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2015 IL App (3d) 140144-U

Order filed September 2, 2015
Modified upon denial of rehearing October 27, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

JOHN WIESEHAN,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiff-Appellant,)	Tazewell County, Illinois.
)	
v.)	
)	
JLG INDUSTRIES, INC., a Pennsylvania)	
Corporation, and ONE SOURCE)	
EQUIPMENT RENTALS OF MORTON,)	
LLC, an Illinois Limited Liability Company,)	
and JOHNSTOWN WELDING &)	
FABRICATION, INC., a Pennsylvania)	
Corporation,)	
)	
Defendants.)	
)	
)	Appeal No. 3-14-0144
)	Circuit No. 11-L-91
JOHNSTOWN WELDING &)	
FABRICATION, INC., a Pennsylvania)	
Corporation,)	
)	
Counterplaintiff-Appellee,)	
)	
v.)	
)	
JLG INDUSTRIES, INC., a Pennsylvania)	
Corporation, and ONE SOURCE)	
EQUIPMENT RENTALS OF MORTON,)	

LLC, an Illinois Limited Liability Company,)	
)	
Counterdefendants.)	
_____)	
)	
JLG INDUSTRIES, INC., a Pennsylvania)	
Corporation,)	
)	
Third-Party Plaintiff,)	
)	
v.)	
)	
JOHNSTOWN WELDING &)	
FABRICATION, INC., a Pennsylvania)	
Corporation,)	Honorable
)	Paul Gilfillan,
Third-Party Defendant.)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice McDade and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Portion of appeal dismissed as moot where plaintiff and third-party plaintiff failed to refile their causes of action against manufacturer within one year of the statute of limitations for voluntary dismissals, creating an intervening event that rendered it impossible to grant effectual relief.

(2) Trial court did not err in denying plaintiff additional time to conduct discovery before granting manufacturer's motion for summary judgment with prejudice.

¶ 2 Plaintiff, John Wiesehan, filed a negligence action against Defendant, JLG Industries Inc. (JLG), seeking damages for injuries he sustained when a scissor lift manufactured by JLG collapsed. Wiesehan subsequently amended his complaint to include Johnstown Welding & Fabrication, Inc. (Johnstown), the manufacturer of the steel arm that failed, causing the collapse, and the trial court granted Johnstown's motion for summary judgment. Wiesehan eventually settled the case with JLG and assigned its contribution claim against Johnstown to Wiesehan, conditioned on a good faith finding dismissing JLG as a liable party, which the trial court denied.

On appeal, Wiesehan claims that the trial court (1) abused its discretion in denying his motion for a good faith finding and (2) erred in denying an earlier discovery request related to Johnstown's motion for summary judgment.

¶ 3 Johnstown filed two motions to dismiss the appeal, which we have taken with the case. We now grant Johnstown's motion to dismiss filed on March 6, 2015, and dismiss the first issue raised on appeal as moot. We further hold that the trial court did not err in granting Johnstown's motion for summary judgment and denying Wiesehan additional time to conduct discovery.

¶ 4 BACKGROUND

¶ 5 A. Trial Court Proceedings

¶ 6 Wiesehan was injured on November 30, 2009, when the scissor lift he was using to install heating and air conditioning ductwork suddenly collapsed. The lift collapsed as the result of the failure of a bolt attaching the hydraulic cylinder to the steel arms. The scissor lift was manufactured by JLG, but the steel arms were built and supplied by Johnstown.

¶ 7 Wiesehan filed a complaint on August 22, 2011, alleging a cause of action against JLG and One Source Equipment Rentals of Morton, LLC, the company that owned the scissor lift and rented it to Wiesehan's employer. In its answer and affirmative defenses, JLG admitted that it had manufactured the scissor lift but stated that "JLG did not manufacture all of the components of the JLG 2646ES scissor lift." JLG's answer described several components, including a "plate immediately adjacent to the pivot pin assembly," but it did not identify the manufacturer of the plate.

¶ 8 On October 28, 2011, Wiesehan sent interrogatories to JLG asking it to answer several questions, including whether JLG manufactured the plate immediately adjacent to the pivot pin assembly as that part was described in JLG's answer. On November 28, 2011, JLG's counsel

mailed its answers to the interrogatories to Wiesehan's attorney. In those answers, JLG stated that the plate was manufactured by Johnstown. The affidavit attesting to the answers to the interrogatories was dated November 18, 2011.

