2015 IL App (3d) 130584-U

Order filed October 28, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

MARK RUANE,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
	)	Will County, Illinois.
Plaintiff-Appellant	)	
	)	
v.	)	Appeal No. 3-13-0584
	)	Circuit No. 12-L-250
	)	
LETKE & ASSOCIATES, INC., and JOSEPH T. LETKE,	)	
	)	Honorable
Defendants-Appellees.	)	Michael J. Powers
	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justice O'Brien concurred in the judgment.
Justice McDade dissented.

ORDER

¶ 1 *Held*: In a lawsuit against an accountant and accounting firm for breach of fiduciary duty, negligent misrepresentation and common law fraud relating to a failed investment transaction, the trial court correctly determined that the appropriate statute of limitations (735 ILCS 5/13-214.2(a) (West 2004)) barred the complaint for professional negligence where the complaint was not filed within two years after the cause of action arose.

¶ 2 The plaintiff, Mark Ruane, brought suit against the defendants, Letke and Associates, Inc. and Joseph Letke, for breach of fiduciary duty (count I), negligent misrepresentation (count II), and common law fraud (count III) in relation to a failed investment transaction. The defendants filed motions for summary judgment, claiming that the suit was barred by a two-year statute of limitations for causes of action against public accounts for acts or omissions done while in the performance of professional services. The trial court agreed and granted summary judgment for the defendants. The plaintiff appealed. We affirm the judgment of the circuit court.

¶ 3 FACTS

¶ 4 The material facts in the instant matter are undisputed. Joseph Letke is a certified public accountant and was the owner of the public accounting firm Letke and Associates. The plaintiff, Mark Ruane hired Letke and Letke and Associates to perform accounting services for himself and his business, Ruane Construction Company. These accounting services were contracted for 2006 and 2007. In early 2007, Joseph Letke gave Ruane information regarding a potential real estate investment. Letke informed Ruane that a potential purchaser had been unable to obtain financing and suggested that Ruane could take that individual's place in the transaction.

¶ 5 On April 17, 2007, Ruane, Letke, and six other individuals, formed an investment group, Lake Michigan Land Group, LLC (Lake Michigan Group). Lake Michigan Group entered into a membership purchase agreement with Gierczyk Holding Company, LLC, under which Lake Michigan Group purchased a controlling interest in another holding company, Lake Michigan Land Development, LLC. (LMLD). In turn, LMLD owned a series of single purpose real estate entities that each owned a single parcel of real estate in Illinois, Indiana, or Michigan. Simultaneously, Lake Michigan Group executed a promissory note to Gierczyk Holding in the amount of $48,750,000. Each individual investor in Lake Michigan Group, including Mark

Ruane and Joseph Letke, executed two personal guarantees to Gierczyk Holding guaranteeing Lake Michigan Group's obligations under the agreement with LMLD and guaranteeing the promissory note. Ruane maintained that Letke recruited him for membership in Lake Michigan Group, and that he executed the personal guarantees without reading them or understanding the contents, relying instead on Letke's advice and guidance.

¶ 6 From the very start, the investors had difficulty obtaining the necessary financing for the various properties. A meeting of the investors was held in late May 2007 attended by Ruane, Letke, and other investors wherein the lack of financing was first discussed. The record indicates that the lack of funding was a primary topic at each subsequent monthly investors meeting. On August 23, 2007, Lake Michigan Group sent a notice of default to Gierczyk Holding claiming that Gierczyk had defaulted on its obligations under the purchase agreement. The next day, on August 24, 2007, Gierczyk Holding filed suit against Lake Michigan Group seeking a declaratory judgment that it was not in default. On October 19, 2007, Gierczyk Holding filed a separate suit against Lake Michigan Group and each of its individual investors, including Ruane, seeking, *inter alia*, collection under the guarantee of the $48.75 million promissory note. The declaratory action and the suit on the promissory note were consolidated. It appears from the record that Ruane was served with the Gierczyk complaint in January 2008.

¶ 7 Ruane did not file the instant suit against the Letke defendants until March 2012. The crux of the suit alleged that the defendants failed to perform adequate due diligence when advising him on the investment potential of the relevant transactions in that: (1) the loans were not in place to adequately fund property development costs; (2) Gieczyk Holding did not own 100% of the properties being purchased; (3) the loans on the Lake Michigan Group properties were not current and those properties were encumbered by prior liens; (4) the appraisals for those

properties were not trustworthy; and (5) the values of the Lake Michigan Group properties was significantly overrepresented. Ruane maintained that he was entitled to rely upon the professional expertise of the defendants in evaluating the business risk of proposed investments.

