2014 IL App (3d) 130010-U

Order filed July 9, 2014
Modified upon denial of rehearing August 14, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

MARK R. CARLSON, ROBB R. CARLSON, and THOMAS VANA,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiffs-Appellants,	)	
v.	)	Appeal No. 3-13-0010 Circuit No. 10-L-595
LETKE & ASSOCIATES, LTD., an Illinois Corporation, JOSEPH T. LETKE, an individual, and DANIEL J. MCNAMARA, an individual,	)	The Honorable Michael J. Powers, Judge, presiding.
Defendants-Appellees.	)	

JUSTICE CARTER delivered the judgment of the court.
Presiding Justice Lytton concurred in the judgment.
Justice Schmidt dissented.

ORDER

¶ 1 *Held*: In a lawsuit against an accountant and an attorney for professional negligence and certain other claims relating to a failed investment transaction, the appellate court held that the trial court erred in finding that the claims were barred by the statute of limitations and in granting summary judgment for defendants on that basis. The appellate court, therefore, reversed the trial court's grant of summary judgment for defendants, except as to those counts for which the grant of

summary judgment was not challenged, and remanded the case for further proceedings.

¶ 2 The plaintiffs, Mark Carlson, Robb Carlson, and Thomas Vana, brought suit against the defendants, Joseph Letke, Letke and Associates, Ltd., and Daniel McNamara, for professional negligence, breach of fiduciary duty, and negligent misrepresentation in relation to a failed investment transaction.[1] The defendants filed motions for summary judgment, claiming that the suit was barred by the statute of limitations. The trial court agreed and granted summary judgment for the defendants. The plaintiffs appeal. We affirm the trial court's grant of summary judgment for defendants as to those counts that were not challenged by plaintiffs, we reverse the trial court's grant of summary judgment for defendants as to all remaining counts, and we remand this case for further proceedings.

¶ 3 FACTS

¶ 4 All three of the plaintiffs in the instant case were sophisticated business persons: Mark and Robb Carlson were the owners of a commercial construction business and Thomas Vanna was the president and part-owner of a medical equipment and ambulance business. As sophisticated business persons, plaintiffs were familiar with financial and business documents, including contracts and personal guaranties. Defendant, Joseph Letke, was a certified public accountant and the owner of a certified public accounting firm, Letke and Associates, Ltd. (the accounting firm). From 2006 through 2008, Letke and his firm provided professional accounting and auditing services for the plaintiffs and their businesses. Defendant, Daniel McNamara, was an attorney who was employed by the accounting firm at certain relevant times in this case.

[1] Only two of the professional negligence claims were brought against McNamara and those claims were for legal malpractice. The other claims were not brought against him.

¶ 5 In 2006, Letke pooled together a group of his accounting clients, including the plaintiffs, to join him in a complex investment venture involving the purchase and development of numerous pieces of real property in Illinois, Michigan, and Indiana. The properties were owned by several limited liability companies, which were in turn owned by Lake Michigan Land Development, LLC (the land development company). The land development company was owned by Gierczyk Holding Company, LLC (GHC), and was controlled by James Gierczyk (Gierczyk). Letke's plan was for the group that he had assembled to form a limited liability company of their own, called the Lake Michigan Land Group, LLC (the investment group), and to have the investment group purchase a controlling membership interest in the land development company. Letke allegedly advised plaintiffs to participate in the investment venture and allegedly represented to plaintiffs that he had performed a due diligence review of the proposed purchase; that based upon the appraised values of the properties and the construction financing in place, the investment was a very favorable and safe investment; and that the maximum possible loss that the plaintiffs could incur was the amount of their initial capital contributions, $200,000 for the Carlsons and $500,000 for Vana.

¶ 6 On April 17, 2007, the investment group entered into an agreement with GHC to purchase an interest in the land development company for $50 million. The agreement had been negotiated with Gierczyk by Letke and McNamara and was signed by Letke and Mark Carlson on behalf of the investment group. The purchase was to take place in two stages with the investment group purchasing a 33% interest in the land development company at the initial closing in April 2007 and an additional 34% interest at the final closing in October 2007. As part of the agreement, the investment group agreed to pay GHC $1 million up front and to execute a promissory note to GHC for the remaining balance of $48.75 million (earnest money

of $250,000 had been previously paid). The agreement further provided that the investment group would assume and pay when due all liabilities in connection with the land development company's business, operations, assets, or activities as of the beginning of April 2007 including any liabilities related to principal and interest for loans and construction costs.

