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FIFTH DIVISION
September 30, 2015

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FIRST BANK & TRUST COMPANY OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 13 L 12174
)	
CROWLEY, BARRETT & KARABA, LTD.,)	Honorable
)	Margaret Ann Brennan,
Defendant-Appellee.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Palmer concurred in the judgment.

ORDER

¶ 1 *Held:* Where the plaintiff sued its former attorney, alleging the attorney's use of an inaccurate legal description of the property in a mortgage foreclosure action subsequently rendered the foreclosure defective, the circuit court erred when it found as a matter of law that the plaintiff's legal malpractice claim was barred by the two-year statute of limitations.

¶ 2 Plaintiff First Bank and Trust Company of Illinois (First Bank) challenges the circuit court's dismissal of its legal malpractice complaint against defendant Crowley, Barrett & Karaba, Ltd. (CBK) as barred by the two-year statute of limitations. The circuit court found that First Bank

knew or should have known that the foreclosure judgment was based on an inaccurate legal description for the property when the court entered the foreclosure judgment in favor of First Bank and CBK forwarded copies of that judgment to First Bank. For the reasons that follow, we reverse the circuit court's dismissal of First Bank's legal malpractice action and remand for further proceedings.

¶ 3

I. BACKGROUND

¶ 4 In 2010, First Bank retained CBK, a law firm, to handle the foreclosure of certain real property mortgaged by First Bank. During the course of the foreclosure proceeding, CBK used a legal description for the property that was different from the property description contained in the mortgage. On July 14, 2011, the court entered in favor of First Bank a judgment of foreclosure and sale related to the property, and CBK emailed First Bank a copy of that judgment, which included an exhibit that contained the incorrect legal description. On October 5, 2011, the court entered an order approving the report of sale and distribution and order for possession. Furthermore, on October 7, 2011, CBK emailed First Bank an assignment of certificate of sale to execute and return to CBK. The assignment included an exhibit that contained the incorrect legal description. On October 12, 2011, First Bank's officer signed the assignment and had it notarized.

¶ 5 On November 4, 2013, First Bank sued CBK for legal malpractice, alleging CBK failed to use the correct legal description for the property in the foreclosure action and thereby caused the foreclosure to be defective. First Bank alleged that CBK's negligent handling of the foreclosure action caused First Bank to retain new counsel to obtain title to the property for its pending sale. As a result, First Bank incurred fees exceeding \$75,000 to resolve the matter.

¶ 6 CBK moved the court to dismiss the complaint under section 2-619(a)(5) of the Code of Civil Procedure (Code), 735 ILCS 5/2-619(a)(5) (West 2012), contending it was barred by the

two-year statute of limitations. CBK argued that the statute of limitations began to run when the foreclosure judgment was entered on July 14, 2011, and First Bank did not file its complaint until November 4, 2013, approximately five months after the statute of limitations lapsed on July 14, 2013. CBK argued that the statute of limitations commences on the date the wrongful conduct occurred and First Bank's officers knew or should have known on July 14, 2011, when they received the judgment of foreclosure that the legal description contained within the judgment did not match the legal description in the mortgage. CBK also argued that First Bank's officers should have known about the incorrect legal description by October 7, 2011, when CBK sent First Bank an assignment certificate of sale to sign and that document also included an exhibit that contained the incorrect legal description.

¶ 7 In response, First Bank argued that its legal malpractice action was timely filed because the cause of action did not accrue until First Bank discovered or should have discovered its injury and incurred damages directly attributable to CBK's neglect. First Bank argued that CBK had a duty to ensure the correct legal description was used for the property and could not blame First Bank for failing to catch an error CBK, as First Bank's counsel, missed. Moreover, CBK's error did not cause any damage to First Bank until First Bank attempted to sell the property and was prevented from doing so. First Bank argued that the July 14, 2011 foreclosure judgment did not place First Bank on notice that a problem with the title existed because First Bank did not know that the legal description in the foreclosure judgment was inaccurate.

¶ 8 In its reply, CBK argued that First Bank's damages accrued and the statute of limitations began to run when the order approving the report of sale and distribution and order for possession was entered in the underlying foreclosure action on October 5, 2011. CBK argued that the October 5, 2011 order was a final order and First Bank failed to file its complaint within two years of that

final order.