¶ 8 The Letke defendants moved for summary judgment, arguing that the complaint was barred by the two year statute of limitations applicable to claims against accountants and accounting firms arising from performance of professional services. The trial court held that the defendants rendered "professional services" when advising Ruane on the risk and potential of the proposed investments. Specifically, the trial court found that the alleged actionable services provided to Ruane by the defendants included: (1) conducting due diligence inquiries into the value of the real estate entities; (2) examining the status of financing on the various properties; (3) reviewing appraisals on those properties; (4) determining the lien status of the properties; (5) seeking financing on behalf of the investors; and (6) advising Ruane on the investment and financial liability potential arising from the transactions. Finding that these services were "professional services" covered by the 2-year statute of limitations, the court granted the defendants' motion for summary judgment on that basis. Ruane appealed. For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 9 ANALYSIS

¶ 10 At issue in the instant matter is whether the circuit court properly applied section 13-214.2(a) of the Illinois Code of Civil Procedure (the Code) to determine that the plaintiff's complaint was time barred. 735 ILCS 5/13-214.2(a) (West 2010). The relevant statute provides:

"Actions based upon tort, contract or otherwise against any person, partnership or corporation registered pursuant to the Illinois Public Accounting Act, as amended, or any of its employees, partners, members, officers or shareholders, for an act or omission in the

performance of professional services shall be commenced within 2 years from the time the person bringing the action knew or reasonably have known of such act or omission." 735 ILCS 5/13-214.2(a) (West 2010).

¶ 11 Ruane maintains that the circuit court erred in granting the defendants' motion for summary judgment by finding that the actions of the defendant's constituted the rendering "professional services" within the meaning of section 13-214.2(a) of the Code. Ruane argues that "professional services" subject to the 2-year statute of limitations under section 13-214.2(a) of the Code should be limited to "accountancy" services and not "investment" services. We review both the granting of summary judgment and questions of statutory construction *de novo*. *Illinois State Bar Association Mutual Insurance Co. v. Law Office of Tuzzolino and Terpinas*, 2103 IL App. (1st) 122680 ¶ 20; *Polsky v. BDO Seidman*, 293 Ill. App. 3d 414, 424 (1997). Moreover, the question of which statute of limitations apples to a specific cause of action is a legal issue that is appropriately resolved by summary judgment. *Kranzler v. Saltzman*, 407 Ill. App. 3d 24, 27 (2011).

¶ 12 Ruane first maintains that the 2-year statute of limitations contained in section 13-214.2(a) of the Code should apply only where the accountant's actions involved "accounting services" such as tax return preparation, the preparation, auditing, or examination of financial statements, or the issuing of opinions based upon the examination of financial statements. Ruane finds support for his position in the Illinois Public Accounting Act (the Act). 225 ILCS 450/01 *et seq.* (West 2010). Specifically, the Act provides:

> "(a) Accountancy activities are services performed by a CPA, including:
>
> (1) signing, affixing, or associating the names used by a person or CPA firm to any report expressing an assurance on a financial statement or disclaiming an opinion

on a financial statement based on an audit or examination of that statement or to express assurance on a financial statement;

(2) other attestation engagements not otherwise defined in paragraph (1); or

offering to perform or performing one or more types of the following services involving the use of professional skills or competencies: accounting, management, financial or consulting services, compilations, internal audit, preparation of tax returns, furnishing advice on tax matters, bookkeeping, or representation of taxpayers; this includes the teaching of any of these areas at the college of university level." 225 ILCS 450/8.05(a) (West 2010).

¶ 13 Ruane maintains that since the Illinois Public Accounting Act (the Act) regulates and defines what constitutes accounting activities, the Act should define what constitutes "professional services" encompassed by the 2-year statute of limitations provided by section 13-214.2(a) of the Code. We are aware of no authority supporting Ruane's proposition that the 2-year statute of limitation applies only to actions against public accountants arising from accountancy services as defined in the Act. Rather, our review of recent case law interpreting section 13-214.2(a) of the Code leads us to a contrary conclusion. Illinois courts have consistently held that section 13-214.2(a) of the Code applies to a broad range of actions brought against accounts, not just complaints alleging professional malpractice in the performance of accountancy activities defined in the Act. *Polsky*, Id. at 425-26; See also, *Terrell v. Childers*, 920 F. Supp. 854 (N.D. Ill. 1996) (claims against public accountant under the Illinois Consumer Fraud Act are covered by the 2-year statute of limitations under section 13-214.2(a) of the Code rather than the 5-year limitation under the Consumer Fraud Act); *Cashman v. Coopers & Lybrand*, 877 F. Supp. 425 (N.D. Ill. 1995) (section 13-214.2(a) of the Code applies to actions

