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2015 IL App (3d) 140609-U

Order filed June 9, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

DAVID HASKINS, d/b/a WINDOWS AND SIDING UNLIMITED, INC.,)	Appeal from the Circuit Court of the 13th Judicial Circuit, La Salle County, Illinois.
Plaintiff-Appellant,)	
v.)	Appeal No. 3-13-0609
)	Circuit No. 12-SC-230
GINA HOGAN,)	
Defendant-Appellee.)	Honorable Karen C. Eiten, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice McDade and Justice O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* The Business Corporation Act of 1983 applies where the Secretary of State administratively dissolves a corporation. The five-year limitation period set forth in the Act does not apply where a former shareholder seeks to recover a fixed sum.

¶ 2 Defendant, Gina Hogan, entered into a contract with Windows & Siding Unlimited, Inc., on May 27, 2003. Windows & Siding promised to install windows and Hogan agreed to pay \$5,070. The Secretary of State dissolved Windows & Siding in 2005. Subsequently, Hogan defaulted on the contract. Plaintiff, David Haskins, the sole stockholder of the corporation,

brought suit against Hogan for breach of contract in 2012, seven years after the corporation dissolved. The trial court granted Hogan's motion for summary judgment, finding that Haskins filed his claim outside of the five-year period set forth in section 12.80 of the Business Corporation Act of 1983 (Business Corporation Act) (805 ILCS 5/12.80 (West 2012)).

¶ 3 Haskins appeals, arguing that the court erred in granting Hogan's motion for summary judgment. Specifically, he argues that the five-year period does not apply where the corporation did not voluntarily dissolve. Alternatively, Haskins argues that the five-year period did not apply where he sought to recover a fixed amount. For the following reasons, we affirm in part, reverse in part, and remand for further proceedings.

¶ 4 **BACKGROUND**

¶ 5 Hogan entered into a written contract with Windows & Siding for the installation of new windows on May 27, 2003. Hogan promised to pay \$5,070 in three installments. The contract also stated that any unpaid balance shall accrue interest at the rate of 1.5% per month until the contract is paid in full. Furthermore, the contract required Hogan to pay attorney fees if Haskins needed to secure counsel to collect any unpaid balance. Hogan failed to pay any of the three installments.

¶ 6 At the time of the contract, Haskins was the sole stockholder of Windows & Siding. Windows & Siding failed to pay the required annual filing fee to the Illinois Secretary of State for the 2004 year. The Secretary of State administratively dissolved the corporation on September 1, 2005, pursuant to sections 12.35 and 12.40 of the Business Corporation Act (805 ILCS 5/12.35, 12.40 (West 2012)). As president of Windows & Siding, Haskins assigned the corporation's claim against Hogan to himself on January 15, 2012.

¶ 7 Haskins filed a small claims complaint against Hogan for breach of contract on February 15, 2012. Hogan filed a motion to dismiss, arguing that the Business Corporation Act barred Haskins' claim; Haskins filed his claim more than five years after the corporation dissolved. 805 ILCS 5/12.80 (West 2012). Haskins argued that the 5-year period did not apply and he was entitled to bring his claim within 10 years pursuant to section 13-206 of Code of Civil Procedure (735 ILCS 5/13-206 (West 2012)). The court granted Hogan's motion to dismiss, finding that section 12.80 applied and barred Haskins from filing his complaint.

¶ 8 Haskins appeals. We affirm in part, reverse in part, and remand for further proceedings.

¶ 9 ANALYSIS

¶ 10 Haskins argues that the trial court improperly granted Hogan's motion to dismiss. Hogan did not file an appellee's brief.

¶ 11 We review *de novo* summary judgment rulings. *Roe v. Jewish Children's Bureau of Chicago*, 339 Ill. App. 3d 119, 129 (2003). A dissolved corporation's assets belong to the former shareholders, subject to the right of creditors. *Dubey v. Abam Building Corp.*, 266 Ill. App. 3d 44, 47 (1994) (citing *Shute v. Chambers*, 142 Ill. App. 3d 948, 952 (1986)). Here, Haskins, as president of Windows & Siding, assigned the corporation's liabilities and assets to himself after the Secretary of State administratively dissolved the corporation.