¶ 9 On May 8, 2014, the circuit court granted CBK's 2-619 motion to dismiss with prejudice. First Bank moved the court to reconsider and vacate the dismissal order. First Bank attached to its motion the affidavit of Emad Murrar, First Bank's senior vice president, who stated that First Bank attempted to sell the property at issue after the entry of the memorandum of judgment in the underlying foreclosure case on November 3, 2011. Murrar stated that it was not until after First Bank attempted to sell the property, which occurred after November 4, 2011, that First Bank first learned that the legal description of the property contained in the July 2011 and October 2011 judgment orders of the foreclosure case was not accurate. The court denied First Bank's motion to reconsider on June 16, 2014, and First Bank timely appealed.

¶ 10

II. ANALYSIS

¶ 11 A motion to dismiss pursuant to section 2-619 of the Code admits the legal sufficiency of the complaint but asserts defects, defenses or other affirmative matters that appear on the face of the complaint or are established by external submissions that act to defeat the claim. *Wallace v. Smyth*, 203 Ill. 2d 441, 447 (2002). Subsection (a)(5) of section 2-619 allows dismissal when "the action was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2012). In ruling on a section 2-619 motion, all pleadings and supporting documents must be construed in a light most favorable to the non-moving party, and the motion should be granted only where no material facts are in dispute and the defendant is entitled to dismissal as a matter of law. *Mayfield v. ACME Barrel Co.*, 258 Ill. App. 3d 32, 34 (1994). The relevant inquiry on appeal is "whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law." *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993). We review the circuit court's 2-619 dismissal *de*

novo. Spillyards v. Abboud, 278 Ill. App. 3d 663, 668 (1996).

¶ 12 A plaintiff in a legal malpractice action must plead that (1) its attorney owed a duty of care arising from the attorney-client relationship; (2) the defendant-attorney breached that duty; and (3) as a proximate result of defendant's breach, the plaintiff suffered actual damages or injury. *Brite Lights, Inc. v. Gooch*, 305 Ill. App. 3d 322, 325 (1999). Actual damages are an essential element of a cause of action for legal malpractice because absent damages, no cause of action has accrued. *Palmros v. Barcelona*, 284 Ill. App. 3d 642, 646 (1996). Thus, a plaintiff is injured for purposes of legal malpractice and the statute of limitations period begins to run when the plaintiff has suffered a loss for which it may seek damages. *Id.*

¶ 13 Furthermore, section 13-214.3(a) of the Code requires that “[a]n action for damages based on tort, contract, or otherwise *** against an attorney arising out of an act or omission in the performance of professional services” must be commenced within two years “from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought.” 735 ILCS 5/13-214.3(a) (West 2012). The statute of limitations incorporates the discovery rule, which serves to toll the limitations period to the time when a person knows or reasonably should know of his or her injury. *Blue Water Partners, Inc. v. Mason*, 2012 IL App (1st) 102165, ¶ 48; see also *Romano v. Morrisroe*, 326 Ill. App. 3d 26, 28 (2001) (“[u]nder the ‘discovery rule,’ the two-year period does not necessarily begin the day the plaintiff suffers his injury; rather, the period starts when the plaintiff knows or should know facts that would cause him to believe that his injury was wrongfully caused.”). The time when a party becomes charged with the requisite knowledge to maintain a cause of action for legal malpractice is a question of fact, and judgment should be entered as a matter of law only when the undisputed facts allow for only one conclusion. *Blue Water Partners, Inc.*, 2012 IL App (1st) 102165, at ¶ 48.

