FOURTH DIVISION
May 26, 2011

No. 1-10-1305

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

ROBERT A. JONES, JR., as Trustee of the Robert A. Jones, Jr. Trust dated March 26, 2001, DENNIS DORMAN, HAROLD B. DUNNE, LARRY ADLER and NOREEN KATZ, as Trustees of the Martin Katz Marital Trust, and EARLE M. COMBS III, as Trustee of the Earle M. Combs III Trust dated May 31, 2007,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellants,	)	No. 09 L 14361
v.	)	The Honorable Mary Anne Mason, Judge Presiding.
CHESTNUT PLACE ASSOCIATES, LTD., an Illinois limited partnership, ROBERT H. DRUCKER, RICHARD PORTIS and GAIL DeMAY, as co-executors of The Estate of Ralph G. Portis, JOHN J. WHITE and SUZANNE W. FRANK,	)	
Defendants-Appellees.	)	

JUSTICE STERBA delivered the judgment of the court.
Justices Pucinski and Salone concurred in the judgment.

ORDER

HELD: The circuit court did not err in dismissing counts I-III of plaintiffs'original complaint as barred by the statute of limitations and counts IV-VI of plaintiffs' original complaint for failure to state a valid cause of action. Plaintiffs' breach of contract count was based on allegedly improper loans that were made more than ten years prior to the date of filing and the discovery rule does not apply. Plaintiffs' breach of fiduciary duty

> and civil conspiracy counts were subject to a five-year statute of limitations and were not timely filed. Plaintiffs' accounting, constructive trust, and dissolution counts failed to state a cause of action upon which relief may be granted because the underlying claim that the loans were improper was barred by the statute of limitations. The circuit court did not err in dismissing the amended complaint as time barred where plaintiffs based the amended counts on the same allegedly improper loans, thus the amended complaint was still barred by the statute of limitations.

This appeal arises from an alleged breach of a limited partnership agreement. Plaintiffs are a certain group of limited partners in Chestnut Place Associates, Ltd. (Chestnut Place) and defendants are Chestnut Place, its general partners, and the former wife of one of the general partners. Plaintiffs filed a complaint which included counts for: (1) breach of contract, (2) breach of fiduciary duty, (3) civil conspiracy, (4) accounting, (5) unjust enrichment, and (6) removal of the managing partner and dissolution of the partnership. The circuit court dismissed all six counts of the original complaint, but granted leave to amend. Plaintiffs filed an amended complaint and the circuit court subsequently dismissed the amended complaint as barred by the statute of limitations. On appeal, plaintiffs contend: (1) count I was timely because plaintiffs filed their claim within ten years of discovering the injury and that it was wrongfully caused; (2) counts II and III were timely because they were based on a written contract and therefore the ten-year statute of limitations applies; (3) counts IV - VI state valid causes of action; and (4) the amended complaint was timely because it was based on the original timely filed complaint. For the reasons that follow, we affirm the judgment of the circuit court.

BACKGROUND

Chestnut Place is a limited partnership that was formed in 1980 for the purpose of acquiring land and constructing and operating a residential building on the northwest corner of State and Chestnut Streets in Chicago, Illinois. Chestnut Place had five original general partners, including Robert Drucker, who each contributed various amounts of capital. At the time of formation, Chestnut Place had three classes of limited partners. The two original Class A limited partners, Ralph G. Portis and John J. White, also contributed capital and subsequently converted their partnership interests to that of general partners. The original Class B limited partner was an entity known as C-P Properties that also contributed capital. In 1981, C-P Properties' limited partnership interest was divided into 35 units to be individually sold to investors. Each of the plaintiffs purchased units or portions of units, and the units were subsequently converted into Class B limited partnership interests in Chestnut Place. The single Class C limited partner was the general contractor, an entity that did not contribute any capital.

The Agreement of Limited Partnership (Partnership Agreement) contained a provision in paragraph 11 entitled "Loans" which required the general partners and Class A limited partners to make interest-free loans to Chestnut Place in certain circumstances and for a specified time period. Under the Partnership Agreement, these loans were required if necessary to: (1) complete the construction of the project; (2) install equipment and other property required by the United States Department of Housing and Urban Development (HUD) or the original mortgagee; (3) pay any cost overruns and other debts necessary to effect the final endorsement by HUD of the long-term mortgage note; (4) remedy any latent defects required by HUD within the latent defect period; and (5) meet any cash deficiencies through the end of the second fiscal year after the final endorsement by HUD. The paragraph further provided that when such loans are required, the managing general partner shall provide written notice to the general and Class A partners at least 10 days prior to the date the loan is needed. The Partnership Agreement does not contain any provision for loans made by the general partners or Class A limited partners outside of the parameters given in paragraph 11.

