2018 IL App (2d) 170539-U
No. 2-17-0539
Order filed March 2, 2018

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ROBERT MIKENAS, Individually and as Successor Trustee of the Victor V. Mikenas Declaration of Trust, dated January 30, 2014, and CAROL CHIARELLO,	)	Appeal from the Circuit Court of Du Page County.
Plaintiffs-Appellants,	)	
v.	)	No. 17-MR-403
THE VILLAGE OF WESTMONT, RONALD GUNTER, in his official capacity as Mayor of the Village of Westmont, and VIRGINIA SZYMSKI, in her official capacity as Village Clerk of the Village of Westmont,	)	Honorable Paul M. Fullerton,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Hudson and Justice Spence concurred in the judgment.

RULE 23 ORDER

¶ 1 *Held*: The plaintiff's complaint challenging the validity of a recapture agreement and ordinance was barred by the statute of limitations.

¶ 2 In this appeal, the plaintiffs, Robert Mikenas and Carol Chiarello, filed a complaint challenging the validity of an ordinance and recapture agreement executed by the defendant, the

Village of Westmont (Village), which imposed recapture fees on future subdivision of the property at 25 Hidden View Drive, Westmont. The Village filed a combined motion to dismiss. The trial court granted the Village's motion to dismiss finding that the ordinance and recapture agreement were valid and alternatively finding that the plaintiffs' claims were barred by the statute of limitations. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The title to 25 Hidden View Drive, Westmont, was held in a trust by Victor V. Mikenas (Victor), as trustee to a Declaration of Trust dated January 30, 2014 (the "Trust"). The property at 25 Hidden View Drive consists of one lot with a single-family home and four undeveloped lots. Victor died on February 18, 2014. Mikenas, Victor's son, assumed the duties as successor trustee of the Trust and is the primary beneficiary. Chiarello, Victor's daughter, is the successor trustee to Mikenas and is to inherit the property upon Mikenas' death. The Village is a home rule municipal corporation. The defendant Ronald Gunter is the Village Mayor. The defendant Virginia Szymski is the Village Clerk.

¶ 5 On March 21, 2011, the Village passed Ordinance No. 11-38 (Ordinance). In the Ordinance, the Village stated that it had previously approved a four-lot plat of subdivision for property located at 22 E. 56th Place. Before the plat of subdivision was recorded or any improvements were made, the 56th Place property went into foreclosure and American Chartered Bank assumed ownership. Thereafter, the Village agreed to install public improvements, including roads, water mains and sewers, benefitting the property on 56th Place. The improvements also benefitted the plaintiffs' property. The Village wished to recapture the costs of the public improvements that benefitted the plaintiffs' property but "only upon the subdivision of" that property. The Village also wished to approve a Recapture Agreement, which was

attached to the Ordinance. The Village mayor and clerk were authorized to execute the Recapture Agreement on behalf of the Village. The Village clerk was directed to record the Recapture Agreement and it was recorded against the title to the plaintiffs' property with the Du Page County Recorder as document number R2011-058544 on May 11, 2011.

¶ 6 The Recapture Agreement attached to the Ordinance was dated March 22, 2011, and indicated that it was "by and between" the Village. In that Agreement, the Village stated that it was installing public improvements to benefit the property at 22 E. 56th Place, noted that the plaintiffs' property was adjacent thereto, and stated that it wished to take advantage of economies of scale to install improvements that would benefit both properties. The Village wished to recapture the *pro rata* share of the cost of the improvements that would benefit the plaintiffs' property from the plaintiffs. The improvements would have been required by the Village's Land Development Code if the plaintiffs ever sought to subdivide the property. Attached as Exhibit B was a list of the improvements, the costs, and the *pro rata* share of the cost allocable to the plaintiffs' property. The recapture obligation was only triggered if the plaintiffs sought to subdivide the subject property within the 20-year term of the Recapture Agreement. The Recapture Agreement was signed by the Village's mayor and clerk.