against public accountants for alleged fraud relating to investment advice). In *Polsky*, the court specifically upheld the granting of summary judgment pursuant to section 13-214.2(a) where the plaintiff, a former employee of an accounting firm, brought common law and statutory fraud claims against the firm in a dispute over unpaid salary and benefits. *Id.* The *Polsky* court rejected an argument that section 13-214.2(a) of the Code applied only to professional malpractice claims against public accountants, holding that it "also applies to cases alleging fraud *by* a public accountant." (Emphasis added.) *Polsky*, 293 Ill. App. 3d at 424.

¶ 14 Moreover, while this matter was being considered by this court, our supreme court issued its holding in *Brunton v. Kruger*. 2015 IL 117663. On March 31, 2015, we granted the appellees' motion to cite *Brunton* in this matter and find it to be highly relevant, if not dispositive to the issue at hand. In *Brunton*, the court addressed whether the evidentiary privilege protecting certain communications with a public accountant applied where the public accountant had performed certain estate planning activities. *Id*. at ¶¶ 18-21. The party arguing against application of the privilege maintained that the public accountant was acting outside the boundaries of "accountancy activities" that were protected by the privilege. Similar to Ruane's argument in the instant matter, the appellant in *Brunton* suggested that the definition of accountancy services contained in the Act limited the applicability of the evidentiary privilege. *Id*. at ¶ 15. In *Brunton*, our supreme court rejected this narrow interpretation. The court noted that, while the Act defines certain accountancy activities as being within the purview of public accountants (creating and auditing financial statements, preparation of tax returns, and rendering opinions based upon examinations of financial statements), the Act does not purport to be an exhaustive list of services that fall within the professional services provided by public accountants. *Id*. at ¶ 20. The court, noting that the list of "accountancy activities" contained in

the Act was not intended to be exhaustive, held that public accountants use their "professional skills or competencies" to provide "professional services" beyond those beyond those enumerated in the Act. *Id*. While the *Brunton* holding is limited to application of privilege, we see no reason why the court's reasoning that the privilege is not limited to "accountancy" activities specified in the Act should not have broad applicability.

¶ 15 We further note that, even if we were to look to section 8.05(a)(3) of the Act for a definition of "professional services" provided by public accountants, we would find ample support for a conclusion that the services provided to Ruane by the defendants were within those listed in section 8.05 of the Act. Specifically, section 8.05(a)(3) of the Act includes "financial or consulting services" as an example of "services involving the use of professional skill or competencies" within the purview of public accountants. 225 ILCS 405/8.05(a)(3) (West 2010). The services that Ruane alleged were deficiently performed by the defendants included advice and consultation regarding the financial viability of the Lake Michigan Group and the Gieczyk Holding transactions. Ruane maintained that he was entitled to rely upon the "professional expertise" of the defendants when he invested in these transactions. The services which the defendants provided to Ruane - conducting due diligence, obtaining financing for property development, and providing advice on the financial viability of the investments – clearly fall within the definition of professional services expected to be performed by public accountants. *Brunton*, 2015 IL 117663 ¶ 20.

¶ 16 Since there is no dispute that Ruane did not file the complaint in the instant matter within two years of the actions giving rise to his claims, section 214.2(a) of the Code prevents his claims from being raised. We therefore affirm the circuit court's grant of summary judgment to the defendants.

¶ 17 CONCLUSION

¶ 18 The judgment of the circuit court of Will County is affirmed.

¶ 19 Affirmed.

¶ 20 PRESIDING JUSTICE McDADE, dissenting.

¶ 21 The majority finds the claims of plaintiff, Mark Ruane, barred by the statute of limitations for causes of action against public accountants for acts or omissions done while in the performance of professional services (735 ILCS 5/13-214.2 (West 2008)) and affirms the trial court's award of summary judgment in favor of defendants, Joseph Letke and Letke Associates, Inc. For the reasons that follow, I would reach the opposite conclusion and I, therefore, respectfully dissent.

