

No. 1-16-1606

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
FIRST JUDICIAL DISTRICT

JJD, INC., JOSEPH ZUCCHERO, and DOMINIC ZUCCHERO,)	Appeal from the
)	Circuit Court of
)	Cook County
)	
Plaintiffs-Appellants,)	
)	Nos. 15 L 009321 and
v.)	12 CH 04099 (cons.)
)	
CHICAGO TITLE LAND TRUST COMPANY,)	
)	Honorable
Defendant-Appellee.)	Darryl B. Simko,
)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* Affirming the judgment of the circuit court of Cook County dismissing breach of fiduciary duty complaint and denying request to file an amended complaint alleging breach of contract.

¶ 2 Joseph Zucchero (Joseph), Dominic Zucchero (Dominic), and JJD, Inc. (JJD) (collectively, the Zuccheros) filed a single-count complaint in the circuit court of Cook County alleging breach of fiduciary duty against Chicago Title Land Trust Company (Chicago Title). According to the Zuccheros, Chicago Title’s predecessor executed a mortgage based on a forged letter of direction. Chicago Title filed a motion to dismiss pursuant to section 2-619(a)(5) of the

Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(5) (West 2014)), arguing that the complaint was time-barred under the applicable five-year statute of limitations (735 ILCS 5/13-205 (West 2014)). The circuit court granted the motion, dismissed the complaint, and denied the Zuccheros' request to file an amended complaint alleging breach of contract, which has a ten-year statute of limitations (735 ILCS 5/13-206 (West 2014)). The Zuccheros contend that the circuit court erred in dismissing their complaint and denying them leave to file an amended complaint. For the reasons discussed below, we affirm the judgment of the circuit court.

¶ 3

BACKGROUND

¶ 4 JJD held a 100% beneficial interest in a trust which held certain commercial property, and Joseph and Dominic had the power of direction. On October 30, 2009, the trustee executed a mortgage on the property in favor of a bank, which was recorded with the Cook County Recorder of Deeds on November 3, 2009. The bank initiated foreclosure proceedings in 2012. On September 11, 2015, the Zuccheros filed a breach of fiduciary duty action against Chicago Title, as the successor trustee, alleging that the mortgage was executed pursuant to a fraudulent letter of direction, *i.e.*, the signatures of Joseph and Dominic were forged. After consolidating the breach of fiduciary duty and foreclosure actions, the circuit court considered Chicago Title's motion to dismiss the breach of fiduciary action as time-barred.

¶ 5 The circuit court concluded that the fraud was discoverable as of the date that the mortgage was recorded in 2009, and thus the breach of fiduciary duty action was time-barred. In denying leave to amend, the circuit court characterized the complaint as "uncurable." The Zuccheros filed a motion to reconsider and attached a proposed amended complaint. The circuit court denied the motion, and the Zuccheros filed the instant appeal.

¶ 6

ANALYSIS

¶ 7 Prior to addressing the merits, we initially consider whether we have jurisdiction. An appellate court has a duty to consider its own jurisdiction, regardless of whether the parties have raised it as an issue. *Daewoo International v. Monteiro*, 2014 IL App (1st) 140573, ¶ 72.

Illinois Supreme Court Rule 304(a) provides, in part: “If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both.” Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016). Neither the order granting the motion to dismiss the breach of fiduciary duty complaint nor the order denying the Zuccheros’ motion to reconsider contains a Rule 304(a) finding, despite the fact that (i) the foreclosure case and the breach of fiduciary case were consolidated and (ii) the record does not indicate that there was a final judgment in the foreclosure matter prior to the instant appeal. See *EMC Mortgage v. Kemp*, 2012 IL 113419, ¶ 11 (stating that a judgment ordering the foreclosure of a mortgage is not final and appealable until the trial court enters an order approving the sale and directing the distribution).

¶ 8 “Where a consolidation concerns several actions involving an inquiry into the same event in its general aspects and is limited to a joint trial, with separate docket entries, verdicts and judgments, an order dismissing one of the actions is deemed final and immediately appealable.” *Nationwide Mutual Insurance Co. v. Filos*, 285 Ill. App. 3d 528, 532 (1996). “Where several actions actually merge into one action, however, thereby losing their identity, they are disposed of as one suit and Supreme Court Rule 304(a) language is necessary before an appeal of dismissal of less than all counts will be heard.” *Id.*

¶ 9 The instant consolidated proceedings were more akin to the first scenario than the second

scenario stated above. The consolidation order expressly provided that the circuit court judge had the discretion to handle the two cases separately or in any manner he deemed appropriate. Based on our review of the record, the consolidation appears to have been effectuated for purposes of convenience and economy and did not have the effect of merging the actions or changing the substantive rights of the parties. *Id.* We conclude that the orders dismissing the breach of fiduciary duty action and denying the motion to reconsider did not require a Rule 304(a) finding, regardless of the ongoing proceedings in the consolidated foreclosure case. *Id.*; *In re Adoption of S.G.*, 401 Ill. App. 3d 775, 783 (2010) (noting that Rule 304(a) finding was not required where the cases maintained separate identities).