¶ 7 The $48.75 million promissory note from the investment group to GHC was executed that same day. Under the terms of the promissory note, the investment group agreed to pay GHC $1 million per month starting on May 17, 2007, until the maturity date on October 17, 2007. On the maturity date, at the final closing, the investment group was to pay to GHC the remaining amount owed on the promissory note in a lump sum payment.

¶ 8 In addition to the above, each of the individual members of the investment group, including plaintiffs and Letke, were required to sign a personal guaranty for the $48.75 million outstanding balance. In the personal guaranty, each member of the investment group personally agreed to be jointly and severally liable for the entire amount of the outstanding balance, if the investment group defaulted on its obligations under the purchase agreement or under the promissory note. When the documents were executed, McNamara was present and directed the plaintiffs where to sign the documents. McNamara did not discuss the transaction with the plaintiffs at that time, did not encourage or discourage the plaintiffs from entering into the transaction, and did not warn or caution plaintiffs about any possible problems or risks with the transaction or with the documents they were signing.

¶ 9 Shortly after the transaction was entered into, problems developed and plaintiffs began to realize that there was something wrong with the transaction. For example, despite Letke's claim that the financing was already almost entirely in place, plaintiffs learned relatively quickly that there was no financing in place for the land development. As apparently the only members with

available money, the Carlsons scrambled to try to meet the monthly payment obligation of the investment group to GHC and to pay the ongoing obligations of the development. However, after an initial payment or two, no additional monthly payments were made by the investment group.

¶ 10 On August 7, 2007, GHC notified the investment group that it was in default of its obligations under the membership purchase agreement. A few weeks later, on August 23, the investment group sent GHC a notice that it believed that GHC was in default under the agreement for requiring the investment group to pay certain bills in connection with the development of the properties that the investment group was not required to pay, for directing the investment group to make payment for certain loans that were not previously disclosed or to which the investment group had no obligation, and for willfully refusing to cause certain companies to sell properties. On August 24, 2007, GHC filed suit in Cook County against the investment group, seeking a declaratory judgment that GHC (or the land development company) was not in default under the membership purchase agreement. In October 2007, a second lawsuit was filed by GHC in Cook County. In the second lawsuit, both the investment group and its individual members were named as defendants. GHC sought to obtain specific performance of the purchase agreement, to collect the remaining balance owned on the promissory note, and to enforce the personal guaranties of the individual members of the investment group. The two lawsuits were consolidated by the trial court and will be referred to herein merely as the Cook County lawsuit. Initially, the plaintiffs and Letke were represented by the same attorney in the Cook County lawsuit. However, in May 2009, Letke broke from the group and obtained his own attorney.

¶ 11 In July 2010, the plaintiffs filed suit in Will County against Letke and the accounting firm (the Letke defendants). McNamara was later added as a defendant. In the second amended complaint, the operative complaint in this case, plaintiffs alleged claims of professional negligence, breach of fiduciary duty, and negligent misrepresentation against the Letke defendants and claims of legal malpractice (professional negligence) against McNamara.[2]

¶ 12 In June 2011, while the Will County lawsuit was pending, plaintiffs settled their dispute with Gierczyk. Pursuant to the settlement agreements, the Carlsons paid Gierczyk $1 million (in addition to the amounts they had already paid during the course of the transaction) and released a mechanics lien for $1 million. Vana paid Gierczyk $2 million (in addition to the amount that Vana had already paid). Letke had previously settled with Gierczyk for a much lower amount.

¶ 13 In August 2012, the Letke defendants filed a motion for summary judgment as to all of the claims against them, asserting that the claims were barred by the two-year statute of limitations that applied to claims against a certified public accountant, accounting firm, or its employees (see 735 ILCS 5/13-214.2(a) (West 2010)). McNamara filed a similar motion, alleging that the claims against him were barred by the two-year statute of limitations as well (see 735 ILCS 5/13-214.2(a), 13-214.3(b) (West 2010)). McNamara also claimed that summary judgment was appropriate because he had not acted as the plaintiffs' attorney in the transaction and did not have an attorney-client relationship with plaintiffs relative to the transaction. Plaintiffs filed a response and opposed the motions for summary judgment. In addition, the parties filed numerous supporting documents in support of their respective positions as to

[2] In the legal malpractice claims against McNamara, it was also alleged that the accounting firm was liable under those claims as well because McNamara was an employee of the accounting firm at the time of the alleged malpractice.

summary judgment, including copies of the membership purchase agreement, the promissory note, and the personal guaranties; portions of the depositions of all three plaintiffs, of Letke, and of McNamara; and the affidavits of all three plaintiffs.

