute of limitations on her claim did not begin to run until she was released from jail on November 16, 2009. After a hearing, the court granted the plaintiff two days leave to submit any case law to support her contention that the continuing tort doctrine was applicable to the facts of this case.

¶ 7 The plaintiff filed a first amended complaint, adding two new allegations. First, she alleged that she was under a legal disability while incarcerated. She further alleged that the defendant had a continuing obligation to investigate her claim that her prescription was valid. The defendant again filed a motion to dismiss the complaint on the basis of the statute of limitations. The court granted this motion and dismissed the first amended complaint without prejudice, allowing the plaintiff 28 days to file another amended complaint.

¶ 8 The plaintiff's second amended complaint repeated the allegations of her first amended complaint. In addition, she alleged that when she was arrested, she did not have sufficient information to determine whether her arrest was wrongfully caused. She further alleged that she was wrongfully incarcerated due to the defendant's conduct, which prevented her from exercising her legal rights during this period. The defendant filed a motion to dismiss the plaintiff's second amended complaint. In her response to that motion, the plaintiff raised the issue of the discovery rule for the first time. She alleged that she could not have discovered that her incarceration was due to wrongful conduct on the part of the defendant until she was released from jail on November 16, 2009, thereby tolling the limitations period under the discovery rule. The court granted the defendant's motion, this time dismissing the plaintiff's complaint with prejudice. This appeal followed.

¶ 9 The plaintiff argues that her complaint was timely under three different

theories: (1) the continuing tort theory, (2) the discovery rule, and (3) the doctrine of equitable tolling. The plaintiff's complaint was dismissed pursuant to section 2-619(a)(5) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(5) (West 2012)). In ruling on a motion to dismiss pursuant to this section, courts must construe all pleadings in the light most favorable to the nonmoving party. *Griffin v. Willoughby*, 369 Ill. App. 3d 405, 410, 867 N.E.2d 1007, 1011 (2006). On appeal, we consider whether the pleadings and any supporting documentation raise a genuine issue of material fact and whether the defendant is entitled to dismissal as a matter of law based on the facts pled. *Griffin*, 369 Ill. App. 3d at 410, 867 N.E.2d at 1012. Our review is *de novo*. *Griffin*, 369 Ill. App. 3d at 410, 867 N.E.2d at 1011; *Pavlik v. Kornhaber*, 326 Ill. App. 3d 731, 737-38, 761 N.E.2d 175, 181 (2001). We find none of the plaintiff's arguments persuasive.

¶ 10 The plaintiff first argues that the statute of limitations on her claim did not begin to run until November 16, 2009, pursuant to the continuing tort doctrine. She argues that this is so because the defendant was under a continuing obligation to investigate the validity of her prescription, which it failed to do the entire time she was in jail. We find the continuing tort doctrine inapplicable to the plaintiff's claim.

¶ 11 Statutes of limitations serve the dual purposes of encouraging diligence in filing actions and discouraging the pursuit of stale claims. *Bank of Ravenswood v. City of Chicago*, 307 Ill. App. 3d 161, 167, 717 N.E.2d 478, 483 (1999). The limitations period on a claim ordinarily begins to run when facts exist which give the plaintiff a cause of action against the defendant. This occurs when the plaintiff's interest is invaded. *Bank of Ravenswood*, 307 Ill. App. 3d at 167, 717 N.E.2d at 483. This is true even if the full extent of the plaintiff's damages is not immediately discernable. *Bank of Ravenswood*, 307 Ill. App. 3d at 167, 717 N.E.2d at 483.

¶ 12 However, where the case involves continuing or repeated tortious conduct, the limitations period does not begin to run until the time when the last such act occurs. This rule—known as the continuing tort doctrine—applies only where there are continuing wrongful acts or conduct. *Bank of Ravenswood*, 307 Ill. App. 3d at 167, 717 N.E.2d at 484. The continuing tort doctrine does not apply where there are continuing injuries that result from a single overt act. *Bank of Ravenswood*, 307 Ill. App. 3d at 167-68, 717 N.E.2d at 484.