¶ 22 In 2006 and 2007, Mark Ruane contracted with Joseph Letke through his public accounting firm, Letke & Associates, to provide accounting and auditing services for himself and for his business, Ruane Construction Company.

¶ 23 Also in 2006, in an undertaking that gives every appearance of having been totally unrelated to the accounting/auditing services he was rendering, Letke enlisted six of his accounting clients, including Ruane, to join him in a complex investment venture involving the purchase and development of numerous parcels of real property in Illinois, Michigan and Indiana. This coalition, which the facts indicate was initiated and driven by Letke, was not accomplished or confirmed by written contract but, rather, through oral agreement.

¶ 24 As indicated by the majority, the material facts of the case are undisputed. The sole issue in this appeal is whether Ruane's complaint was timely filed or is barred by the applicable statute of limitations. The majority finds that it has been barred; I believe it has not.

¶ 25 The two limitations statutes at issue are section 13-214.2 and section 13-205 of the Code of Civil Procedure.

¶ 26 Section 13-214.2 is entitled "Public accounting" and it provides:

> "(a) Actions based upon tort, contract or otherwise against any person, partnership or corporation registered pursuant to the Illinois Public Accounting Act, as amended, or any of its employees, partners, members, officers or shareholders, *for an act or omission in the performance of professional services* shall be commenced within 2 years from the time the person bringing an action knew or should reasonably have known of such act or omission." (Emphasis added.) 735 ILCS 5/13-214.2 (West 2008).

As can be seen, this section sets the time limits for filing a claim alleging errors in the nature of malpractice—that is, errors made while performing professional services.

¶ 27 By contrast, section 13-205 provides:

> "[A]ctions on *unwritten contracts, expressed or implied*, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued." (Emphasis added.) 735 ILCS 5/13-205 (West 2008).

This statute sets the time limits for filing, *inter alia*, a claim for injuries growing out of an "unwritten contract[ ], express or implied."

¶ 28 The facts reveal that Ruane and Letke stood in two separate and distinct relationships. Which statute applies to this particular action is determined by which relationship resulted in the injury.

¶ 29 I agree with Ruane's argument that the two-year statute of limitations does not apply to this action, but not on his asserted basis of a distinction between "accountancy" and "investment" services. Rather, I would draw the distinction between work done "in the performance of professional services" and giving, or failing to give, gratuitous advice in the pursuit of a joint undertaking or venture.

¶ 30 Ruane hired Letke to provide professional accounting and auditing services for himself and his construction business—an engagement that was defned and specific. Had Ruane or his business sustained loss or other injury as a result of an act or omission by Letke in the performance of those services, he would have two years to assert that claim.

¶ 31 In the instant case, however, Ruane did not engage Letke to perform professional services—in fact, he did not engage him at all. Rather, Letke solicited Ruane to take the place of another investor who had dropped out of an extant, allegedly lucrative property development venture. In furtherance of that venture, Letke allegedly made representations to and shared documents with his fellow investors on which they assertedly relied to their significant detriment.

¶ 32 The fact that Letke was statutorily authorized to offer investment services professionally and the fact that Ruane may have relied on his advice because he knew or believed that Letke had some expertise cannot transform gratuitous conduct in furtherance of the mutual interests of the investors into the performance of professional services.

¶ 33 If, by way of analogy, we were to find that another member of the LLC was a lawyer and he offered some advice clearly within the parameters of his license to practice law, would we find that a claim against him was subject to the two-year statute for "an act or omission in the performance of professional services" (735 ILCS 5/13-214.3 (West 2015))? If Ruane, himself, ventured some advice within his construction design expertise, would we find the four-year statute for "an act or omission of the person in the design, planning, supervision, observation or management of construction" (735 ILCS 5/13-214 (West 2015)) to be applicable? Or what if one of them was a doctor and he gave some advice about safety equipment in buildings within the development grounded in his medical expertise would we consider that to be medical malpractice subject to the shorter statute? Or would we find the basis and limits of liability established by the terms of engagement?

¶ 34 The relationship between these parties is that of joint investors pursuant to an oral contract and co-members in an LLC pursuant to written documents. Ruane's alleged injuries thus flow from a relationship which is, at its essence, a contractual agreement to purchase and develop real estate, not to render professional services. The applicable limitations statute should be the one that pertains to *that* relationship—that is, section 13-205 that establishes a five-year period to assert claims arising from an oral contract.