¶ 14 The relevant evidence contained in the supporting documents, most of which is not in dispute in this appeal, can be summarized briefly as follows. All three of the plaintiffs testified in their depositions that they did not read the membership purchase agreement until after they were served with the Cook County lawsuit in October 2007 and that their understanding of the agreement from what had been represented to them by Letke was that their risk of loss was limited to the amount of their initial capital contributions. From the time the investment group entered into the transaction in April 2007 until the time that the plaintiffs filed their own lawsuit in July 2010, the plaintiffs had various indications that something was wrong with the deal that they had entered into or at least with Letke's representations of that deal to them.

¶ 15 Within a day or so after Vana had signed the documents for the transaction, he received a letter from his mother's attorney, who had reviewed the documents because of the mother's possible interest in joining the venture. The attorney informed Vana that Vana had signed a personal guaranty for over $48 million and pointed out to Vana that if the investment group defaulted, Vana himself could be held personally liable for the whole amount. Vana had not seen the guaranty document at the time that he had signed and was only shown the signature page, which did, however, reference a guaranty. Vana immediately discussed the matter with Letke because that was not Vana's understanding of the transaction and told Letke that his risk was supposed to be limited to his capital contribution and that he did not agree to personally guaranty the obligation. Letke allegedly told Vana that he would discuss the matter with Giercyzk and would fix the problem.

¶ 16 In addition, the plaintiffs became aware over the next several months that no financing had been set up for the development of the properties, contrary to what they had been told by Letke, and that Letke had not done the due diligence review that he had claimed. When the investment group tried to obtain financing, they were unable to do so because the appraised value of the properties was considerably less than the amount that had been represented to them by Letke, and supposedly, by Giercyzk. The plaintiffs asked Letke for his documentation as to the due-diligence work he had done on the transaction, but Letke was unable to produce any documentation. Furthermore, at various times over the next few months, the Carlsons were called upon to contribute more capital to the investment group or to pay certain expenses on the investment group's behalf, and each time, Letke allegedly assured the Carlsons that they would get their money right back. The plaintiffs also learned that two of the properties that plaintiffs thought were part of the transaction had been deeded out, one to James Giercyzk and one to Letke.

¶ 17 According to the plaintiffs, as things became worse and worse, Letke continued to assure them that they would get their money back, that the Cook County lawsuit was the result of fraud and misrepresentation by Gierczyk, and that they would be released from the Cook County lawsuit (and presumably the guaranty). Letke's reassurances and blaming of Gierczyk continued all the way up until May 2009, when Letke split from the group and obtained a separate attorney for himself in the Cook County lawsuit.

¶ 18 After Letke obtained his own attorney, the plaintiffs learned additional information about the transaction that caused them concern. In late 2009 or early 2010, the plaintiffs learned that Letke had paid himself or his firm over $500,000 from the investment group's funds, allegedly as reimbursement or as payment for services rendered. During that same time period in late 2009

or early 2010, the plaintiffs also learned that Letke had cut a side deal with Gierczyk in April 2008 to be released from the personal guaranty if he provided Gierczyk with prospective buyers for some of the properties and assisted Gierczyk with the negotiation and financing.