Paragraph 10 of the Partnership Agreement provided for distributions and contained a section that detailed how the net proceeds from any refinancing were to be distributed. The Managing General Partners were first to deduct such an amount as they deemed necessary for the operation of the business. Proceeds were then to be distributed in the following order: (1) to the partners in repayment of their loans to Chestnut Place and other amounts owed to them by Chestnut Place; (2) $3,600,000 to the Class B limited partners, less any other amounts previously distributed to them through previous refinancings; and (3) the remaining balance to the partners in accordance with the appropriate percentages set forth in the relevant schedule.

The construction on the project was completed in the mid-1980s, and the final endorsement by HUD of the long-term mortgage note occurred shortly thereafter. Beginning in the mid-to-late-1980s, the defendants, in their individual capacities, extended a series of loans to Chestnut Place. The loans covered a variety of business purposes, including funding operating deficiencies, recording deferred management fees, making repairs, and financing the development of retail space in the building. Some of the loans were for the purposes described in paragraph 11 of the Partnership Agreement and were interest-free, others were outside of the parameters given in paragraph 11 and were interest bearing loans. The interest bearing loans were necessary at that time because Chestnut Place did not have the income or reserves to pay its operating expenses and, because of its outstanding mortgage, could not borrow from a commercial source. The last such loan was made in 1993. The loans were disclosed on the annual financial statements that were mailed to the general and limited partners. In the notes payable section of the financial statement, totals were shown for both non-interest bearing notes and interest bearing notes held by general partners. For the interest bearing notes, totals were shown based on the interest rate. For example, the financial statement for 1993 showed one total for notes bearing interest at the prime rate, and another total for notes bearing interest at prime plus 2%.

Chestnut Place refinanced its mortgage on April 12, 1999, and used the proceeds to repay all of the loans, including the accrued interest. On May 3, 1999, Drucker, the Managing General Partner of Chestnut Place, sent each general and limited partner a letter containing notification of the refinancing. The letter stated: "With the proceeds of the new loan, we were able to pay off all of the partnership's obligations to its General Partners, some of which were accruing interest at one percent over the prime rate." The use of the refinancing proceeds to repay the loans was also disclosed in the financial statements for Chestnut Place for the two years following the refinancing.

In September 2008, a letter was sent on behalf of Dennis Dorman, one of the plaintiffs, to Chestnut Place requesting various partnership documents, including annual financial statements, federal income tax returns, details of all distributions made to partners, and a list of the names and addresses of all partners. In October 2008, Chestnut Place sent tax returns and financial statements for the previous 3 years, and a list with the names and addresses of the partners. In November 2008, Dorman responded to Chestnut Place, asking for the annual statements and tax returns for all years available, details of all distributions made to partners, and a list of all notes (paid and unpaid) due to the general partners. Chestnut Place responded with a letter denying the request for the documents that were described in the November letter.

On March 31, 2009, plaintiffs filed a complaint alleging violations of the Partnership Agreement and of the fiduciary duties of the general and limited partners by failing to allow plaintiffs access to the financial records; failing to give notice of deficit loans; failing to distribute refinance proceeds in accordance with the Partnership Agreement; failing to act in good faith in conducting the business of the partnership; and charging excessive interest rates on deficit loans. Defendants moved to dismiss the complaint on the grounds that the claims were barred by the statute of limitations and also defective on the face of the complaint.

The circuit court granted the motion to dismiss with leave to refile an amended breach of contract claim. Counts I and III were dismissed with prejudice to the extent those claims were based on the loans, because the circuit court determined that the statute of limitations began to run when the loans were made and any claims based on the loans themselves were therefore time barred. The circuit court dismissed count II with prejudice as time barred because the statute of limitations for breach of fiduciary duty is 5 years. The portions of those counts which alleged denial of access to partnership records were also dismissed because the circuit court found that plaintiffs received the three years of required information to which they were statutorily entitled. Counts IV through VI were also dismissed because, to the extent those counts were based on the loans, they lacked a valid, underlying cause of action. However, the circuit court granted plaintiffs leave to amend their complaint to the extent that they wished to contest the 1999 refinancing itself. To the extent that counts IV through VI could be based on the actual refinancing and not on the loans, the circuit court granted plaintiffs leave to replead those counts.