¶ 10 Consistent with the foregoing, we will not consider the Zuccheros' arguments on appeal regarding the resolution of the foreclosure action, *e.g.*, that the "loss of the Property to foreclosure would be a disaster for the Zuccherero family and, in the circumstances, a miscarriage of justice." As framed by their notice of appeal, our review is limited to the disposition of the Zuccheros' action, not the merits of the foreclosure action. We further note that the statement of facts in the Zuccheros' initial brief violates Illinois Supreme Court Rule 341 by including argument and legal citations. Ill. S. Ct. R. 341(h)(6) (eff. Jan. 1, 2016) (requiring a statement of facts "without argument or comment"). As these deficiencies do not effectively preclude our review of the case, we therefore turn to two primary issues: the dismissal of the breach of fiduciary duty complaint and the denial of the Zuccheros' request to amend the complaint.

¶ 11 Dismissal of Breach of Fiduciary Duty Complaint

¶ 12 A motion to dismiss under section 2-619 admits the legal sufficiency of the complaint but asserts that some affirmative matter defeats the plaintiff's claim. *Stone Street Partners, LLC v. City of Chicago Department of Administrative Hearings*, 2017 IL 117720, ¶ 4. Section 2-

619(a)(5) provides that an action may be dismissed where it was “not commenced within the time limited by law.” 735 ILCS 5/2-619(a)(5) (West 2014). When reviewing whether a section 2-619 motion should have been granted, we may consider all facts presented in the pleadings, affidavits, and depositions found in the record. *Stone Street Partners*, 2017 IL 117720, ¶ 4. “All well-pleaded facts along with all reasonable inferences that can be drawn from those facts are deemed admitted, and all pleadings and supporting documents must be interpreted in the light most favorable to the nonmoving party.” *Id.* The standard of review is *de novo*. *Id.*

¶ 13 The statute of limitations for a breach of fiduciary duty claim is five years. 735 ILCS 5/13-205 (West 2014) (stating that the action “shall be commenced within 5 years next after the cause of action accrued”). To state a claim for a breach of fiduciary duty, it must be alleged and ultimately established that: (1) a fiduciary duty exists; (2) the fiduciary duty was breached; and (3) such breach proximately caused the injury of which the party complains. *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 69.

¶ 14 The Zuccheros assert that a “cause of action accrues when all the elements of the cause of action are present.” Because damages constitute an element of a breach of fiduciary duty claim, the Zuccheros argue that the limitations period was not triggered until they were damaged by the judgment in the foreclosure action on August 3, 2015.¹ We reject this contention. Illinois courts have consistently held that the limitations period commences when the plaintiff is injured, rather than when the plaintiff realizes the consequences of the injury or the full extent of his injury. *Golla v. General Motors Corp.*, 167 Ill. 2d 353, 364 (1995). See also *Indiana Insurance Co. v. Machon & Machon, Inc.*, 324 Ill. App. 3d 300, 304 (2001) (noting that the fact that damages are not immediately ascertainable does not postpone the accrual of the claim). As discussed below,

¹ The sole order in the record entered on August 3, 2015, granted partial summary judgment in favor of the bank’s assignee. Despite the Zuccheros’ reference to the entry of a judgment of foreclosure and sale on that date, the record does not include any signed order so captioned.

the Zuccheros were injured prior to the entry of partial summary judgment in the foreclosure action.

¶ 15 Under section 13-205 of the Code, the “limitations period commences when the cause of action ‘accrues,’ or when ‘facts exist that authorize the bringing of the cause of action.’ ” *Lane v. Deutsche Bank AG*, 2015 IL App (1st) 142968, ¶ 18, citing *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 20. See also *Diotallevi v. Diotallevi*, 2013 IL App (2d) 111297, ¶ 27 (noting that “a statute of limitations begins to run as soon as a person suffers injury or, in the case of contract-based actions, at the time of the breach”). Accordingly, we consider the allegedly unauthorized execution of the mortgage on October 30, 2009, to be the “injury” which triggered the limitations period. Even prior to the bank’s initiation of the foreclosure case in 2012, the Zuccheros could have commenced an action based on the execution of the mortgage – and thus the imposition of a multimillion dollar encumbrance – on the property by the trustee. See *Cassidy v. Derek Bryant Insurance Brokers, Ltd.*, 244 Ill. App. 3d 1054, 1064 (1993) (noting that the statute of limitations generally begins to run when the party to be barred has a right to invoke the aid of the court to enforce his remedy). See also *Johnson v. Riedler*, 395 Ill. 412, 417-18 (1947) (removing unauthorized mortgage as a cloud on title); *Kurtz v. Hubbard*, 2012 IL App (1st) 111360, ¶ 21 (discussing the “onus on the liened party to take affirmative judicial action” to remove a fraudulent lien assessment).