¶ 19 As for the claims against McNamara, the plaintiffs testified in their depositions that they were told by Letke that they did not need to obtain their own attorneys for the transaction; that Letke had already hired an attorney, McNamara, who would represent all of them in the transaction; and that McNamara had an enormous amount of expertise in negotiating complex transactions and was a real estate expert. Based on Letke's representations, plaintiff's believed that McNamara represented them individually in the transaction, that McNamara had acted in their best interests in negotiating the purchase agreement, and that McNamara had reviewed the documents as their attorney and would inform them if there was a concern with the documents or with the transaction itself. Plaintiffs acknowledged in their depositions, however, that they had never personally hired McNamara to represent them in the transaction and that they had never signed any type of a retainer agreement with McNamara. The plaintiffs also acknowledged that McNamara did not make any statements to them, true or false, about whether they should enter into the transaction or sign the documents. McNamara testified in his deposition that he worked for Letke at the time of the transaction and that he did not represent the plaintiffs in the transaction or provide them with any legal advice regarding the transaction. McNamara acknowledged, however, that he had advised the two managing members of the investment group, Letke and Mark Carlson, as to some of the terms of the investment's group's operating agreement and about filing the paperwork with the state to have the investment group incorporated. Letke testified in his deposition that McNamara represented him and his accounting firm in the transaction, that McNamara did not represent the other members of the

investment group, and that he did not tell the plaintiffs that McNamara was representing them in the transaction or that they did not need to hire their own attorneys.

¶ 20 With regard to the actual transaction documents, copies of which were submitted to the trial court as part of the summary judgment proceeding, it was clear from those documents that each individual plaintiff had agreed to be personally liable for the entire $48.75 million unpaid balance and for the investment group's obligations under the purchase agreement. It was also clear from those documents that plaintiffs' risk was not limited to the amount of their initial capital contribution. In addition, the personal guaranties provided that notices on behalf of the guarantors (the members of the investment group) was to be sent to Letke and to McNamara.

¶ 21 The trial court held a hearing on defendants' motions for summary judgment in October 2012. At the time of the hearing, the trial court had before it the briefs of the parties and the supporting documents. After hearing the arguments of the attorneys, the trial court took the case under advisement and later issued a ruling granting the defendants' motions for summary judgment based upon the statute of limitations.[3] Plaintiffs appealed.

¶ 22 ANALYSIS

¶ 23 On appeal, plaintiffs argue that the trial court erred in finding that their claims against defendants were barred by the statute of limitations and in granting summary judgment for defendants on that basis.[4] In support of their argument, plaintiffs make numerous assertions. Plaintiffs assert first that summary judgment should not have been granted for the defendants

[3] Although the written order did not specify the basis upon which McNamara's motion for summary judgment was granted, it is clear from the trial court transcript that McNamara's motion was granted based upon the statute of limitations.

[4] Plaintiffs do not, however, challenge the grant of summary judgment as to counts IV and VIII of the operative complaint.

because under the discovery rule, plaintiffs' lawsuit was timely filed since it was filed within two years from the date that plaintiffs knew or reasonably should have known that they had been wrongfully injured by defendants. In keeping with that assertion, plaintiffs suggest that the statute of limitations in this case did not actually begin to run until June 2011, when plaintiffs settled the Cook County lawsuit with GHC. According to plaintiffs, it was only at that time that their injury became concrete and non-speculative and that it became definite that plaintiffs would not realize any of the proposed benefit (potential profit) of the transaction. As another possibility, plaintiffs suggest that the statute of limitations in this case did not begin to run until Letke obtained his own attorney in the Cook County lawsuit in May 2009. According to plaintiffs, prior to that time, Letke participated in the joint defense of the Cook County lawsuit and continued to assure plaintiffs that he would work things out with Gierczyk, that plaintiffs would be released from the Cook County lawsuit, and that the lawsuit was the result of Gierczyk's fraudulent conduct. Plaintiffs suggest further that at the very least, a genuine issue of material fact exists as to the discovery date in this case because of the circumstances involved and because of Letke's continued reassurances to the plaintiffs.

¶ 24 Second, and in the alternative, plaintiffs assert that summary judgment should not have been granted in this case because defendants were equitably estopped from asserting the statute of limitations as a defense based upon Letke's false assurances, the defendants' silence as to the true nature of the transaction and lack of due diligence, and because of the defendants' failure to disclose all of the material facts to the plaintiffs (under a theory that a fiduciary relationship existed between the plaintiffs and the defendants). Plaintiffs assert further that at the very least a genuine issue of material fact exists as to whether the elements of equitable estoppel have been established.

¶ 25 Third, and again in the alternative, plaintiffs assert that summary judgment should not have been granted for defendant McNamara in this case because a genuine issue of material fact exists as to whether plaintiffs were the intended third-party beneficiaries of McNamara's legal representation in the transaction so as to allow plaintiffs to bring a legal malpractice claim against McNamara. For that reason and for all of the reasons stated above, plaintiffs ask that we reverse the trial court's grant of summary judgment for defendants and that we remand this case for further proceedings.