¶ 7 On March 24, 2017, the plaintiffs filed a complaint for declaratory judgment and mandamus. The plaintiffs alleged that the improvements made by the Village traversed 12 lots and 9 single-family homes. However, no other property owners, other than the plaintiffs and the owner of 22 E. 56th Place, were asked to share in the costs of the improvements. The plaintiffs argued that the Recapture Agreement was an unenforceable, unilateral agreement because the Village was the only signatory to the Agreement and the plaintiffs were never notified of it. The plaintiffs also argued that the Recapture Agreement was not a proper exercise of the Village's

police power because the lien charges were not enacted as a tax or fee and because it gave disparate treatment to the plaintiffs as they were the only property owner on Hidden View Drive made to pay for a portion of the improvements. The plaintiffs requested a declaratory judgment that the Ordinance was invalid, due to its reliance on an invalid Recapture Agreement, and a writ of mandamus compelling the Village to execute and record a release of the lien created by the Recapture Agreement.

¶ 8 On May 10, 2017, the Village filed a combined motion to dismiss pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2016)). The Village argued that the Recapture Agreement was valid as a matter of law and, therefore, the plaintiffs' complaint should be dismissed under section 2-615 of the Code (735 ILCS 5/2-615 (West 2016)). Alternatively, the Village argued that the plaintiffs' complaint was barred by the statute of limitations and should be dismissed pursuant to section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2016)).

¶ 9 With regard to the validity of the Recapture Agreement, the Village argued that it was a home rule municipality and had authority to impose the recapture fees. The Village further argued that it was not required to pass an ordinance to collect recapture fees and that it had the discretion to determine which properties should pay recapture fees. With regard to the statute of limitations defense, the Village argued that the five-year statute of limitations found in section 13-205 of the Code (735 ILCS 5/13-205 (West 2016)), which applied to actions "to recover damages for an injury done to property, real or personal," applied to the plaintiffs' complaint and thus the complaint was time-barred.

¶ 10 On May 24, 2017, the plaintiffs filed a response to the motion to dismiss. The plaintiffs argued that despite having broad home rule powers, the Village improperly executed its powers

in fashioning a one-sided agreement without the plaintiffs' consent. As to the statute of limitations, the plaintiffs argued that this case was based on the validity of the Recapture Agreement and that the 10-year statute of limitations for written contracts (735 ILCS 5/13-206 (West 2016)) was applicable. The plaintiffs further argued that even if a five-year statute of limitations applied, the limitation period would not begin to run until the plaintiffs paid the recapture fees.

¶ 11 On June 29, 2017, following a hearing, the trial court issued an oral ruling on the Village's motion to dismiss. The trial court found that the Village had the authority to recapture fees and neither an ordinance nor an agreement was necessary to accomplish that goal. The trial court thus granted the Village's motion to dismiss the complaint under section 2-615 of the Code. With respect to the statute of limitations, the trial court found that this case was essentially a claim for damage or injury to property and that the catch-all five-year statute of limitations applied. The statute of limitations for written contracts was not applicable because the Recapture Agreement was not really a contract. Finally, the trial court found that the recapture fees did not need to be paid before the cause of action accrued. The trial court thus granted the Village's motion to dismiss the plaintiffs' complaint as beyond the statute of limitations pursuant to section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2016)). The trial court entered a written order that same day. Thereafter, the plaintiffs filed a timely notice of appeal.

¶ 12 II. ANALYSIS

¶ 13 On appeal, the plaintiffs argue that the trial court erred in dismissing their complaint. The plaintiffs argue that the Ordinance was invalid on its face, as it was based on an improper Recapture Agreement, and was void *ab initio*. The plaintiffs also argue that the enactment of the

Ordinance violated: (1) procedural due process, (2) existing Village recapture ordinances; and (3) other constitutional provisions. Finally, the plaintiffs assert that a 10-year statute of limitations should apply to this case and that, if a five-year statute of limitations applies, the cause of action should not begin to accrue until the recapture fees are paid. As the statute of limitations issue is dispositive of this appeal, we will address that argument first.

¶ 14 Section 2-619.1 of the Code provides that motions prescribed by sections 2-615 and 2-619 may be filed together as a single motion but that such a combined motion must be divided into parts that are limited to and specify the single section of the Code under which relief is sought. 735 ILCS 5/2-619.1 (West 2016). A section 2-615 motion attacks the legal sufficiency of the plaintiff's claims, while a section 2-619 motion admits the legal sufficiency of the claims but raises defects, defenses, or other affirmative matter, appearing on the face of the complaint or established by external submissions, that defeats the action. *Zahl v. Krupa*, 365 Ill. App. 3d 653, 657-58 (2006). Where a claim has been dismissed pursuant to section 2-619, the questions presented are whether there is a genuine issue of material fact and whether the defendant is entitled to judgment as a matter of law. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 494 (1994). We review the trial court's ruling on a motion to dismiss *de novo*. See *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31.