¶ 9 Wiesehan filed a motion for leave to file an amended complaint on December 5, 2011. The amended complaint added Johnstown as a named Defendant. The court granted Wiesehan's motion on December 8, 2011.

¶ 10 Johnstown moved for summary judgment, arguing that Wiesehan's amended complaint was not brought within the applicable two-year statute of limitations. Wiesehan conceded that the complaint against Johnstown was not filed within two years of his injury. However, he argued that he should be allowed to conduct discovery prior to the court's ruling on the motion for summary judgment to determine (1) whether equitable tolling extended the time for the claim to be filed or (2) whether JLG's late disclosure of Johnstown could give rise to a claim for fraudulent concealment of a cause of action, extending the time for filing a claim to five years. The trial court denied Wiesehan's request for discovery and granted Johnstown's motion for summary judgment on January 4, 2013.

¶ 11 Two weeks later, Wiesehan settled his claim against JLG. Part of the settlement included an assignment of JLG's right to bring a contribution claim against Johnstown under the Joint Tortfeasor Contribution Act (Act) (740 ILCS 100/0.01 *et seq.* (West 2012)). Under the terms of the assignment, JLG agreed to assign its contribution claim rights against Johnstown to Wiesehan. The relevant provisions of the agreement provided:

"Releasees hereby assign their right to file a counterclaim for contribution and their right to contribution against Defendant Johnstown Welding & Fabrication, Inc. to Releasors. Releasees agree to make reasonable efforts to cooperate with

Releasors in order to assist Releasors in bringing and prosecuting the assigned right to file a counterclaim for contribution, and their right to contribution, against Defendant Johnstown Welding & Fabrication, Inc."

The settlement further stated that JLG was paying Wiesehan the consideration of \$190,000 to "release, acquit and forever discharge *** JLG INDUSTRIES, INC. *** from any and all claims, actions, *** and controversies, whatsoever, in law or in equity." The settlement and assignment was conditioned on JLG being granted a finding of good faith under the Act, a finding that was necessary to discharge any counterclaims for contribution against JLG.

¶ 12 JLG and Wiesehan then filed a joint motion in circuit court seeking a finding of good faith. Johnstown intervened and objected. In its memorandum in response to Johnstown's objection, JLG stated that "[p]aintiff also incorrectly implies that some portion of the \$190,000 monetary consideration was for the assignment of contribution." JLG maintained that no portion of the \$190,000 was attributable to the assignment and that the \$190,000 was "consideration for the release of the claims against JLG."

¶ 13 The trial court denied the motion for good faith finding on May 7, 2013. The court held that the terms of the settlement conflicted with the terms of the Act and were inconsistent with the policies underlying the Act. Specifically, the court found that the settlement at issue could not have "extinguished" the liability of Johnstown to Wiesehan as required under section 2(e) of the Act (740 ILCS 100/2(e) (West 2012)) because the liability had already been extinguished by the earlier entry of summary judgment. The court found that by assigning JLG's contribution claim against Johnstown to Wiesehan, the claim lost identity as a contribution claim and was transformed into a direct cause of action by Wiesehan against Johnstown.

¶ 14 On June 7, 2013, JLG filed a third-party complaint against Johnstown, seeking contribution for damages in Wiesehan's personal injury suit.

¶ 15 On July 12, 2013, Wiesehan moved for a finding, pursuant to Illinois Supreme Court Rule 308(a) (eff. Feb. 26, 2010), certifying two questions for review:

"(a) Does the Joint Tortfeasor Contribution Act permit a plaintiff to take an assignment of a contribution claim, as part of a settlement with another defendant, against a party which had previously been granted summary judgment against the plaintiff in an interlocutory order which is not final and appealable at the time of assignment?

(b) Does an interlocutory order granting summary judgment in favor of a defendant that is not final or appealable 'extinguish' the liability of that defendant as the term 'extinguish' is used in Section 2(e) of the Joint Tortfeasor Contribution Act, 735 ILCS 100/2."

The trial court denied Wiesehan's request for certification.

¶ 16 Three months later, on October 31, 2013, Wiesehan moved for voluntary dismissal of his claims under section 2-1009(a) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1009(a) (West 2012)) for the stated purpose of "pursuing an appeal of the court's prior adverse orders." On November 13, 2013, JLG also filed a motion for voluntary dismissal of its third-party complaint.

