

Rule 23 order filed
September 29, 2015;
Modified upon denial of
Rehearing December 18, 2015

2015 IL App (5th) 150084-U

NO. 5-15-0084

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).

JASPER OIL PRODUCERS, INC.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	St. Clair County.
)	
v.)	No. 14-AR-236
)	
DUPO OILFIELD DEVELOPMENT, INC.,)	Honorable
)	Heinz M. Rudolf,
Defendant-Appellee.)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Stewart and Cates concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court erred in dismissing the plaintiff's claim for a breach of contract based on the five-year statute of limitations set forth in section 13-205 of the Illinois Code of Civil Procedure (735 ILCS 5/13-205 (West 2014)) because the allegations of the complaint, construed liberally, pled equitable estoppel as a defense to the statute of limitations, and, in the interest of justice, the plaintiff should be granted leave to amend its complaint to plead the precise elements for such a defense. The circuit court erred in dismissing the plaintiff's claim for specific performance because questions of fact remain as to whether the real estate contract at issue is evidenced by a writing sufficient to satisfy the Statute of Frauds (740 ILCS 80/2 (West 2014)), which will determine whether specific performance is available as a remedy or whether the plaintiff's remedy is limited to the value of its performance, which is the purchase price it paid.

¶ 2 The plaintiff, Jasper Oil Producers, Inc. (Jasper), appeals the February 10, 2015, order of the circuit court of St. Clair County, which dismissed, with prejudice, its second amended complaint against the defendant, Dupo Oilfield Development, Inc. (Dupo). On appeal, Jasper argues that the circuit court erred in finding that it brought its complaint outside the statute of limitations for oral contracts as set forth in section 13-205 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/13-205 (West 2014)), and that the circuit court erred in finding that it failed to state a cause of action for specific performance. For the following reasons, we reverse and remand with directions.

¶ 3 **FACTS**

¶ 4 On March 12, 2014, Jasper filed a complaint in the circuit court of St. Clair County against Dupo, alleging that Dupo breached a contract it entered into with Jasper on September 16, 2008. According to the complaint, Dupo agreed to sell to Jasper, for \$25,000, a 1/32 share of all mineral interests and development rights Dupo acquired in the Dupo Oilfield. The complaint alleges that Jasper tendered a cashier's check to Dupo on September 17, 2008, which Dupo cashed and deposited. For several years thereafter, Jasper repeatedly inquired of Dupo about the conveyance of the 1/32 share, and Dupo responded that it was "having some trouble with the oilfield and would get at preparing the documents soon." Finally, in a meeting in March 2011, Dupo was vague and nonresponsive to Jasper's inquiry, and the complaint alleges that this is when Dupo breached the contract. Count I of the complaint requested damages for breach of contract, count II contained an alternative request for specific performance, and count III alleged unjust enrichment.

¶ 5 On June 23, 2014, Dupo filed a motion to dismiss Jasper's complaint, arguing, *inter alia*, that the complaint was filed outside of the five-year statute of limitations set forth in section 13-205 of the Code (735 ILCS 5/13-205 (West 2014)). On July 14, 2014, the circuit court entered an order granting the plaintiff leave to amend the complaint within 30 days.

¶ 6 On July 28, 2014, Jasper filed a first amended complaint, attaching documentation upon which its claim was based, pursuant to section 2-606 of the Code (735 ILCS 5/2-606 (West 2014)). This documentation included, *inter alia*, a check from Jasper made out to Dupo in the amount of \$25,000, with the memo line stating, "St. Clair County, Illinois 1/32 interest Sec. 28, 33, 34 T1N." The signature line appears to have two signatures on it, but it is unclear whether these signatures include the signature of each party. There is also a cashier's check appended to the first amended complaint made out to Dupo in the amount of \$25,000. According to the first amended complaint, Jasper tendered the first check to Dupo, but Dupo insisted that payment be made in the form of a cashier's check. The first amended complaint also omitted count III, which had alleged unjust enrichment. Otherwise, the operative facts alleged in the complaint mirrored those pled in the original complaint.