¶ 15 The plaintiffs argue that a 10-year statute of limitations should apply to this cause of action. The plaintiffs cite section 13-206 of the Code (735 ILCS 5/13-206 (West 2016)), which states that "[a]ctions on *** written contracts or other evidences of indebtedness in writing *** shall be commenced within ten years next after the cause of action accrued." The plaintiffs contend that the writing at issue here is the Recapture Agreement and that it created an "indebtedness" to the Village.

¶ 16 The plaintiffs further argue that, even if a five-year statute of limitations applies to this case, the limitation period does not start until the recapture fees are paid. The plaintiffs rely on *Sundance Homes Inc. v. County of Du Page*, 195 Ill. 2d 257 (2001). In *Sundance Homes*, a developer sought a refund of transportation impact fees that it had paid because the statutes and ordinances which authorized the imposition of the fees were subsequently held unconstitutional. *Id.* at 259. The County filed a motion to dismiss arguing that the claim was barred by a five-year statute of limitations that began to accrue when the impact fees were paid. *Id.* at 261. Sundance Homes argued that the cause of action did not begin to accrue until the statutes and ordinances authorizing the impact fees were held unconstitutional. *Id.* The trial court denied the County's motion to dismiss. *Id.* The County appealed and this court reversed, holding that the complaint was barred by the five-year statute of limitations. *Id.* at 265.

¶ 17 Sundance Homes appealed and our supreme court affirmed this court's determination. *Id.* The supreme court held that impact fees were similar to a tax (*id.* at 266) and noted well established case law holding that a statute of limitations may bar a tax refund action even if the taxing statute is later held unconstitutional and irrespective of the retroactive application of such a ruling (i*d*. at 269). The court reasoned that this principle would make no sense if a cause of action for a refund did not begin to run until a state taxing statute was held unconstitutional. *Id.* Thus, the cause of action accrued when the impact fee was paid. *Id.*

¶ 18 Relying on *Sundance Homes*, the plaintiffs argue that the recapture fee is similar to a tax and any cause of action related to recapture fees does not begin to accrue until the recapture fees are paid, not when the legislation creating the right to those fees is enacted.

¶ 19 The applicability of a statute of limitations to a cause of action presents a legal question that is reviewed *de novo*. *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d

325, 345 (2002). Statutes of limitation "discourage the presentation of stale claims and *** encourage diligence in the bringing of actions." *Sundance Homes, Inc. v. County of Du Page*, 195 Ill. 2d 257, 265-66 (2001). A statute of limitations begins to run when the party to be barred has the right to invoke the aid of the court to enforce his remedy. *Id.* at 266. "Stated another way, a limitation period begins 'when facts exist which authorize one party to maintain an action against another.'" *Id.* (quoting *Davis v. Munie*, 235 Ill. 620, 622 (1908)). The appropriate statute of limitations to apply to a cause of action "is determined by the nature of the plaintiff's injury rather than the nature of the facts from which the claim arises." *John Doe A. v. Diocese of Dallas*, 234 Ill. 2d 393, 413 (2009). To determine the applicable statute of limitations, a court must focus on the nature of the liability and not on the nature of the relief sought. *Travelers Casualty & Surety Company v. Bowman*, 229 Ill. 2d 461, 467 (2008).

¶ 20 The trial court did not err in determining that a five-year statute of limitations applied to the present action. In reaching this determination, we find *Raintree Homes, Inc. v. Village of Kildeer*, 302 Ill. App. 3d 304 (1999), instructive. In *Raintree Homes*, the plaintiff filed a declaratory judgment action seeking a declaration that the Village's impact fee ordinance was unconstitutional and beyond the Village's statutory authority, and a refund of the impact fees it had paid. *Id.* at 305. The reviewing court held that a challenge to the constitutionality of an ordinance and claim based upon abuse of governmental authority is governed by the five-year catch-all statute of limitations found in section 13-205 of the Code (735 ILCS 5/13-205 (West 2016)). *Id.* at 307**.** Similarly, in the present case, the plaintiffs challenge the constitutionality of the Ordinance and the Village's authority to impose the Recapture Agreement. As in *Raintree*, this case is governed by the catch-all statute of limitations found in section 13-205 of the Code. *Id.*