¶ 35 I acknowledge that this conclusion appears to be at odds with the part of the decision in *Polsky v. BDO Seidman*, 293 Ill. App. 3d 414 (1997), that found section 13-214.2 extends beyond accountant malpractice actions and applied it to plaintiff's fraud claim against an accountant not his own. By way of context, Polsky's employment with Indeck Energy Services was terminated pursuant to a section in his employment agreement that allowed the termination if Indeck's net worth fell below a certain level. Polsky sued Indeck's accounting firm and its

partners, alleging that they had falsified the employer's financial statements, thereby causing him to lose his job. Technically this was not a malpractice claim because the accountants worked for Indeck and not for Polsky, but the court found the statute should apply. The *Polsky* court did, however, also state: "[B]y its plain words, section 13-214.2 applies to actions *** arising from acts or omissions *in the performance of professional services involving accounting."* (Emphasis added.) *Polsky*, 293 Ill. App. 3d at 424.

¶ 36 While I am not in total agreement with *Polsky*, it is clearly distinguishable from the instant case.[1]

¶ 37 In *Polsky*, the accounting firm was actually performing accounting services from which Polsky's injuries resulted. That is vastly different from the situation here where Letke was not performing accounting services for anyone and, therefore, no such services gave rise to Ruane's claimed injuries.

¶ 38 Similarly, *Cashman v. Coopers & Lybrand, inc.*, 877 F. Supp. 425 (1995), is distinguishable. The accountant in *Cashman* did not merely advise or urge the plaintiff to engage in an investment transaction as Letke did in the instant case. The *Cashman* accountant provided the plaintiff with false information concerning a financial transaction by actually making misrepresentations in financial statements and tax returns. His conduct fit squarely within the Illinois Public Accountings Act's definition of "practicing as a licensed public accountant" and therefore constituted "professional services" under Section 13-214.2.

¶ 39 In *Polsky* and in *Cashman*, the defendant accountants were actually rendering professional services. In our case, Ruane seeks to assert a fraud claim where Letke had not been

[1] In addition, none of the cases relied upon by the majority that actually speak to this issue is binding on this court, being decisions from other districts and the federal courts.

engaged to perform professional services in conjunction with this investment venture; nor does it appear that he prepared any of the documents by which Ruane was allegedly lured, defrauded and rendered susceptible to significant economic injury.

¶ 40 I believe the majority's reliance on *Brunton* is similarly misplaced. In the supreme court's decision in *Brunton v. Kruger*, 2015 IL 117663, which we allowed to be submitted as additional authority, the court considered the contours and application of the public accountant's privilege. Following its analysis, the court held that (1) the Public Accounting Act's privilege belongs to the accountant, not the client, (2) there is no testamentary exception to the privilege, and (3) once the accountant has waived the privilege by disclosing information to one party in the litigation, he cannot claim the privilege to avoid disclosure of the same information to the other party. *Id*, ¶ 90.

¶ 41 Preliminary to its analysis of the actual issues presented, the court considered the contention of Brunton that the privilege only applied to "financial statement certification"—an argument that had been rejected by the appellate court. The supreme court rejected that argument as well, saying:

> "The appellate court concluded that the privilege of section 27 applies to information obtained by an accountant in the course of providing estate planning services, just as it applies to information obtained by an accountant providing one of the services expressly listed in section 8.05(a). Indeed, the court noted, 'it is unclear why the legislature would care about confidentiality when the CPA audited a financial statement but would not care about

> confidentiality when the CPA helped a client with estate planning.' (Citation)
>
> "We agree with the appellate court's analysis. *** Because professional accountants regularly provide the types of services that Striegel provided to the Krugers, and because the information was provided to a Striegel accountant acting 'in his confidential capacity as a licensed or registered CPS' (citation), such information comes within the scope of the statutory accountant privilege." (Emphases added.) Id, ¶¶ 20-21.

¶ 42 As can be seen, in *Brunton*, the accountant had actually been engaged to provide and was providing estate planning services and was, therefore, covered by the privilege.

¶ 43 The *Brunton* decision does not undermine the position I have taken in the instant case—indeed, I would argue that it strengthens it.

¶ 44 I do not know if Ruane ultimately could, would or should prevail on the merits of his fraud claim, but I would find that his ability to assert and develop his claims should not be barred by a statute of limitations that is not, on these facts, applicable to his action.