¶ 7 On August 18, 2014, Dupo filed a motion to dismiss the first amended complaint based primarily on the five-year statute of limitations set forth in section 13-205 of the Code (735 ILCS 5/13-205 (West 2014)). Again, no response to the motion appears of record, and there is no report of proceedings regarding any hearing. On October 9, 2014, the circuit court entered an order dismissing the first amended complaint. In the order,

the circuit court found that Jasper's claims were barred by the statute of limitations and Jasper "knew or reasonably should have known its claims accrued more than five years prior to the filing of this action based on the allegations set forth in the first amended complaint." The circuit court granted Jasper leave to again amend the complaint within 30 days.

¶ 8 On November 7, 2014, Jasper filed a second amended complaint, setting forth in further detail the interactions between the parties in the years prior to Jasper's filing suit. According to the second amended complaint, Dupo acquired the rights in the Dupo Oilfield in mid-October 2008, but did not inform Jasper of this fact until approximately one month later. At that time, Dupo informed Jasper that it needed \$40,000 for the interest, and Jasper indicated that there was already a contract for \$25,000. Dupo agreed, but indicated that "it did not know how to put down [Jasper] as an owner" and "would have to figure this out" since the other investors had contributed \$40,000.

¶ 9 The second amended complaint alleges that on several occasions over the next several months, Jasper contacted Dupo to inquire as to the status of its interest in the Dupo Oilfield. During these contacts, Dupo represented that it would prepare the documents necessary to convey the interest as soon as it could find the time. Jasper realized that it was not receiving proceeds from the development of the oilfield, but attributed this to startup costs for operating the oilfield. Jasper did not become suspicious that Dupo was not going to convey the 1/32 interest to Jasper until August 2009. Jasper contacted the crude oil purchaser for the oilfield and learned in September 2009 that the crude oil purchaser had no record of Jasper's interest in the oilfield and Jasper would not

receive any proceeds. Jasper continued to confront Dupo and Dupo repeatedly acknowledged that it intended to convey the interest. However, on or about March 3, 2011, Jasper confronted Dupo at an Illinois Oil and Gas Association meeting, and for the first time, did not receive an assurance that the conveyance was forthcoming. According to the second amended complaint, this was the first time that Dupo failed to indicate that it was going to transfer the interest that Jasper had purchased. Jasper again attached both of the checks to the second amended complaint.

¶ 10 On January 7, 2015, Dupo filed a motion to dismiss the second amended complaint, again arguing that the five-year statute of limitations applied to bar Jasper's cause of action. See 735 ILCS 5/13-205 (West 2014). The parties filed a bystander's report regarding the hearing on these motions. See Ill. S. Ct. R. 323 (eff. Dec. 13, 2005). Jasper argued that the details set forth in the second amended complaint regarding the communications between the parties created a question of fact as to when the breach of contract occurred and the statute of limitations began to run. On February 10, 2015, the circuit court entered an order that dismissed the second amended complaint with prejudice based on the statute of limitations. On March 6, 2015, Jasper filed a notice of appeal, and on March 10, 2015, an amended notice of appeal.

¶ 11 We issued our original decision in this case on September 29, 2015. On October 20, 2015, Dupo filed a petition for rehearing. After full briefing by the parties on the petition for rehearing, we issue this modified order upon denial of rehearing.

¶ 12

ANALYSIS

¶ 13 A section 2-619 (735 ILCS 5/2-619 (West 2014)) motion to dismiss raises certain defects or defenses and questions whether the defendant is entitled to judgment as a matter of law. *Prime Leasing, Inc. v. Kendig*, 332 Ill. App. 3d 300, 307 (2002). Because the resolution of such a motion involves a question of law, the standard of review is *de novo*. *Id.* On a motion to dismiss, this court must accept all well-pleaded facts as true. *Id.*

¶ 14 The parties agree that Jasper's complaint is subject to a five-year statute of limitations. See 735 ILCS 5/13-205 (West 2014). For contract actions and torts arising out of contractual relationships, a cause of action ordinarily accrues for statute of limitations purposes at the time of the breach of contract. *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 77 (1995). Here, the alleged breach of contract occurred at the end of 2008, when Dupo obtained the rights in the Dupo Oilfield and failed to convey a 1/32 share to Jasper. However, Jasper has pled, in detail, a course of dealing between the parties consisting of Dupo's repeated assurances to Jasper that performance was forthcoming and Jasper's reliance on these assurances. Although Jasper does not succinctly identify these allegations as an equitable estoppel defense to the statute of limitations, we find that, construed liberally, these allegations amount to such a defense.