Plaintiffs filed an amended complaint on February 18, 2010. Count I of the amended complaint was entitled "Breach of the Partnership Agreement - Loans" and alleged that defendants breached the Partnership Agreement by wrongfully distributing proceeds from the refinancing to repay improper loans. Count II alleged a similar breach to repay improper interest-bearing management fee notes. Count III requested an accounting, alleging that defendants breached their duties of loyalty to Chestnut Place by repaying improper principal notes. Count IV sounded in unjust enrichment and alleged that defendants received close to $2.9 million from the refinancing for their improper loans and management fees. Count V requested the removal of Drucker as managing partner and dissolution of the partnership. Plaintiffs also included all counts from their original complaint solely for purposes of appeal.

Defendants filed a motion for a conference with the court, pointing out that although plaintiffs made references to the refinancing in the amended complaint, they were still asserting the loan claims that had been dismissed with prejudice. Defendants stated that they did not believe they should have to incur the expense of briefing the same issues that had already been dismissed. The circuit court ordered plaintiffs to file a memorandum of law demonstrating that, in light of the prior dismissal, they could, in good faith, proceed with the case. In the memorandum, plaintiffs stated that they were not suing on the creation of the notes but on the breach that occurred with the 1999 refinancing because it was only at that time that plaintiffs sustained actual damages.

The circuit court dismissed the amended complaint on the grounds that the claims were barred by the statute of limitations. Plaintiffs timely filed this appeal.

ANALYSIS

The circuit court granted defendants' motion to dismiss pursuant to section 2-619.1 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2008)). Section 2.619.1

authorizes combined motions for an involuntary dismissal based upon certain defenses (735 ILCS 5/2-619 (West 2008)) and for failure to state a claim upon which relief may be granted (735 ILCS 5/2-615 (West 2008)). A section 2-619 motion to dismiss admits the legal sufficiency of the complaint but asserts an affirmative defense or other matter that avoids or defeats the plaintiffs' claim. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). A motion to dismiss under section 2-615 challenges the legal sufficiency of the complaint and a court must determine whether the allegations of the complaint, when interpreted in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. *Jackson v. South Holland Dodge, Inc.*, 197 Ill. 2d 39, 45 (2001). We review *de novo* a circuit court's dismissal of a complaint under section 2-619.1 of the Code. *Morris v. Harvey Cycle and Camper, Inc.*, 392 Ill. App. 3d 399, 402 (2009).

Plaintiffs' entire cause of action is based on allegations that certain loans made by the general partners to Chestnut Place were improper because paragraph 11 of the Partnership Agreement requires interest-free loans. Plaintiffs do not contest that the last loan was made in 1993, or that the statute of limitations for an action on a written contract is 10 years. Rather, plaintiffs argue that their action is saved by the discovery rule, because it was not until the 1999 refinancing that plaintiffs knew of their injury and that it was wrongfully caused. Plaintiffs contend that when defendants repaid the improper notes from the refinancing proceeds, that was their first indication of the true nature of the alleged breach by defendants.

Pursuant to section 13-206 of the Code, the statute of limitations on written contracts is 10 years. 735 ILCS 5/13-206 (West 2008). Where a contractual relationship is involved, the statute of limitations commences at the time of the alleged breach, not when the damage is sustained, because the breach itself is actionable. *West American Insurance Co. v. Sal E. Lobianco & Son, Co.*, 69 Ill. 2d 126, 132 (1977). Otherwise, the plaintiffs could delay filing a suit after the contract is breached in order to increase damages. *Id*.

Because the application of the statute of limitations can sometimes produce harsh results, the discovery rule was developed to avoid situations where an individual would be barred from filing suit before he was aware that he was injured. *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 77-78 (1995). The discovery rule delays the commencement of the statute of limitations until the plaintiff knows or reasonably should have known that he was injured and that his injury was wrongfully caused. *Id*. at 77. Under the discovery rule, the statute of limitations begins to run when a reasonable person possesses sufficient information to be put on inquiry to determine whether a cause of action exists. *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 415-16 (1981).

In the instant case, application of the discovery rule cannot save this action. While it can certainly be argued that the limited partners did not know of the interest bearing notes at the time they were issued, the record shows that they possessed sufficient information through the receipt of the annual financial statements in which the loans were disclosed to be put on inquiry to determine whether they had a cause of action. Moreover, even if plaintiffs were remiss in noticing the interest bearing notes on the annual financial statements, they received a letter in May 1999 informing them that the proceeds from the refinancing had been used to repay the outstanding notes issued to the general partners, some of which were interest bearing. The record does not disclose when either the interest-free or interest bearing notes were issued, but the last note was issued in 1993 and appeared on the financial statement that was distributed in 1994, therefore, the statute of limitations expired in 2004 at the latest.