¶ 12 Initially, we note that the Secretary of State administratively dissolved Windows & Siding pursuant to section 12.40, which states:

"(a) After the Secretary of State determines that one or more grounds exist under Section 12.35 for the administrative dissolution of a corporation, he or she shall send by regular mail to each delinquent corporation a Notice of Delinquency to its

registered office, or, if the corporation has failed to maintain a registered office, then to the president or other principal officer at the last known office of said officer.

(b) If the corporation does not correct the default described in paragraphs (a) through (e) of Section 12.35 within 90 days following such notice, the Secretary of State shall thereupon dissolve the corporation by issuing a certificate of dissolution that recites the ground or grounds for dissolution and its effective date."

805 ILCS 5/12.40(a), (b) (West 2012).

Section 12.35 provides the grounds for administrative dissolution. "The Secretary of State may dissolve any corporation administratively if: *** it has failed to pay any fees, franchise taxes, or charges prescribed by this Act ***." 805 ILCS 5/12.35(c) (West 2012). Here, Windows & Siding failed to pay the required annual filing fee.

¶ 13 Haskins argues that section 12.80 of the Business Corporation Act does not apply where the State administratively dissolves a company. Section 12.80, in relevant part, states:

"The dissolution of a corporation *** (2) by the issuance of a certificate of dissolution in accordance with Section 12.40 of this Act, *** shall not take away nor impair any civil remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within five years after the date of such dissolution. " 805 ILCS 5/12.80 (West 2012).

Under Illinois law, the five-year period creates the outer limit for suits by dissolved corporations and suits against them. *Sharif v. International Development Group Co., Ltd.*, 399 F.3d 857, 860 (2005) (citing *Citizens Electric Corp. v. Bituminous Fire & Marine Insurance Co.*, 68 F.3d 1016, 1018 (1995)). The General Assembly intended to continue the life of the corporation for five years for the purpose of wrapping up its affairs. *Sharif*, 399 F.3d at 860 (citing *Canadian Ace Brewing Co. v. Joseph Schlitz Brewing Co.*, 629 F.2d 1183 (1980)). Any action against or on behalf of a dissolved corporation must be commenced before the end of the five-year period after dissolution. *Riley Acquisitions, Inc. v. Drexler*, 408 Ill. App. 3d 397, 401 (2011).

¶ 14 Based on the plain language of the statute, we disagree with Haskins' argument that the five-year period does not apply to an involuntary dissolution of a corporation. Where the language of a statute is unambiguous, we will enforce the law as written and not look beyond the language of the statute. *Petersen v. Wallach*, 198 Ill. 2d 439, 445 (2002); *Stinson v. Chicago Board of Election Commissioners*, 407 Ill. App. 3d 874, 876 (2011); *Land v. Board of Education of the City of Chicago*, 202 Ill. 2d 414, 421-22 (2002). We will not read into the statute exceptions, limitations, or conditions. *Stinson*, 407 Ill. App. 3d at 876.

¶ 15 Here, the Secretary of State administratively dissolved Windows & Siding in 2005 pursuant to sections 12.35(c) and 12.40. Section 12.80 does not differentiate between voluntary and involuntary dissolution. In fact, section 12.80 explicitly states that corporations dissolved pursuant to section 12.40 are subject to the five-year period. Therefore, the five-year period applied when the State dissolved Windows & Siding.

¶ 16 Alternatively, Haskins argues that the five-year period did not apply where he sought to collect a fixed amount, namely the contract price plus interest. Initially, we note that Haskins failed to raise this issue below. The trial court discussed the *Sharif* case, which illustrates the