¶ 26 The defendants argue that the trial court's grant of summary judgment in this case was proper and should be upheld. The defendants assert first that the lawsuit in this case was not timely filed, even if the discovery rule is applied. According to defendants, the discovery date in this case occurred much earlier than June 2008 (more than two years before the instant action was filed). Defendants suggest that the statute of limitations began to run in October 2007 when plaintiffs were served with notice of the Cook County lawsuit. At that point, according to defendants, plaintiffs read all of the transaction documents and knew or reasonably should have known all of the underlying facts necessary for plaintiffs to determine that they had been wrongfully injured by defendants. Plaintiffs knew, for example, that their losses were not limited to their capital contributions and were far greater than those amounts; that defendants had failed to conduct proper due diligence and to secure proper financing for the development; that defendants had failed to represent, or had misrepresented, the true nature of the transaction and the extent of plaintiffs' liability; that plaintiffs were not going to receive the major benefit of the transaction for which they had hoped; and that defendants were not protecting or acting in plaintiffs' best interests.

¶ 27 In addition to the joint assertion listed above, which was made by both defendants (the Letke defendants and McNamara), each of the defendants makes some additional assertions. For example, as to claims that the Letke defendants breached a fiduciary duty to plaintiffs by failing to disclose a financial interest in the transaction (that Letke was deeded a parcel of real property that plaintiffs thought was one of the subject properties), the Letke defendants assert that those facts were known to the plaintiffs by May 2008, which was still more than two years before the instant lawsuit was filed. In addition, as to claims that the statute of limitations did not begin to run until after Letke obtained separate counsel in the Cook County lawsuit, the Letke defendants assert that those claims should be rejected because: (1) there was no evidence that the joint representation in the Cook County lawsuit prevented the plaintiffs from discovering their cause of action; (2) the evidence showed that Letke stopped making assurances to plaintiffs prior to the time when the Cook County lawsuit was filed; and (3) under the case law, Letke's assurances as to possible future events did not serve as a basis to toll the statute of limitations. Finally, as to claims of fraudulent concealment and equitable estoppel, the Letke defendants assert that those claims should be rejected as well because: (1) they were forfeited when plaintiffs failed to plead those claims in the trial court; (2) plaintiffs failed to prove the elements of equitable estoppel or to establish that a genuine issue of material fact existed as to those elements; and (3) plaintiffs had ample opportunity to file suit after they were no longer misinformed by defendants.

¶ 28 McNamara, on the other hand, in addition to the joint assertion listed above, asserts that plaintiffs forfeited their claim that the statute of limitations did not begin to run until they settled the Cook County lawsuit because plaintiffs did not make that claim in the trial court (plaintiffs argued in the trial court that they did not discover until 2009 or 2010 that defendants were the cause of their injury). McNamara asserts further that plaintiffs claims of equitable estoppel and

fraudulent concealment do not apply to him because: (1) those claims were not pled or argued against him in the trial court; and (2) according to plaintiffs' own testimony, McNamara made no false or fraudulent representations to plaintiffs that plaintiffs relied upon or that were designed to prevent plaintiffs from discovering their cause of action. Finally, McNamara asserts that plaintiffs failed to establish a claim for legal malpractice or to establish that McNamara owed them a duty of care as an attorney because plaintiffs failed to plead or prove that they were the primary intended beneficiaries of Letke's hiring of McNamara's for legal representation in the transaction. Based upon the above arguments and assertions, the defendants collectively ask that we affirm the trial court's grant of summary judgment in their favor.

¶ 29 The purpose of summary judgment is not to try a question of fact, but to determine if one exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). Summary judgment should be granted only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010); *Adams*, 211 Ill. 2d at 43. Summary judgment should not be granted if the material facts are in dispute or if the material facts are not in dispute but reasonable persons might draw different inferences from the undisputed facts. *Adams*, 211 Ill. 2d at 43. Although summary judgment is to be encouraged as an expeditious manner of disposing of a lawsuit, it is a drastic measure and should be allowed only where the right of the moving party is clear and free from doubt. *Id*. In appeals from summary judgment rulings, the standard of review is *de novo*. *Id*. A trial court's grant of summary judgment may be affirmed on any basis supported by the record. *Illinois State Bar Ass'n Mutual Insurance Co. v. Coregis Insurance Co.*, 355 Ill. App. 3d 156, 163 (2004) (Coregis).