¶ 21 Further, the trial court did not err in determining that the 10-year statute of limitations for written contracts was not applicable in this case. A contract, by definition, is "an agreement between competent parties, upon a consideration sufficient in law, to do or not to do a particular thing." *People v. Dummer*, 274 Ill. 637, 640 (1916). The plaintiffs contend on appeal that the Recapture Agreement is unilateral, thus it is not an agreement "between competent parties." The Village asserts that although the Recapture Agreement was titled as an "agreement," it was essentially a lien to recover the costs of public improvements. Accordingly, there is no dispute that the Recapture Agreement was not a contract. Thus, the 10-year statute of limitations for written contracts (see 735 ILCS 5/13-206 (West 2016)) is not applicable.

¶ 22 The plaintiffs argue that the Recapture Agreement is "other written evidence of indebtedness" and thus falls within the 10-year statute of limitations provided by section 13-206 of the Code (735 ILCS 5/13-206 (West 2016)). However, the plaintiffs failed to provide any argument or authority in support of this contention and it is thus forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). It is well settled that the appellate court is not a depository into which a party may dump the burden of argument and research. *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 13.

¶ 23 Finally, the trial court did not err in rejecting the plaintiffs' argument that the cause of action did not begin to accrue until the recapture fees were paid. The statute of limitations began to accrue either when the Ordinance was passed or the Recapture Agreement was recorded against the plaintiffs' property. In making this determination, we find *Universal Outdoor, Inc. v. Elk Grove Village*, 969 F. Supp. 1125, 1126-27 (N.D. Ill. 1997), instructive.[1] In that case,

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[1]Although this court is not bound to follow federal district court decisions, such decisions can provide guidance and serve as persuasive authority. *Lamar Whiteco Outdoor Corp. v. City*

Universal erected a billboard on property that was later annexed by Elk Grove Village. In 1985, Elk Grove Village enacted a sign ordinance barring billboards, but granted Universal a 12-year variance from the ordinance. When the variance expired, Universal filed a claim alleging that Elk Grove Village's sign code and sign ordinance unconstitutionally infringed on its right to a permanent variance. The court granted Elk Grove Village's motion to dismiss the complaint as untimely, emphasizing that, if the sign code and sign ordinance were unconstitutional on the date the complaint was filed, they were equally unconstitutional when enacted more than 12 years earlier. *Universal Outdoor*, 969 F. Supp. at 1126. The court held that the applicable statute of limitations began to accrue when the ordinance was passed. *Id.* at 1128; see also *De Anza Properties X, Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1086 (9th Cir.1991) (challenge to a county ordinance was time-barred because the plaintiff was on notice that its property interests would be affected by the ordinance at the time the ordinance was enacted; court rejected party's argument that it was not injured until the effect of the ordinance kicked in as a result of the sale of a mobile home). Moreover, in *Raintree Homes*, in holding that the five-year statute of limitations was applicable to a challenge to the validity of an impact fee ordinance, this court emphasized that the cause of action was filed within five years of when the ordinance went into effect. *Raintree Homes*, 302 Ill. App. 3d at 307-308. This court made no mention of when the impact fees were paid.

¶ 24 The plaintiffs' reliance on *Sundance* is unpersuasive. In *Sundance*, the ordinance and statute that allowed the collection of the impact fees had already been declared unconstitutional and the plaintiffs were seeking only a refund of the impact fees. In the present case, the plaintiffs are challenging the validity of the Ordinance and Recapture Agreement and they have yet to pay

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of West Chicago, 355 Ill. App. 3d 352, 360 (2005).

any recapture fees. The present case is more similar to *Raintree Homes*, where the plaintiffs were directly challenging the constitutionality of an ordinance. *Raintree Homes,* 302 Ill. App. 3d at 307. Accordingly, the plaintiffs' complaint is time-barred because the Ordinance was passed on March 21, 2011, the Recapture Agreement was recorded on May 11, 2011, and the plaintiffs did not file their complaint until March 24, 2017, beyond the five-year statute of limitations. We affirm the trial court's dismissal of the plaintiffs' complaint under section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2016)). Since this issue is dispositive of this appeal, we do not deem it necessary to consider the other issues raised by the plaintiffs on appeal.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, the judgment of the circuit court of Du Page County is affirmed.

¶ 27 Affirmed.