¶ 14 The injury in a legal malpractice action is not a personal injury and it is not the attorney's negligent act itself. *Warnock v. Karm Winand & Patterson*, 376 Ill. App. 3d 364, 368 (2007). Instead, it is "a pecuniary injury to an intangible property interest caused by the lawyer's negligent act or omission." *Id.* In other words, "[t]he injury is not the negligent act itself, it is something caused by the negligent act or omission for which the plaintiff may seek damages." *Romano*, 326 Ill. App. 3d at 28. Therefore, the existence of actual damages is essential to a viable cause of action for legal malpractice. *Id.* Moreover, no cause of action will accrue without actual damages, and those damages will be considered speculative only if their existence itself (rather than merely the amount) was uncertain *Id.*

¶ 15 Here, the parties disagree on when the legal malpractice action accrued. First Bank asserts the action did not accrue until after November 4, 2011, when it attempted to sell the property but was prevented from doing so because the July 2011 foreclosure judgment was defective due to the inaccurate legal description of the property. First Bank asserts that it first learned of the erroneous property description after November 4, 2011, and neither the July 2011 foreclosure judgment nor the October 2011 assignment document prepared by CBK placed First Bank on notice that a problem existed with the legal description contained in exhibits to those documents. First Bank argues that CBK's error concerning the legal description did not cause any damage to First Bank until First Bank attempted to sell the property and was prevented from doing so.

¶ 16 We agree. Adhering to the principle that " 'a cause of action for legal malpractice will rarely accrue prior to the entry of an adverse judgment, settlement, or dismissal of the underlying action in which the plaintiff has become entangled due to the purportedly negligent advice of his attorney' " (*Warnock*, 376 Ill. App. 3d at 371 (quoting *Lucey v. Pretzel & Stouffer*, 301 Ill. App. 3d

349, 356 (1988))), we conclude that the circuit court erred when it found as a matter of law that First Bank's legal malpractice action against CBK was time barred. Construing the pleadings and supporting documents in a light most favorable to First Bank, CBK's motion to dismiss the complaint as time barred should not have been granted because material facts are in dispute and, thus, CBK is not entitled to dismissal as a matter of law. Contrary to CBK's arguments before the circuit court and on appeal, First Bank's legal malpractice action did not accrue and the statute of limitations did not commence when the court entered a final order in the foreclosure action on or about October 2011. That order was not adverse to First Bank but, rather, in favor of First Bank and, thus, did not serve to put First Bank on notice that CBK had used an incorrect legal description for the property. See *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 84-87 (1995) (where the plaintiffs alleged a defect in the mechanic's lien prepared by the defendants, the statute of limitations began running when the circuit court first entered an order reducing the amount of the lien). Moreover, there is no indication that First Bank suffered any actual damages due to CBK's error in October 2011. First Bank alleges that it first learned of CBK's negligence when First Bank attempted to sell the property after November 4, 2011, but was prevented from doing so due to CBK's error and subsequently sustained damages when it had to hire new counsel to correct CBK's error. First Bank has raised a genuine issue of material fact sufficient to preclude dismissal under the statute of limitations as a matter of law.

¶ 17 CBK argues that First Bank forfeited its right to an appeal because First Bank did not raise the issue of the discovery rule until it filed its motion to reconsider the circuit court's dismissal order. CBK's forfeiture argument, however, is refuted by the record, which establishes that First Bank raised the discovery rule issue before the circuit court in response to CBK's motion to dismiss.

¶ 18 CBK also complains that First Bank forfeited the argument that it discovered CBK's error after November 4, 2011, because First Bank first raised this argument in its motion to reconsider. We disagree. According to the record, First Bank's complaint alleged that it incurred damages when it had to retain new counsel to fix CBK's error because the foreclosure was defective. Moreover, First Bank's response to CBK's motion to dismiss argued that CBK's error did not cause any damage to First Bank until First Bank attempted to sell the property and was prevented from doing so. In further support for these arguments already before the trial court, First Bank attached, as an exhibit to its motion to reconsider, Murrar's affidavit, which clarified that the aforementioned events concerning attempting to sell the property and retaining new counsel to fix CBK's error did not occur until after November 4, 2011. Contrary to CBK's assertion on appeal, First Bank was not raising a new argument for the first time in its motion to reconsider but, rather, was properly bringing to the court's attention errors in the court's application of the law to the relevant facts. See *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶36 ("The purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence that was not available at the time of the original hearing, changes in existing law, or errors in the court's application of the law.").

¶ 19 Accordingly, we reverse the judgment of the circuit court dismissing First Bank's legal malpractice complaint and remand for further proceedings.

¶ 20 Reversed and remanded.