¶ 13 The plaintiff acknowledges that the continuing tort doctrine does not apply unless the allegations involve a continuous course of wrongful conduct. She argues that this case involves a continuing tort because she alleged that the defendant had a continuing obligation to investigate the validity of her prescription for Vicodin. She cites no authority in support of her position, and we are not persuaded by her contention.

¶ 14 We find the case of *Bank of Ravenswood v. City of Chicago* instructive on this point. There, the plaintiffs brought a suit alleging trespass due to the city's construction of a subway line under property they had purchased for the development of a residential community. *Bank of Ravenswood*, 307 Ill. App. 3d at 163, 717 N.E.2d at 480. Construction of the subway was complete in September 1988, and the plaintiffs filed their complaint in February 1990. *Bank of Ravenswood*, 307 Ill. App. 3d at 166, 717 N.E.2d at 482. The applicable limitations period was one year. *Bank of Ravenswood*, 307 Ill. App. 3d at 165, 717 N.E.2d at 482.

¶ 15 The plaintiffs there argued on appeal that the presence of the subway under their property constituted a continuing tort. The appeals court rejected this contention, explaining that the plaintiffs' interest was invaded as soon as construction of the subway was complete. *Bank of Ravenswood*, 307 Ill. App. 3d at 168, 717

N.E.2d at 484. The court further explained that the continued presence of the subway under the plaintiffs' property was "a continual effect from the initial violation but not a continual violation." *Bank of Ravenswood*, 307 Ill. App. 3d at 168, 717 N.E.2d at 484.

¶ 16 Here, similarly, the plaintiff's continued incarceration for four days amounted to a continuing impact from the defendant's employees' act of reporting to the police that the plaintiff was attempting to obtain the Vicodin without a valid prescription. We acknowledge that the plaintiff also alleged that the defendant and its employees had an ongoing duty to investigate the validity of her prescription. Her assertion is, in essence, that the defendant was under a continuing obligation to correct its mistake. Accepting this argument as a means of extending the limitations period would expand the continuing tort doctrine beyond its intended reach. It ignores the distinction between a continuing course of wrongful conduct and continuing ill effects from a single overt act. We thus conclude that the trial court properly found the continuing tort doctrine inapplicable to the facts alleged here.

¶ 17 The plaintiff next argues that her action was timely due to application of the doctrine of equitable tolling. We disagree.

¶ 18 Under the doctrine of equitable tolling, a court can excuse a plaintiff's failure to comply with the applicable statute of limitations where, due to " 'disability, irremediable lack of information, or other circumstances beyond his control,' the plaintiff *cannot reasonably be expected to file suit on time.*" (Emphasis added.) *Williams v. Board of Review*, 241 Ill. 2d 352, 360, 948 N.E.2d 561, 567 (2011) (quoting *Miller v. Runyon*, 77 F.3d 189, 191 (7th Cir. 1996)). Equitable tolling should be "applied with caution" and allowed only under extraordinary circumstances. *Ciers v. O.L. Schmidt Barge Lines, Inc.*, 285 Ill. App. 3d 1046, 1052, 675 N.E.2d 210, 214

(1996).

¶ 19 Typically, the doctrine applies in situations where a plaintiff has been actively deceived or misled by the defendant (*Ciers*, 285 Ill. App. 3d at 1052, 675 N.E.2d at 214) or induced by the defendant into waiting for the statute of limitations to run before filing suit (*Hess v. I.R.E. Real Estate Income Fund, Ltd.*, 255 Ill. App. 3d 790, 806, 629 N.E.2d 520, 531 (1993)). However, there is no requirement that the defendant be at fault. *Williams*, 241 Ill. 2d at 361, 948 N.E.2d at 567. Equitable tolling also applies in cases where a plaintiff timely files an action in the wrong forum. *Ciers*, 285 Ill. App. 3d at 1052, 675 N.E.2d at 214. Although there is no requirement that the defendant be at fault, application of equitable tolling "does require due diligence on the part of" the plaintiff. *Williams*, 241 Ill. 2d at 371-72, 948 N.E.2d at 574.