¶ 30 Section 13-214.2 of the Code of Civil Procedure provides for a two-year statute of limitations for actions against a public accountant, accounting firm, or its employees based upon tort, contract, or otherwise for an act or omission in the performance of professional services. 735 ILCS 5/13-214.2(a) (West 2010). A similar two-year statute of limitations applies to attorneys, law firms, and their employees. See 735 ILCS /13-214.3(b) (West 2010). The language of both statutory subsections (the one for accounting malpractice and the one for legal malpractice) incorporates the discovery rule. See 735 ILCS 5/13-214.2(a), 13-214.3(b) (West 2010).

¶ 31 Under the discovery rule, " 'when a party knows or reasonably should know both that an injury has occurred and that it was wrongfully caused, the statute [of limitations] begins to run and the party is under an obligation to inquire further to determine whether an actionable wrong was committed.' " *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 21 (quoting *Nolan v. Johns-Mansville Asbestos*, 85 Ill. 2d 161, 170-71 (1981)). A person has knowledge that an injury is wrongfully caused when he possesses "enough information about the injury to alert a reasonable person to the need for further inquiries to determine if the cause of the injury is actionable at law." *LaSalle National Bank v. Skidmore, Owings & Merrill*, 262 Ill. App. 3d 899, 901-02 (1994) (LaSalle). The determination of whether an injury is wrongfully caused is rooted in common sense. *LaSalle*, 262 Ill. App. 3d 900. Although a plaintiff's knowledge that the problems at issue might be wrongfully caused is generally not sufficient to trigger the statute of limitations (*LaSalle*, 262 Ill. App. 3d 905), it is not required that a plaintiff know the full extent of his injuries for the statute of limitations to start running (*Khan*, 2012 IL 112219, ¶ 22).

¶ 32 A determination of the date of discovery is generally a question of fact for the trier of fact to decide and is generally not appropriate for summary judgment. *Khan*, 2012 IL 112219, ¶ 21;

LaSalle, 262 Ill. App. 3d at 902-03. However, the discovery date may be determined as a matter of law if two conditions are satisfied: (1) the facts known by the plaintiff are not in dispute; and (2) only one conclusion can be drawn from those facts. *Khan*, 2012 IL 112219, ¶ 21; *LaSalle*, 262 Ill. App. 3d at 903. That the plaintiff was provided with non-actionable explanations for the problem or was assured that there was not a problem may be a significant factor in determining the discovery date. See, *e.g.*, *Khan*, 2012 IL 112219, ¶¶ 25-26; *LaSalle*, 262 Ill. App. 3d at 904 (application of the discovery rule in a construction defect case).

¶ 33 In the present case, over the three-year period from the time that plaintiffs entered into the transaction in April 2007 until the time that the instant lawsuit was filed in July 2010, plaintiffs had various indications that a problem existed with either the transaction itself or with the representations that had been made to them regarding the transaction. By the time that the Cook County lawsuit was served on plaintiffs in October 2007 or shortly thereafter, plaintiffs knew that they had signed personal guarantees for the entire $48.75 million balance, that their losses were not limited to their capital contributions, and that defendants had not conducted proper due diligence or arranged for appropriate financing. During that same time period up to the point when Letke obtained separate counsel in the Cook County lawsuit, plaintiffs were being informed by Letke, who they trusted as their accountant and as an investment advisor, that the problems were due to Giercyzk's fraudulent conduct and that Letke was going to work things out with Gierczyk and get plaintiffs released from the lawsuit. In late 2009 and early 2010, plaintiffs learned further that Letke had cut a side deal with Giercyzk to be released from the personal guaranty and that Letke had paid himself or his firm over $500,000 from the investment group's funds. Under the circumstances of the present case, the discovery date should not have been fixed as a matter of law by the trial court. See *Khan*, 2012 IL 112219, ¶ 21; *LaSalle*, 262

Ill. App. 3d at 902-03. While it is clear that at some point plaintiffs possessed sufficient information to conclude that the problems were wrongfully caused by defendants, it is for the trier of fact to determine when that point occurred. See *id*.