¶ 15 In order to plead equitable estoppel as a defense to the statute of limitations, a party must allege that:

" '(1) the other party misrepresented or concealed material facts; (2) the other party knew at the time the representations were made that the representations were untrue; (3) the party claiming estoppel did not know that the representations were untrue when the representations were made and when they were acted upon; (4) the other party intended or reasonably expected the representations to be acted upon by the party claiming estoppel or by the public generally; (5) the party claiming estoppel reasonably relied upon the representations in good faith and to their detriment; and (6) the party claiming estoppel has been prejudiced by his reliance on the representations.' " *McIntosh v. Cueto*, 323 Ill. App. 3d 384, 390 (2001) (quoting *Parks v. Kownacki*, 193 Ill. 2d 164, 180 (2000)).

¶ 16 Here, Jasper's second amended complaint contains detailed allegations regarding representations that were made by Dupo that the paperwork for the conveyance was forthcoming. If proven, this conduct on the part of Dupo can amount to equitable estoppel because "one cannot justly or equitably lull his adversary into a false sense of security, causing him to subject his claim to the bar of the statute [of limitations], and then plead the very delay caused by his course of conduct." (Internal quotation marks omitted.) *Swann & Weiskopf, Ltd. v. Meed Associates, Inc.*, 304 Ill. App. 3d 970, 977 (1999). Construed liberally, the allegations of the second amended complaint suggest that Jasper relied upon Dupo's assurances in good faith and to its detriment and has been prejudiced as a result. If the finder of fact finds that Jasper reasonably relied, to its detriment, upon representations made by Dupo, it could legally find that Dupo is equitably estopped from asserting the statute of limitations as a defense in this case.

¶ 17 We recognize that equitable estoppel must be specifically pled to be available. See *id.* We also recognize that we could find that Jasper has waived this issue on appeal for failure to specifically raise it in the circuit court and in its opening brief on appeal. See *Bell Realty & Insurance Agency v. Chicago Comm'n on Human Relations*, 130 Ill. App. 2d 1072, 1079 (1971) (citing Ill. S. Ct. R. 341(e)(7) and *Woman's Athletic Club of Chicago v. Hulman*, 31 Ill. 2d 449 (1964)). However, waiver is a limitation on the parties and not the court, and may be relaxed in the interests of justice. See *id.* (citing *Hux v. Raben*, 38 Ill. 2d 223, 230 (1967)). We find that justice requires that the merits of Jasper's equitable estoppel defense to the statute of limitations be adjudicated. Accordingly, we remand with directions that Jasper be permitted to again amend its complaint to specifically plead all essential elements of equitable estoppel.

¶ 18 Having found that Jasper should be permitted to amend its complaint to specifically plead equitable estoppel, we must examine the circuit court's finding that Jasper's claim for specific performance is unavailable to it as a matter of law. Here, Jasper contends that Dupo breached a contract to sell it a 1/32 interest in the mineral rights to the Dupo Oilfield. "The conveyance of the right to enter upon the land for the purpose of prospecting and operating for oil and gas is a conveyance of an interest in the land itself." *John O. Schofield, Inc. v. Nikkel*, 314 Ill. App. 3d 771, 783-84 (2000). "Where a specific and unambiguous written contract for the sale of real estate has been entered into fairly and understandingly, each party is entitled to specific performance of the contract as a matter of right." *Curtis Casket Co. v. D.A. Brown & Co.*, 259 Ill. App. 3d 800, 805 (1994) (citing *Young v. Kich*, 369 Ill. 29, 34 (1938)). Section 2 of the Illinois

Fraud Act (Statute of Frauds) sets forth the requirements for a written contract for the sale of real estate. It provides that "[n]o action shall be brought to charge any person upon any contract for the sale of lands, *** or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing, and signed by the person to be charged therewith." 740 ILCS 80/2 (West 2008).