¶ 17 On February 5, 2014, the trial court entered an order granting Wiesehan's motion and voluntarily dismissing his remaining claims against JLG. The court also entered an order dismissing JLG's third-party complaint against Johnstown.

¶ 18 B. Appellate Court Proceedings

¶ 19 Wiesehan filed a notice of appeal from the May 7, 2013, order, denying his request for a good faith finding of the settlement agreement and the January 4, 2013, order refusing to allow further discovery of the disclosure of Johnstown. Before filing a brief on appeal, Johnstown filed a motion to dismiss the appeal for want of jurisdiction. Wiesehan objected, and we ordered the motion taken with the case. After briefing was completed and the case had been set for oral arguments, Johnstown filed a motion to dismiss portions of the appeal as moot, claiming that Wiesehan's appeal of the May 7, 2013, order is moot because Wiesehan and JLG voluntarily dismissed their complaints on February 5, 2014, and cannot refile their claims within the one-year statute of limitations under section 13-217 of the Code (735 ILCS 5/13-217 (West 2012)). Wiesehan filed an objection, and that motion was also taken with the case. We now grant Johnstown's motion to dismiss the first issue raised on appeal as moot.

¶ 20 ANALYSIS

¶ 21 A. Motion for Good Faith Finding

¶ 22 A case on appeal becomes moot where the issues presented below no longer exist because events subsequent to the filing of the appeal render it impossible for the reviewing court to grant the complaining party effective relief. *In re Marriage of Eckersall*, 2015 IL 117922, ¶ 9. This court will not review cases merely to establish a precedent or guide future litigation. See *Davis v. City of Country Club Hills*, 2013 IL App (1st) 123634, ¶ 10; see also *Hanna v. City of Chicago*, 382 Ill. App. 3d 672, 676-77 (2008) (when issues have ceased to exist, cause of action should be dismissed; reviewing courts are not to render advisory opinions even if to offer future guidance in similar situations). "The fact that a case is pending on appeal when the events which render an issue moot occur does not alter this conclusion." *Felzak v. Hruby*, 226 Ill. 2d

382, 392 (2007) (quoting *Dixon v. Chicago & North Western Transportation Co.*, 151 Ill. 2d 108, 116-17 (1992)).

¶ 23 Where a plaintiff has voluntarily dismissed a claim or count of a complaint, section 13-217 of the Code gives the plaintiff the right to refile a cause of action within one year after the dismissal, or the remaining period of limitations, whichever is greater. 735 ILCS 5/13-217 (West 2012); *Case v. Galesburg Cottage Hospital*, 227 Ill. 2d 207, 215 (2007). The one-year refiling period begins to run on the date of the trial court's order granting the dismissal. *Fiorito v. Bellocchio*, 2013 IL App (1st) 121505, ¶ 10. The statute of limitations for filing a cause of action under section 13-217 is not tolled or stayed during the pendency of an appeal. *Wade v. Byles*, 295 Ill. App. 3d 545, 546 (1998); *Wilson v. Evanston Hospital*, 257 Ill. App. 3d 837, 840 (1994); see also *Suslick v. Rothschild Securities Corp.*, 128 Ill. 2d 314, 320-321 (1989).

¶ 24 Here, Wiesehan and JLG voluntarily dismissed their claims against Johnstown by court order entered on February 5, 2014. Wiesehan has not refiled his personal injury complaint. JLG has not refiled its contribution claim. As a consequence of the failure of either party to refile their causes of action within one year of their voluntary dismissals, JLG's contribution claim against Johnstown is time barred by the statute of limitations. Therefore, there is no viable cause of action that JLG can assign to Wiesehan pursuant to the settlement agreement. See *Sikora v. AFD Industries, Inc.*, 18 F. Supp. 2d 839, 841 (N.D. Ill. 1998) (worker's refiling of personal injury claim he had previously voluntarily dismissed did not revive defendant manufacturer's right to pursue third party claim for contribution where statute of limitations had run on manufacturer's third party claim). Even if we were to conclude that the trial court should have granted Wiesehan and JLG's joint motion for a good faith finding, Wiesehan would not be able to pursue a contribution claim against Johnstown. Given that Wiesehan and JLG moved to

voluntarily dismiss their complaints and have not refilled their claims, we have no choice but to dismiss this appeal as moot. See *Eckersall*, 2015 IL 117922, ¶ 9 (events have occurred that make it impossible for the reviewing court to grant the complaining party effectual relief, rendering the appeal moot).