¶ 34 Having reached that conclusion, we need not address the other claims raised by the parties in this appeal, other than McNamara's claim that summary judgment should also have been granted because plaintiffs failed as a matter of law to establish that plaintiffs were intended third party beneficiaries of Letke's hiring of McNamara's for legal representation in the transaction. See *Coregis*, 355 Ill. App. 3d at 163 (a trial court's grant of summary judgment may be affirmed on any basis supported by the record). We believe that such a question may not be answered as a matter of law in this case. In the record before us, a genuine issue of material fact remains as to whether plaintiffs were the intended third party beneficiaries of the legal relationship. That question turns primarily on a determination of credibility because all three plaintiffs testified that Letke told them that McNamara would be representing them in the transaction and Letke himself testified that he made no such statement. That question of credibility cannot be resolved by the trial court as a matter of law in a summary judgment proceeding. See *Coole v. Central Area Recycling*, 384 Ill. App. 3d 390, 396 (2008). Thus, we reject McNamara's argument on this point.

¶ 35 CONCLUSION

¶ 36 For the foregoing reasons, we affirm the trial court's grant of summary judgment for defendants as to count IV and VIII of the operative complaint (which the plaintiffs did not contest), we reverse the trial court's grant of summary judgment for defendants as to all of the remaining counts, and we remand this case for further proceedings.

¶ 37 Affirmed in part and reversed in part; cause remanded.

¶ 38 JUSTICE SCHMIDT, dissenting.

¶ 39 The majority acknowledges that the "determination of the date of discovery" of an injury, for statute of limitations purposes, can be made as a matter of law (s*upra* ¶ 32), yet concludes that the facts presented herein raise a question of fact as to when the plaintiffs knew or reasonably should have known both that they suffered an injury and that it was wrongfully caused. *Supra* ¶ 33. Therefore, the majority reverses the trial court's grant of summary judgment and remands for further proceedings. I find that the undisputed facts of this matter indicate that the plaintiffs filed this suit more than two years after possessing knowledge of their injury sufficient to begin the running of the statute of limitations. As such, I would affirm the trial court's judgment awarding summary judgment to defendants based on the statute of limitations.

¶ 40 Plaintiffs filed this lawsuit in July of 2010. Their second amended complaint alleges that defendants committed professional negligence by enticing plaintiffs to enter into a business transaction. Specifically, plaintiffs claim that defendants "advised the Carlsons that their maximum exposure in the proposed LMLD investment would be $200,000" and "advised Vana that his maximum exposure in the proposed LMLD investment would be $500,000." The basis for plaintiffs' negligence claim is "despite professional advice that, under the *** Transaction, the maximum exposure to the Carlsons was $200,000 apiece, and the maximum exposure to Vana was $500,000, *** the Carlsons and Vana became jointly and severally obligated to pay and assume responsibility for, among other things, all construction costs, and existing loan payments of principal and interest, relative to LMLD Properties, obligations which were far in excess of the maximum exposures Letke previously informed the Carlsons and Vana they would have." Plaintiffs became liable for amounts above and beyond the original $200,000 and $500,000 by executing various guaranties in "reliance on the professional advice from" the

defendants. The second amended complaint continues, noting that despite the assurances of maximum exposure, from April 17, 2007, through 2008, the plaintiffs "paid monies into the *** Transaction in the amount of approximately $4.0 Million."

¶ 41 Uncontroverted facts developed through discovery in this suit show that on October 19, 2007, the plaintiffs herein were sued and served with a different law suit seeking, *inter alia*, to collect on the $48.75 million guarantee each plaintiff executed. Vana testified, regarding the October of 2007 suit seeking to enforce the guarantees, that he "actually saw the full complete document ***[and] became aware that there were problems, that things were going bad, that things were not as they should be in this deal."

¶ 42 Vana received a letter from a family attorney, James Lanting, on April 17, 2007, which stated that Lanting was "alarmed to see that you are also being asked to sign a personal guarantee of the $48.75 million note." The letter further stated, "You should realize *** that if for some reason the note to Gierczyk is not paid when due, each investor in the LLC, including you, could be sued individually to the maximum of $48.75 million plus interest, plus attorney's fees and costs."