¶ 19 The parties stipulate that where, as in the case at bar, there has been performance of the contract by one party, the Statute of Frauds will not preclude an action on the contract brought by that party. *John O. Schofield, Inc.*, 314 Ill. App. 3d at 785. However, specific performance is not available as a remedy in that situation if the value of the consideration provided by that party is readily ascertainable and certain. See *Fowley v. Braden*, 4 Ill. 2d 355, 362 (1954); see also *John O. Schofield, Inc.*, 314 Ill. App. 3d at 786-87. In such a case, money damages are considered adequate to compensate the aggrieved party. *Id.* Here, the value of the consideration provided by Jasper, the \$25,000 purchase price, is readily ascertainable and certain, and would therefore be considered an adequate remedy of law if the real estate contract does not meet the requirements of the Statute of Frauds.

¶ 20 Based on the foregoing, the issue of whether specific performance is available to Jasper turns on whether there is a writing evidencing the contract at issue that is sufficient to satisfy the Statute of Frauds. If the writing meets the requirements of the Statute of Frauds, then specific performance is available to Jasper. If not, then Jasper's remedy is

limited to the value of its performance of the contract, which is the \$25,000 purchase price it paid to Dupo. According to the Illinois Supreme Court:

" 'To satisfy the Statute of Frauds, the writing itself must contain on its face or by reference to other writings, the names of the vendor and of the vendee, a description of the property sufficiently definite to identify the same as the subject matter of the contract, the price, the terms and conditions of sale, and the signature of the party to be charged.' " *Manda v. Branham*, 50 Ill. App. 3d 91, 96 (1977) (quoting *Thompson v. Wiegand*, 9 Ill. 2d 63, 66 (1956)).

¶ 21 Here, the only writing evidencing a contract consists of the two checks that are appended to the first amended complaint. The first check is made out from Jasper to Dupo in the amount of \$25,000, with the memo line stating, "St. Clair County, Illinois 1/32 interest Sec. 28, 33, 34 T1N." A negotiable instrument can be considered a writing sufficient to satisfy the Statute of Frauds if it contains all the necessary elements. See *Lewis Realty Co. v. Smith*, 7 Ill. App. 3d 734, 735 (1972). However, it is unclear whether this check contains the signatures of both parties. There appears to be two signatures on the contract, but the signatures are illegible. Accordingly, there is insufficient evidence in the record to determine whether the check contains the signature of the party to be charged as required by the Statute of Frauds.

¶ 22 Further, we find insufficient evidence in the record to determine, as a matter of law, whether the description of the property interest to be conveyed is sufficiently definite to satisfy the Statute of Frauds. "A contract for the sale of land must definitely point out the land to be conveyed or furnish the means of identifying the land with

certainty." *Thomas v. Moore*, 55 Ill. App. 3d 907, 911 (1977) (citing *Kopprasch v. Satter*, 331 Ill. 126, 128 (1928)). A description of land is sufficiently definite when it will enable a surveyor to locate the property. *Id.* Here, the statement on the check indicating a "1/32 interest" may not definitively identify the interest as a mineral interest because there is inadequate evidence in the record to determine whether a surveyor would recognize this statement to pertain to a mineral interest. In addition, Dupo sets forth information in its petition for rehearing that would suggest that the description of the location of the property (St. Clair County, Illinois 1/32 interest sec. 28, 33, 34 T1N) does not identify with accuracy the location of the property involved. However, that information was not before the circuit court at the time it ruled on the motion to dismiss. Accordingly, it is not appropriate for this court to consider this information on appeal. See *Allstate Insurance Co. v. Kovar*, 363 Ill. App. 3d 493, 499 (2006). Accordingly, we find that the circuit court had insufficient evidence to determine whether the description of the property interest was sufficiently definite to enable a surveyor to recognize and identify a mineral interest and the location of the subject property. See *Thomas*, 55 Ill. App. 3d at 911. Because the question of whether the contract is evidenced by a writing sufficient to satisfy the Statute of Frauds cannot be determined based on the evidence in the record, and this issue is determinative regarding the availability of specific performance as a remedy, we find that the circuit court erred in dismissing count II at this stage in the proceedings.

¶ 23

CONCLUSION

¶ 24 For the foregoing reasons, the February 10, 2015, order of the circuit court of St. Clair County that dismissed Jasper's complaint for breach of contract and specific performance is reversed. This cause is remanded with directions that Jasper be permitted to amend its complaint to specifically plead the elements of equitable estoppel as a defense to the statute of limitations and for further proceedings consistent with this order.

¶ 25 Reversed and remanded with directions.