two exceptions. However, the trial court did not apply such exceptions because Haskins' counsel did not make the argument below. Further, Hogan's counsel affirmatively misled the court by simply stating: "And of the exceptions that are carved out and set forth in the case, I do not believe that Mr. Haskins falls into either of those two." Hogan's counsel never explained the exceptions, nor why neither applied. Typically, a party waives an argument by failing to raise it below. *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 413 (2002). However, waiver is an affirmative defense. *R & B Kapital Development, LLC v. North Shore Community Bank & Trust Co.*, 358 Ill. App. 3d 912, 921 (2005) (citing *Hubble v. O'Connor*, 291 Ill. App. 3d 974 (1997)). A party waives his or her affirmative defenses by failing to raise such defenses in his or her brief on appeal. *Stevens v. Village of Oak Brook*, 2013 IL App (2d) 120456, ¶ 30 (citing *Willaby v. Bendersky*, 383 Ill. App. 3d 853, 861 (2008)). In addition, Illinois Supreme Court Rule 341(h)(7), which applies to appellees pursuant to Illinois Supreme Court Rule 341(i), states: "points not argued [in appellee's brief] are waived ***." Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Here, Hogan waived the defense of waiver by failing to file an appellee's brief. Thus, we will address the issue, despite Haskins' failure to raise it below.

¶ 17 Two exceptions to the five-year period rule exist, allowing the shareholder to file outside the five-year period. The exceptions apply where the shareholder: (1) is a direct beneficiary of the contract; and (2) seeks to recover a fixed sum. *Sharif*, 399 F.3d at 862.

¶ 18 In order to recover under the first exception, the shareholder must show that the parties to the original contract manifested an intent to confer a benefit upon the third party. *Sharif*, 399 F.3d at 862. This exception does not apply here. Windows & Siding entered into the contract with Hogan. Nothing in the contract suggests that the parties intended to benefit Haskins.

¶ 19 To proceed under the second exception, the shareholder must establish that he is attempting to recover a fixed amount that can be ascertained. *Sharif*, 399 F.3d at 862 (citing *Shute*, 97 Ill. App. 3d 948 (1986)); *Dubey v. Abam Building Corp.*, 266 Ill. App. 3d 44, 47 (citing *Canadian Ace*, 629 F. 2d at 1187) (a fixed debt represented by a document is similar to a transfer of tangible property, upon which the shareholder can maintain an action). In *Sharif*, the shareholder filed a breach of contract claim eight years after the corporation dissolved. *Sharif*, 399 F.3d at 860. The contract stated that the corporation would collect a consultant's fee for services rendered amounting to 1% of gross revenues received by the client. *Sharif*, 399 F.3d at 862. There, the court held that the second exception to the five-year period did not apply; the contract did not state a fixed amount.

¶ 20 Here, the contract stated that Hogan owed a fixed amount of \$5,070. Further, the contract clearly indicated that an interest rate of 1.5% per month accrued until Hogan paid the contract in full. Haskins sued to recover the contract price, a sum certain. Accordingly, we find that the five-year period does not apply to Haskins' breach of contract claim. Instead, the statute of limitations for breach of a written contract applies.

"[A]ctions on *** written contracts, or other evidences of indebtedness in writing *** shall be commenced within 10 years next after the cause of action accrued; but if any payment or new promise to pay has been made, in writing, on any bond, note, bill, lease, contract, or other written evidence of indebtedness, within or after the period of 10 years, then an action may be commenced thereon at any time within 10 years after the time of such payment or promise to pay." 735 ILCS 5/13-206 (West 2012).

¶ 21 Here, Hogan did not make any payments. The parties entered into the contract on May 27, 2003. Hogan promised to pay the first installment on November 1, 2003. She failed to do so. Haskins filed his small claims complaint on February 15, 2012, which was within the 10-year time period.

¶ 22 In his brief, Haskins makes reference to recovering the value of the improvements in *quantum meruit* for labor and materials. We make it clear that Haskins is not entitled to a judgment for *quantum meruit*. For reasons stated above, the five-year period set forth in section 12.80 bar those claims. We affirm the court's dismissal of Haskins' complaint related to any *quantum meruit* claims. However, to the extent that Haskins has a claim for breach of contract for the fixed contract price plus interest, we remand for further proceedings.

¶ 23 CONCLUSION

¶ 24 For the foregoing reasons, the judgment of the circuit court of La Salle County is affirmed in part, reversed in part, and the cause is remanded for further proceedings.

¶ 25 Affirmed in part and reversed in part; cause remanded for further proceedings.