¶ 43 On September 14, 2007, Gierczyk directed correspondence to each of the three plaintiffs herein, which stated that the promissory note was in default and, "Demand for full payment in the amount of $47,852,927.59 *** is herewith made upon you." On the last two days of October of 2007, the plaintiffs herein were served with a lawsuit that requested specific performance of the purchase agreement, payment on the note in the amount of $47,852,927.59, and enforcement of the guarantees.

¶ 44 None of these facts are in dispute. Despite receiving a letter in September of 2007 and being served with a lawsuit in October of 2007, which sought to collect approximately

$48,000,000 from them, the plaintiffs claim they did not possess sufficient knowledge of an injury or that it was wrongly caused until sometime after July of 2008. I disagree.

¶ 45 As the majority notes, a person has knowledge of his injury and that it is wrongfully caused when he possesses enough information about the injury to alert a reasonable person to the need for further inquiries to determine if the cause of the injury is actionable at law. *Supra* ¶ 31. Having allegedly been told by defendants that their liability would be capped at either $200,000 or $500,000, plaintiffs were charged with sufficient knowledge of their injury to start the running of the statute of limitations upon receiving service of a lawsuit requesting they pay $48,000,000. By the time plaintiffs received the lawsuit, Vana had been informed by his family attorney of his risk under the guarantee and the Carlsons had paid multiple hundreds of thousands of dollars above and beyond their alleged exposure cap of $200,000.

¶ 46 I also find plaintiffs' argument that they did not have sufficient knowledge of their injury until July of 2011, when they settled the October of 2007 lawsuit, lacking. While the plaintiffs may not have known the full extent of their injuries until they settled the October of 2007 lawsuit, they absolutely knew their exposure was well beyond the promised $200,000 and $500,000 amounts. Our supreme court has been clear that, "There is no requirement that a plaintiff must know the full extent of his or her injuries before suit must be brought under the applicable statute of limitations." *Clay v. Kuhl*, 189 Ill. 2d 603, 611 (2000). Our supreme court reiterated that fact in *Kahn* when stating that it has " 'never suggested that plaintiffs must know the full extent of their injuries before the statute of limitations is triggered.' " *Khan*, 2012 IL 112219, ¶ 22 (quoting *Golla v. General Motors Corp*., 167 Ill. 2d 353, 364 (1995)).

¶ 47 Plaintiffs knew, or reasonably should have known, of their injury upon being asked twice to make payments above and beyond the amounts of their promised original exposure. Not only

were the plaintiffs sued to collect the full amount of their guarantees through the October of 2007 litigation, but Mark Carlson testified that despite being informed his liability was capped at $200,000, he put approximately $2.5 million into the transaction prior to being sued.

¶ 48 There is little question that in October of 2007, the plaintiffs knew or reasonably should have known that they were exposed to liability far in excess of $200,000 or $500,000. At that point, the statute of limitations began to run on plaintiffs' claim that the professionals representing them committed malpractice when advising them that their exposure totaled either $200,000 or $500,000.

¶ 49 Finally, plaintiffs argue that even if the statute began to run prior to July of 2008, defendants should be equitably stopped from asserting the statute of limitations as a defense. This is so plaintiffs claim, as the "defendants lulled plaintiffs into inaction by falsely assuring them that their interests were being protected." To support this contention, plaintiffs cite to *DeLuna v. Burciaga*, 223 Ill. 2d 49 (2006).

¶ 50 In *DeLuna*, our supreme court recited the elements that a party must demonstrate to successfully assert equitable estoppel. *Id.* at 82-83. The fifth element forces a party claiming estoppel to demonstrate they "reasonably relied upon the representations in good faith." *Id.* I find the trial court did not err in granting defendants' motion for summary judgment as plaintiffs can in no way demonstrate they reasonably relied on defendants' assertions that plaintiffs' exposure would be capped at either $200,000 or $500,000.

¶ 51 Again, as noted above, well before July of 2008, plaintiffs made payments totaling millions of dollars toward this transaction and had received service of a lawsuit seeking to hold them personally liable for close to $48,000,000 based upon guarantees which bore plaintiffs' signatures. I submit such facts make it impossible for plaintiffs to demonstrate that they should

be absolved of the responsibility to investigate their claims based upon the assertion that they reasonably relied on representations that their exposure was capped at $200,000 or $500,000. As such, I would affirm the trial court's grant of summary judgment.