2012 IL App (1st) 110999-U

FOURTH DIVISION
March 29, 2012

No. 1-11-0999



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IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| DAVID HOKIN, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellant, | ) | Cook County. |
| | ) | |
| v. | ) | No. 09L011304 |
| | ) | |
| MICHAEL HERSHENSON, Individually, | ) | The Honorable |
| and MICHAEL HERSHENSON | ) | Brigid Mary McGrath, |
| ARCHITECTS, LTD., | ) | Judge Presiding. |
| | ) | |
| Defendants-Appellees. | ) | |

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JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Sterba concur in the judgment.

**ORDER**

*HELD: Trial court properly dismissed complaint where appellant failed to preserve his right to contribution from appellees because he neglected to raise the claim in a timely fashion during pendency of the original proceeding.*

¶ 1 Appellant David Hokin appeals from an order of the circuit court dismissing with prejudice his first amended complaint against appellees Michael Hershenson and Michael

Hershenson Architects, Ltd. pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2010)). For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 In November 2008, Donald Van Gelderen installed window coverings at David Hokin's house. Van Gelderen was injured when he fell down a stairwell as he left the house that day. Thereafter, Van Gelderen and his wife brought a premises liability action against Hokin, alleging that the location of the stairs in relation to the door through which Van Gelderen attempted to exit constituted an unreasonably dangerous condition that defendant, through the use of reasonable care, should have known about and protected against.

¶ 4 The cause proceeded to jury trial, during which, in relevant part, Michael Hershenson, the architect who built defendant's house, testified on behalf of defendant that, in his opinion, the stairs did not constitute an unreasonably dangerous condition.

¶ 5 The jury found by special interrogatory that Van Gelderen's injury was caused by an unreasonably dangerous condition that Hokin, through the exercise of reasonable care, should have known about and guarded against. The jury further found that Van Gelderen was 50% contributorily negligent and, accordingly, reduced damages by one-half. Ultimately, Van Gelderen was awarded just over $1.5 million.

¶ 6 The trial court entered judgment on the verdict on May 11, 2009. Thereafter, Hokin filed a motion for judgment notwithstanding the verdict. The trial court denied the motion in November 2009, and Hokin appealed to this court. In that appeal, Hokin challenged, in relevant part, the court's denial of the judgment notwithstanding the verdict. *Van Gelderen v. Hokin*,

2011 IL APP (1st) 093152, 1034 (2011). This court, with one justice dissenting, affirmed the trial court. *Hokin*, 2011 IL APP (1st) 093152, 1041.

¶ 7 In September 2009, appellant David Hokin filed an amended complaint against appellees Michael Hershenson and Michael Hershenson Architects, Ltd. The complaint was titled "first amended complaint for professional malpractice." In it, appellant alleged that appellees defectively designed a staircase which was located in appellant's house and was the cause of Van Gelderen's injuries. Appellant claimed it suffered the following damages:

> "9. [Appellant] suffered damages as a result of the [appellees'] negligence when Donald Van Gelderen, a workman lawfully upon the premises engaged in activities related to the construction and completion of [appellant's] home, fell down the stairs and was injured.
>
> 10. [Appellant] suffered damages as a result of the [appellees'] negligence when Donald Van Gelderen filed suit against [appellant] alleging that the home had a stairway and doorway adjacent to one another which created the inherently dangerous situation that led to his injuries, and [appellant] was required to incur attorney fees and costs to defend this lawsuit.
>
> 11. [Appellant] suffered damages as a result of the [appellees'] negligence when a judgment was entered in favor of Donald Van Gelderen and against [appellant] in excess of $1,500,000.000.

> 12. [Appellant] suffered damages as a result of [appellees'] negligence when [appellant] filed post trial and appellate proceedings to seek the reversal of the judgment entered in favor of Donald Van Gelderen and against [appellant]."

¶ 8 Appellees then filed a motion to dismiss pursuant to Section 2-619 of the Code (735 ILCS 5/2-619 (West 2010)). In their motion, appellees argued that the court should dismiss the complaint because, although it was titled "first amended complaint for professional malpractice," in actuality it was a motion for contribution. As such, argued appellees, the claim was barred because it was not asserted during the pendency of the underlying cause and because the two-year statute of limitations period applicable to claims for contribution had run.

¶ 9 The trial court granted the motion to dismiss, and appellant appeals.

¶ 10 ANALYSIS

¶ 11 Appellant contends that the court erred in dismissing his case where it misconstrued his motion as a motion for contribution. Specifically, appellant argues that the motion in question cannot be for contribution because seeking contribution would be improper because: (1) he was not a tortfeasor in the underlying cause; and (2) his fault was not at issue in the underlying cause. We disagree.