¶ 25 Our determination that the first issue on appeal is moot obviates the need to consider Johnstown's remaining motion to dismiss taken with the case. The motion to dismiss for lack of jurisdiction, filed on May 9, 2014, is denied.

¶ 26 B. Motion for Summary Judgment and Discovery Request

¶ 27 Next, Wiesehan argues that the trial court abused its discretion in denying his request for additional time to conduct discovery before granting Johnstown's motion for summary judgment. Wiesehan maintains that the two-year statute of limitations should not apply because (1) the limitations period against Johnstown is equitably tolled since JLG took three days too long to answer Wiesehan's interrogatories, and (2) the five-year imitations period under section 13-215 of the Code should apply because JLG committed an intentional act of fraud by concealing Johnstown's identity.

¶ 28 Actions for damages for an injury to the person shall be commenced within two years after the cause of action accrued. 735 ILCS 5/13-202 (West 2010). A cause of action for personal injury accrues when a plaintiff suffers injury. *Golla v. General Motors Corp.*, 167 Ill. 2d 353, 360 (1995).

¶ 29 In this case, Wiesehan argues that either equitable tolling or fraudulent concealment justifies his failure to meet the statute of limitations deadline because JLG failed to timely answer interrogatories that would have identified Johnstown as a component supplier.

¶ 30 First, Wiesehan's arguments fail because JLG timely responded. Wiesehan mailed interrogatories to JLG on October 28, 2011. JLG responded by mailing its answers on November 28, 2011. Supreme Court Rule 213(d) requires that within 28 days after service of the interrogatories upon the party to whom they are directed, the party shall serve a sworn answer or objection to each interrogatory. Ill. S. Ct. R. 213(d) (eff. Jan. 1, 2007). Illinois Supreme Court Rule 12(c) states that service by mail is complete four days after mailing. Ill. S. Ct. R. 12(c) (eff. Dec. 29, 2009). Thus, for purposes of determining timeliness, the 28-day period started on November 1, 2011. JLG's proof of service is dated November 28, 2011. Consequently, JLG's answers to interrogatories were timely when JLG deposited them in the mail on November 28, 2011. See *Armagan v. Pesh*, 2014 IL App (1st) 121840, ¶ 21.

¶ 31 Also, Wiesehan cannot rely on the theory of equitable tolling because he failed to act with due diligence. Equitable tolling requires due diligence on the part of the claimant. *Williams v. Board of Review*, 241 Ill. 2d 352, 372 (2011). Here, Wiesehan failed to perform his duty to investigate further concerning the existence of a cause of action. Although he suffered a traumatic injury when he fell after the lift collapsed in November of 2009, he did not file a complaint until August of 2011. He then became aware that there were suppliers of component parts when JLG filed its answer on September 27, 2011. Nevertheless, he did not mail his interrogatories until October 28, 2011. Given this timeline, we find that Wiesehan did not act with due diligence to protect against the running of the statute of limitations. See *Williams*, 241 Ill. 2d at 360-61.

¶ 32 Moreover, Wiesehan failed to prove fraudulent concealment such that the statute of limitations could be extended to five years. Section 13-215 of the Code of Civil Procedure provides:

“If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such cause of action, and not afterwards.” 735 ILCS 5/13-215 (West 2010).

Generally, the concealment must consist of affirmative acts that are calculated to lull or induce the plaintiff into delaying filing his or her claim or to prevent the plaintiff from discovering a claim. *Barratt v. Goldberg*, 296 Ill. App. 3d 252, 257 (1998).

¶ 33 In this case, Wiesehan failed to identify any false statement made by anyone that was calculated to deceive him. Wiesehan claimed that JLG failed to timely answer the interrogatories in an attempt to deceive Wiesehan, but JLG did, in fact, timely respond. Furthermore, no false statement is attributed to JLG or any other named Defendant. Wiesehan did not present to the trial court any basis for suggesting that a conspiracy existed between JLG and Johnstown to hide Johnstown’s identity other than JLG’s tardy response to his interrogatories. Accordingly, section 13-215 does not apply.

¶ 34 CONCLUSION

¶ 35 For the foregoing reasons, we dismiss the first issue on appeal as moot. The judgment of the circuit court of Tazewell County is otherwise affirmed.

¶ 36 Dismissed in part; affirmed in part.