¶ 20 Here, the plaintiff alleged that she was prevented from pursuing her claim because she was incarcerated for four days due to the defendant's employees' actions. We note that this is the same conduct that forms the basis of the underlying tort, and the plaintiff does not allege that the defendant or its employees did anything else to impede her ability to file this action within the limitations period.

¶ 21 Moreover, even assuming that the allegations in the plaintiff's complaint can be considered the type of extraordinary circumstances that would justify application of the equitable tolling doctrine, she has not alleged any facts explaining why she could not reasonably be expected to bring her suit within the two-year statute of limitations. The plaintiff was arrested after business hours on a Friday evening and released the following Monday. Thus, she was incarcerated for a period of less than four full days, nearly all of which occurred over the weekend. She alleges no facts that explain why, through the exercise of due diligence, she could not have filed her

claim within the remainder of the two-year limitations period.

¶ 22 In addition, as the plaintiff acknowledges, incarceration itself is not considered a legal disability in Illinois. *Schweih's v. Burdick*, 96 F.3d 917, 919 (7th Cir. 1996) (applying Illinois law); see also Pub. Act 86-1329, § 4 (eff. Jan. 1, 1991). That is, an incarcerated plaintiff is ordinarily required to bring his or her action within the applicable statute of limitations even if she remains incarcerated the entire time. The trial court correctly found that the doctrine of equitable tolling was inapplicable to the facts alleged.

¶ 23 The plaintiff finally contends that her suit was timely filed because the statute of limitations was tolled under the discovery rule. We disagree.

¶ 24 Under the discovery rule, the statute of limitations begins to run when a party knows or reasonably should know that she has suffered an injury and that the injury was wrongfully caused. *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 415, 430 N.E.2d 976, 980 (1981). The term "wrongfully caused" is "a general or generic term, and not a term of art." *Knox*, 88 Ill. 2d at 416, 430 N.E.2d at 980. It does *not* mean that a plaintiff must know that the defendant has acted negligently or that she has a cause of action before the statute of limitations is triggered. *Knox*, 88 Ill. 2d at 416, 430 N.E.2d at 980. Instead, the limitations period begins to run once an injured party has enough information about both the injury and its cause "to put a reasonable person on inquiry to determine whether actionable conduct is involved." *Knox*, 88 Ill. 2d at 416, 430 N.E.2d at 980-81.

¶ 25 Here, the plaintiff knew that she had a valid prescription when she was arrested. This gave her sufficient notice that her arrest for attempting to obtain Vicodin fraudulently was wrongfully caused to trigger the limitations period. The plaintiff argues that she did not discover that her incarceration was wrongfully caused

until after she was released on November 16. She contends that this is so because "there are several circumstances that could exist that would indicate that her injury was not wrongfully caused—*i.e.*, innocent mistake, false identification, [or] false arrest protected by legal immunities." As stated, however, a plaintiff need not know that actionable conduct is involved or that the defendant has acted negligently in order to trigger the limitations period under the discovery rule. The plaintiff only needs to have sufficient knowledge to prompt an inquiry. " 'At that point, the burden is upon the injured person to inquire further as to the existence of a cause of action.' " (Emphasis omitted.) *Knox*, 88 Ill. 2d at 416, 430 N.E.2d at 980 (quoting *Witherell v. Weimer*, 85 Ill. 2d 146, 156, 421 N.E.2d 869, 874 (1981)). The facts pled establish that the plaintiff had sufficient information to trigger this duty and start the limitations period. The mere fact that there were possible explanations other than the negligent acts of the defendant's employees does not change this. We find no error in the court's ruling.

¶ 26 For the reasons stated, we affirm the order of the trial court dismissing the plaintiff's complaint.

¶ 27 Affirmed.