¶ 12 A section 2-619 motion to dismiss admits the legal sufficiency of the plaintiff's complaint but asserts affirmative defenses or other matter that avoids or defeats the plaintiff's claim. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). An " '[a]ffirmative matter' is something in the nature of a defense that completely negates the cause of action or refutes crucial conclusions of

law or conclusions of material fact contained in or inferred from the complaint." *Golden v. Mullen*, 295 Ill. App. 3d 865, 869 (1997). All properly pleaded facts are accepted as true and a reviewing court is concerned only with the question of law presented by the pleadings. *Thornton v. Shah*, 333 Ill. App. 3d 1011, 1019 (2002). Dismissal is proper where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2010). Such affirmative matter has been defined as "a type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint." *Neppl v. Murphy*, 316 Ill. App. 3d 581, 585 (2000). A reviewing court may affirm or reverse the judgment of the trial court on any basis in the record. See *Bell Leasing Brokerage, LLC v. Roger Auto Service, Inc.*, 372 Ill. App. 3d 461, 469 (2007). Rulings on section 2-619 motions are reviewed *de novo*. *DeLuna*, 223 Ill. 2d at 59. Accordingly, we will consider whether the trial court erred in dismissing the claim, not whether its reasoning was correct.

¶ 13 Section 2 of the Contribution Act provides, in relevant part, that "where 2 or more persons are subject to liability in tort arising out of the same injury to person or property * * * there is a right of contribution among them, even though judgment has not been entered against any or all of them." 740 ILCS 100/2 (West 2010). Section 5 of the Contribution Act provides:

> "A cause of action for contribution among joint tortfeasors may be asserted by a separate action before or after payment, by counterclaim or by third-party complaint in a pending action." 740

ILCS 100/5 (West 1992).[1]

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[1]Effective March 9, 1995, section 5 was amended to provide as follows:

> "Other than in actions for healing art malpractice, a cause of action for contribution among joint tortfeasors is not required to be asserted during the pendency of litigation brought by a claimant and may be asserted by a separate action before or after payment of a settlement or judgment in favor of the claimant, or may be asserted by counterclaim or by third-party complaint in a pending action." 740 ILCS 100/5 (West 1996).

In *Harshman v. DePhillips*, 218 Ill. 2d 482 (2006), our supreme court noted:

> "The amended version of section 5 was part of Public Act 89-7, which this court declared unconstitutional in its entirety in *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 467 (1997). As a result, the amended version of section 5 was rendered void *ab initio*, and the version of the statute in existence prior to its amendment remained in effect. See, *e.g.*, *People v. Gersch*, 135 Ill. 2d 384, 390 (1990) ("The effect of enacting an unconstitutional amendment to a statute is to leave the law in force as it was before the adoption of the amendment"). As yet, the legislature has not reenacted the amended version of section 5. See 740 ILCS 100/5 (West 2004). The unamended version of the statute is at issue in

¶ 14 Our supreme court has held that parties may not pursue contribution claims in separate actions where another action regarding the matter has already been filed. *Laue v. Leifheit*, 105 Ill. 2d 191, 196 (1984) ("[A] party seeking contribution must assert a claim by counterclaim or by third-party claim in the [pending action."). "Section 5 of the Contribution Act requires that, if there is a pending action, a contribution claim must be asserted in that action." *Harshman*, 218 Ill. 2d at 493. "One jury should decide both the liability to the plaintiff and the percentages of liability among the defendants, so as to avoid a multiplicity of lawsuits in an already crowded court system and the possibility of inconsistent verdicts." *Laue*, 105 Ill. 2d at 196-97. "[A]nytime a joint tortfeasor fails to bring his contribution claim in the original action, any claim to contribution is thereafter a nullity." *Henry by Henry v. St. John's Hospital*, 138 Ill. 2d 533, 546 (1990).

¶ 15 Here, regardless of the fact that appellant titled his complaint "first amended complaint for professional malpractice," it was, in fact, an action for contribution. Van Gelderen, the plaintiff in the underlying cause, was injured in the course of employment at appellant's house. He sued appellant, alleging negligence and that appellant should have known of a dangerous condition on the premises. Van Gelderen alleged that a design defect in appellant's house caused him to fall and sustain injuries. As the owner of the house, Hokin was found negligent and judgment was entered against him. As a result of that judgment, appellant filed his amended

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this case." *Harshman*, 218 Ill. 2d at 489, FN1.