¶ 16 The Zuccheros raise an alternative argument based on the discovery rule, contending that the statute of limitations was not triggered until their counsel obtained copies of all of the documents pertaining to the trust from Chicago Title on August 31, 2015.

¶ 17 The Discovery Rule

¶ 18 Although a cause of action accrues when the plaintiff suffers an injury, Illinois recognizes

a “discovery rule,” which delays the commencement of the applicable limitations period until the plaintiff knows or reasonably should have known that he is injured and that such injury may have been wrongfully caused. *Golla*, 167 Ill. 2d at 363-64. Accord *Rasgaitis v. Waterstone Financial Group*, 2013 IL App (2d) 111112, ¶ 30. The burden is on the injured party at that point to inquire further as to the possible existence of a cause of action. *Khan*, 2012 IL 112219, ¶ 20. The rule mitigates the “potentially harsh results of a mechanical application of the five-year limitations period.” *Lane*, 2015 IL App (1st) 142968, ¶ 18, n. 1. Furthermore, a plaintiff seeking to utilize the discovery rule to delay the commencement of the limitations period has the burden of proving the date of the discovery of his loss. *Machon & Machon*, 324 Ill. App. 3d at 304. In general, the determination of the point at which the running of the limitations period commenced under the discovery rule is a question of fact. *Rasgaitis*, 2013 IL App (2d) 111112, ¶ 30. If it is apparent that only one conclusion can be drawn, however, the question “becomes one for the court.” *Id.* See also *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 171 (1981); *Lane*, 2015 IL App (1st) 142968, ¶ 25. As discussed below, the instant case can be decided as a matter of law.

¶ 19 The Zuccheros suggest that they were unaware of the forged letter of direction until August 31, 2015, because the bank and/or its counsel engaged in discovery misconduct, *i.e.*, the bank failed to produce a copy of the letter in response to a request for production. The Zuccheros do not provide citations to the record, however, for their representations regarding the bank’s alleged misconduct. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016). Furthermore, we reject the Zuccheros’ contention that they were “misled” by a letter of direction which was attached to one of the motions filed by the bank in the foreclosure proceedings. The description of the letter of direction provided by the bank’s representative was accurate, and the letter

related, in part, to the modification of a mortgage in 2008 – not the mortgage which was the subject of the foreclosure proceedings.²

¶ 20 In any event, the recording of the mortgage with the Cook County Recorder of Deeds on November 3, 2009, put the Zuccheros on notice of its existence. *E.g.*, *Skrodzki v. Sherman State Bank*, 348 Ill. 403, 408 (1932) (noting that the “records of the recorder’s office are public records and open alike to all parties”); *Wheeler v. McEldowney*, 60 IL 358, 360 (1871) (concluding that the recording of a bond for a deed on commercial property constituted notice to the public); *Hachem v. Chicago Title Insurance Co.*, 2015 IL App (1st) 143188, ¶ 27 (noting that “[i]t is the duty of a purchaser of land to examine the record and he is chargeable with notice of whatever is shown by the record”). See also *Lane*, 2015 IL App (1st) 142968, ¶ 27 (providing that the criminal conviction of his former counsel was a “matter of public record” that was sufficient to put the plaintiff on notice that his \$18 million loss was wrongfully caused). Notice of the existence of an unauthorized mortgage on the property would alert the Zuccheros to their potential cause of action against the trustee.

¶ 21 For the reasons discussed above, we conclude that the five-year statute of limitations for the Zuccheros’ breach of fiduciary duty claim was triggered in 2009. Therefore, the circuit court correctly dismissed their 2015 complaint as time-barred under section 2-619(a)(5) of the Code.

¶ 22 Denial of Request to File Amended Complaint

¶ 23 The Zuccheros sought leave to file an amended complaint alleging breach of contract.