Plaintiffs' attempt to get around this by arguing that they were not injured until 1999 when defendants did not distribute the refinancing proceeds according to the Partnership Agreement is futile. Paragraph 10 of the Partnership Agreement clearly states that any refinancing proceeds are to be distributed first to the partners in repayment of loans made to Chestnut Place. The record shows that is exactly how the proceeds were distributed, and plaintiffs have not demonstrated how the distribution violated the express terms of paragraph 10. Instead, plaintiffs continue to argue that the loans themselves were a violation of the Partnership Agreement, a claim that is barred by the statute of limitations because plaintiffs have been aware of the loans since at least as far back as 1994. The interest bearing notes began accruing interest on the date they were issued, and if they were issued in violation of the Partnership Agreement, they were actionable at the time they were issued. Thus, the circuit court did not err in dismissing the breach of contract count as barred by the statute of limitations.

Next, plaintiffs argue for the first time on appeal that the breach of fiduciary duty and civil conspiracy claims are also subject to a 10-year statute of limitations because they are based on a written contract. As discussed above, even if this were true, the statute of limitations would have run in 2004 because these counts are based on the allegedly improper loans. However, the circuit court correctly determined that breach of fiduciary duty and civil conspiracy claims are subject to a 5-year statute of limitations pursuant to section 13-205 of the Code (735 ILCS 5/13-205 (West 2008)). Moreover, issues raised for the first time on appeal are waived. *Jones v. Chicago HMO Ltd.*, 191 Ill. 2d 278, 306 (2000). Plaintiffs acknowledged in the proceedings below that a 5-year statute of limitations applies to these counts. Thus, these counts were correctly dismissed as time barred.

The remaining counts in the complaint were dismissed because they lacked a valid, underlying cause of action. The circuit court correctly dismissed these counts in the original complaint because, as discussed above, the claims upon which these counts were based were barred by the statute of limitations. The circuit court granted plaintiffs leave to amend the complaint and replead these counts based on a challenge to the refinancing itself. However, plaintiffs merely added references to the refinancing in the amended complaint, and the amended counts were still based on claims against the allegedly improper loans which had been dismissed with prejudice. On appeal, plaintiffs contend that the circuit court erred in dismissing their amended complaint as time barred because the amended complaint related back to the original complaint which was timely filed.

This argument has no merit. The amended complaint was not dismissed as time barred because it was filed a year after the date that plaintiffs contend the statute of limitations ran. The amended complaint was dismissed as time barred because it was based on the same claims that the circuit court found were time barred in the original complaint. Plaintiffs failed to set forth in the amended complaint a valid claim that the distribution of the refinancing proceeds violated the Partnership Agreement. Thus, the circuit court properly dismissed the amended complaint as barred by the statute of limitations.

As a final matter, we note that this appeal is frivolous and completely lacking in legal merit. Even if the complaint was not time barred, plaintiffs have provided nothing in support of their claims that the loans in question violated the Partnership Agreement. The financial statements show that there were loans made by partners that were interest-free in addition to the interest bearing loans. Drucker's affidavit stated that the loans that were made for the required purposes under paragraph 11 were interest-free, and that subsequent loans outside of those parameters that were required to keep the partnership operating were interest bearing loans. Plaintiffs have not filed a counter-affidavit contesting these facts and they are therefore deemed admitted. See *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993) ("A counter-affidavit is necessary *** else the facts are deemed admitted."). Thus, it appears that plaintiffs' original action was completely lacking in merit even if the statute of limitations had not run. Moreover, even after the circuit court clearly stated that the statute of limitations for claims regarding the loans had run and dismissed those claims with prejudice, plaintiffs filed an amended complaint that was still based on the allegedly improper loans, and continued to argue that the statute did not commence on those claims until the refinancing proceeds were distributed.

Illinois Supreme Court Rule 375(b) provides that if a reviewing court determines that an appeal is frivolous, or that it was not taken in good faith or for an improper purpose, an appropriate sanction may be imposed upon the party or the attorney of the party. Ill. S. Ct. R. 375(b) (eff. Feb. 1, 1994). The imposition of sanctions is a matter left strictly to the appellate court's discretion. *Residential Carpentry, Inc. v. Worker's Compensation Comm'n*, 389 Ill. App. 3d 975, 976 (2009). In the exercise of this discretion, we decline to impose sanctions in the instant appeal. However, we suggest that plaintiffs and their counsel be more circumspect in bringing matters before this court. While a party has a right to appeal, that right should not be abused and does not justify the filing of frivolous appeals.

Affirmed.