Similarly here, the unamended version of the statute is applicable to this case, as the legislature has not reenacted the amended version of section 5.

complaint against appellees seeking damages associated with the judgment that was entered against him in the underlying matter. Clearly, this claim is a claim for contribution as defined in the Contribution Act. See 740 ILCS 100/2(a) (West 2010) ("where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them, even though judgment has not been entered against any or all of them."). As such, the claim should have been brought while the underlying cause was pending. See *Harshman*, 218 Ill. 2d at 493 ("Section 5 of the Contribution Act requires that, if there is a pending action, a contribution claim must be asserted in that action."); *Laue*, 105 Ill. 2d at 196; *Henry*, 138 Ill. 2d at 546 ("The plain meaning of section 5's language mandates that, unless a joint tortfeasor brings a counterclaim or third-party claim for contribution in the original action, any claim for relief under the Contribution Act is thereafter waived.").

¶ 16 Appellant in the case at bar failed to preserve his right to contribution from appellees because he neglected to raise the contribution claim in a timely fashion during the original proceeding. See *Laue*, 105 Ill. 2d at 196*; Henry*, 138 Ill. 2d at 548 ("The doctrine of contribution among joint tortfeasors is equitable in origin (see *Skinner v. Reed-Prentice Division Package Machinery Co.*, 70 Ill. 2d 1, 12-13 (1977); 18 Am. Jur. 2d Contribution ξξ 3 through 5 (1985)), and "equity aids the vigilant and not those who sleep on their rights" (*Bell v. Louisville & Nashville R.R. Co.*, 106 Ill. 2d 135, 146 (1985) (citing *Flannery v. Flannery*, 320 Ill. App. 421, 432 (1943)).

¶ 17 Appellant argues that he does not fit into the matrix of the Contribution Act, which applies solely to those persons "subject to liability in tort," because he was not the actual

tortfeasor in the underlying case. Appellant explains that he was not the tortfeasor because the theory of liability in the underlying case was that he was responsible for a dangerous condition rather than that he actually designed the stairway that constituted the dangerous condition. This argument is unpersuasive. In the underlying case, Van Gelderen sued Hokin, alleging negligence because Hokin: (1) allowed a dangerous condition to be created at his house; and (2) should have known about such dangerous condition on his premises. Van Gelderen alleged that he was injured at Hokin's home. A possessor of land may be subject to liability for physical harm caused to his invitees by a condition on the land if he has actual or constructive knowledge of the alleged defective condition. *VanGelderen*, 2011 IL App (1 st) 093152, 1035 (quoting Restatement (Second) of Torts ξ 343 (1965)). Hokin, as the defendant charged with negligence in the underlying case is certainly a "tortfeasor" and is "subject to liability" under the matrix of the Contribution Act.

¶ 18 We are also unpersuaded by appellant's reliance on *Lucey v. Pretzel Stouffer*, 301 Ill. App. 3d 349 (1998), to argue that filing this action for architectural malpractice would have been premature before he suffered actual damages in the form of the judgment against him in the underlying litigation. Unlike the case at bar, which is an action for contribution, *Lucey* involved a claim for legal malpractice. See *Lucey*, 301 Ill. App. 3d at 351. In *Lucey*, the plaintiff alleged it relied on the advice of the defendant law firm and was sued as a result of the alleged erroneous advice he was given. *Id.* When he filed his legal malpractice action, the underlying action against the plaintiff was still pending. *Id*. The court found that the plaintiff's legal malpractice action was procedurally premature because it failed to show that, but for the attorney's

negligence, the plaintiff would have prevailed in the underlying action. *Id*. at 353. In the case at bar, appellant asks us to find that "since a cause of action against any professional is indeed premature unless and until liability has been imposed upon the person that hires that professional, the trial court erred in dismissing this cause of action." This argument is contrary to the Contribution Act as discussed above. Moreover, accepting this argument would obviate the policy behind the Contribution Act which promotes judicial economy and avoids inconsistent verdicts. See, *e.g., Laue*, 105 Ill. 2d at 196-97 ("'One jury should decide both the liability to the plaintiff and the percentages of liability among the defendants, so as to avoid a multiplicity of lawsuits in an already crowded court system and the possibility of inconsistent verdicts.").

¶ 19 We find that the trial court properly dismissed appellant's first amended complaint pursuant to section 2-619 where appellant failed to preserve his right to contribution from appellees because he neglected to raise the contribution claim in a timely fashion during the original proceeding. See *DeLuna*, 223 Ill. 2d at 59.

¶ 20 CONCLUSION

¶ 21 For the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 22 Affirmed.