The Zuccheros, however, did not submit a proposed amended complaint to the circuit court until

² Although not necessary for our analysis, we note our skepticism regarding certain of the Zuccheros’ contentions. For example, the Zuccheros challenged the validity of the letter of direction only *after* the grant of partial summary judgment against them in the foreclosure proceedings. The idea that the Zuccheros would permit the foreclosure proceedings to continue for years without investigating the possibility that Joseph and Dominic did not authorize the execution of the mortgage strains credulity.

their motion to reconsider the dismissal of the action. See *Misselhorn v. Doyle*, 257 Ill. App. 3d 983, 987 (1994). We would be hard-pressed to conclude that the circuit court abused its discretion in denying their request to file an amended complaint at the time of the dismissal when the Zuccheros had not submitted a proposed complaint for the circuit court to even consider at that time. For this reason alone, we would affirm the circuit court's denial of leave to file an amended complaint.

¶ 24 The Zuccheros further contend that the circuit court erred in denying their request to file an amended complaint alleging breach of contract, which has a ten-year statute of limitations. 735 ILCS 5/13-206 (West 2014). Courts examine four factors when determining whether to permit amended pleadings under section 2-616(a) of the Code. *Feliciano v. Geneva Terrace Estates Homeowners Ass'n*, 2014 IL App (1st) 130269, ¶ 45. See 735 ILCS 5/2-616(a) (West 2014). The four factors are: whether the proposed amendment would cure a defective pleading; whether the proposed amendment would surprise or prejudice the opposing party; whether the proposed amendment was timely filed; and whether the moving party had previous opportunities to amend. *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992). A plaintiff must meet all four factors. *I.C.S. Illinois, Inc. v. Waste Management of Illinois, Inc.*, 403 Ill. App. 3d 211, 220 (2010). There is, however, no indication in the case law that any one of the four factors is dispositive. Indeed, “ ‘the primary consideration is whether [the] amendment would further the ends of justice.’ ” *Bangly v. Baggiani*, 2014 IL App (1st) 123760, ¶ 202, quoting *Regas v. Associated Radiologists, Ltd.*, 230 Ill. App. 3d 959, 968 (1993). In this case, as discussed below, the purported amendment would not further the ends of justice, and the trial court did not abuse its discretion in denying the Zuccheros' request to amend the complaint.

¶ 25 The Illinois Supreme Court has held that “a party may not file suit based on one theory,

and then procedurally defend against a statute of limitations challenge by claiming a different theory in order to benefit from a longer statute of limitations which is applicable to a cause of action which is different from that filed by plaintiff.” *Armstrong v. Guigler*, 174 Ill. 2d 281, 292 (1996). The Zuccheros attempt to do exactly that in the instant case. As instructed by our supreme court, “[a] party simply may not circumvent a shorter period of limitations, or attempt to breathe new life into a stale claim, merely by means of artful pleading.” *Id.* at 287.

¶ 26 In any event, the Zuccheros cannot state a viable cause of action for breach of contract. “[I]t is only where liability emanates from a breach of a contractual obligation that the action may be fairly characterized as ‘an action on a written contract’ ” for purposes of the ten-year limitations period in section 13-206 of the Code. *Id.* at 291. The trust agreement provided that the trustee was authorized to act upon the written direction of Joseph and Dominic. The trustee apparently received a written letter of direction from Joseph and Dominic authorizing the execution of the mortgage on the property. The trust agreement does not expressly require the trustee to authenticate the signatures. “[T]he fact that the origin of a cause of action may ultimately be traced to a writing has never been sufficient, standing alone, to automatically warrant application of the period of limitations governing written contracts.” *Id.* at 290. See also *Miller v. Harris*, 2013 IL App (2d) 120512, ¶ 19 (providing that a “claim for breach of fiduciary duty is not ‘founded on’ a contract, even if the parties’ relationship that gives rise to the fiduciary duty is based on a contract”). Presumably recognizing such fact, the Zuccheros elected to file a breach of fiduciary duty action and not a breach of contract action.

¶ 27 The right to amend is not absolute, but is a matter within the discretion of the circuit court. *Feliciano*, 2014 IL App (1st) 130269, ¶ 45. Accord *Steinmetz v. Wolgamot*, 2013 IL App (1st) 121375, ¶ 43 (applying abuse of discretion standard). A circuit court abuses its discretion

when its ruling is fanciful, arbitrary, or unreasonable or when no reasonable person would adopt its view. *Hachem*, 2015 IL App (1st) 143188, ¶ 34. For the reasons discussed above, we conclude that the circuit court did not abuse its discretion by denying the Zuccheros leave to file an amended complaint. We thus need not consider the additional arguments advanced on appeal regarding the Zuccheros' alleged ratification of the mortgage.

¶ 28

CONCLUSION

¶ 29 The judgment of the circuit court of Cook County is affirmed in its entirety.

¶ 30 Affirmed.