

2013 IL App (1st) 113556-U

SIXTH DIVISION

June 21, 2013

No. 1-11-3556

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 DISTRICT

DR. I. AKHTERT, Doing Business as Centro Medico,)	Appeal from the
Also Known as Prevention and Treatment Center,)	Circuit Court of
)	Cook County.
Plaintiff-Appellant,)	
)	
v.)	No. 11 CH 08538
)	
DR. LUIS M. D'AVIS, DR DIMITRI GEOKARIS,)	Honorable
DR. SAUD DABBAH and GABRIEL BRICENO,)	Nancy Jo Arnold,
)	Judge Presiding.
Defendants-Appellees.)	

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Lampkin and Justice Reyes concurred in the judgment.

ORDER

¶ 1 **Held:** Dismissal of the plaintiff's complaint for breach of contract and an accounting based on the five-year limitations period and *laches* was affirmed in part and reversed in part. Each payment installment carried its own limitations period and only those claims five years or older were barred by the statute of limitations and *laches*. The circuit court's dismissal of the claims not barred by the limitations period on the basis of *laches* was an abuse of discretion; the defendants failed to show that the plaintiff's lack of diligence prejudiced them.

¶ 2 The plaintiff, Dr. I. Akthert, filed a complaint against the defendants, Dr. Luis M. D'avis, Dr. Dimitri Geokaris¹, Dr. Saud Dabbah and Gabriel Briceno, alleging the breach of an oral agreement. The circuit court dismissed the complaint with prejudice. The plaintiff appeals contending that the court erred when it found that the complaint was barred by the statute of limitations, and by *laches*.

¶ 3 On March 8, 2011, the plaintiff filed his complaint, which contained the following factual allegations. In March 2002, the plaintiff and the defendants entered into an oral agreement whereby the defendants would conduct their medical practice under the plaintiff's medical entity, Centro Medico, also known as the Prevention & Treatment Center. The oral agreement required the defendants to pay 40% of their gross income from the plaintiff's medical practice. The oral agreement also required the defendants to pay 50% of their gross income generated through the use of the plaintiff's medical laboratory and to provide the plaintiff an accounting of the receipts. The defendants made monthly payments to the plaintiff from May 2003 to October 2004.

¶ 4 Count I of the complaint alleged that the defendants breached the oral agreement when they stopped making payments to him in December 2004. In count II, the plaintiff sought an accounting of the income received by the defendants from December 2004 to February 11, 2011, and the return of his medical practice.

¶ 5 Dr. Giokaris filed a motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010) (the Code)).² The motion alleged that the complaint

¹The record reflects that "Demetrios Giokaris" is the correct spelling.

²The record on appeal indicates that Dr. D'avis and Mr. Briceno were served with process

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was filed beyond the five-year statute of limitations applicable to oral contracts. Since there was a six-year delay between the last payment under the contract and the filing of the complaint, the plaintiff was guilty of *laches*. Following a hearing, the circuit court found that the plaintiff's cause of action accrued in December 2004, and became time-barred in December 2009. The court further found that the plaintiff's failure to enforce his rights prior to March 8, 2011, was without legal excuse and constituted a lack of diligence. The court dismissed count I as barred by the statute of limitations; count II was dismissed on the grounds of *laches*. The court ordered the case dismissed with prejudice in its entirety.

¶ 6 Following the denial of his motion for reconsideration, the plaintiff filed a notice of appeal.

¶ 7 ANALYSIS

¶ 8 Before addressing the merits of the appeal, we must consider the defendants' challenge to our jurisdiction. The defendants maintain that this court lacks subject matter jurisdiction because after his attorney withdrew, the plaintiff filed a *pro se* motion for reconsideration but did not file a *pro se* appearance. Since the plaintiff was not properly before the court, the defendants argue that the filing of the motion for reconsideration did not toll the time for filing the notice of appeal, rendering appeal untimely.

¶ 9 The defendants cite no authority for their argument. It is therefore forfeited. See Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008).

but did not file appearances. Dr. Dabbah was not served and did not file an appearance.

¶ 10 I. Statute of Limitations

¶ 11 A. *Standard of Review*

¶ 12 The court's review of a dismissal under section 2-619 of the Code is *de novo*. *Schrager v. Bailey*, 2012 IL App (1st) 111943, ¶ 16. A case may be dismissed based on statute of limitations grounds. See 735 ILCS 5/2-619(5) (West 2010). On review, the court considers whether there was a genuine issue of material fact that precluded dismissal or, absent a general fact question, whether dismissal was proper as a matter of law. *Schrager*, 2012 IL App (1st) 111943, ¶ 16.

¶ 13 B. *Discussion*

¶ 14 The parties agree that the five-year statute of limitations applies to the plaintiff's claim that the defendants breached the oral agreement. Under section 13-205, an action for breach of an oral contract "shall be commenced within 5 years next after the cause of action accrues." 735 ILCS 5/13-205 (West 2010). "A cause of action accrues and the statute of limitations begins to run when a creditor may legally demand payment from a debtor." *Kozasa v. Guardian Electric Manufacturing Co.*, 99 Ill. App. 3d 669, 673 (1981).

¶ 15 When a money obligation is payable in installments, the limitations period begins to run against each installment on the date the installment becomes due. *Skinner v. Shirley of Hollywood*, 723 F. Supp. 50, 54 (N.D. Ill. 1989) (citing *Thread & Gage Co. v. Kucinski*, 116 Ill. App. 3d 178, 184 (1983)).

¶ 16 In *Thread & Gage Co.*, the parties contracted for the sale of a corporation. The written agreement provided for a down payment and, beginning on September 1, 1962, installment payments on the balance of the purchase price. When the first installment payment became due,

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the buyer refused to make the payment and informed the seller that no further payments would be made on that agreement. On May 20, 1969, the seller's attorney sent a demand letter for payment of the installments plus interest. The buyer continued to refuse to make the payments. The seller filed suit on March 27, 1973. Citing the rule that each installment carries its own limitations period, the reviewing court held that the 10-year statute of limitations barred the installments which had come due September 1, 1962, through March 27, 1963. The seller's claim for the monthly payments falling due after March 27, 1963, was timely. *Thread & Gage*, 116 Ill. App. 3d at 185.

¶ 17 In *Skinner*, the plaintiff was hired in 1973 as the sales representative for the defendant, in return for which he was to receive a 10% commission. In 1989, the plaintiff filed suit alleging that the defendant breached their oral contract in 1984. The defendant argued that the complaint was barred by Illinois' five-year statute of limitations. While noting the difficulty of applying a limitations period to contracts involving continued or repeated conditions, the district court nevertheless rejected the statute of limitations defense, stating as follows:

"Contrary to Shirley's position, the statute of limitations for all potential harm should not begin to run immediately upon the initial breach; the extent of future harm could vary or cease completely depending on the extent of the defendant's later wrongful conduct.

'Where the potentiality of future harm is not clear, *** limitations should not run until damages become recoverably certain.' " *Skinner*, 723 F. Supp. at 54 (quoting Note, *Developments in the Law: Statutes of Limitations*, 36 Harv.L.Rev. 1177, 1206 (1950)).

The court concluded that any breach occurring within five years of the filing of the suit on May

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18, 1989, was not barred by the limitations period; any breach that occurred prior to May 18, 1984, was barred. *Skinner*, 723 F. Supp. at 54.

¶ 18 The defendants maintains that *Skinner* is distinguishable because, unlike the present case, it involved payments made in consideration for a series of corresponding acts. In the present case, the plaintiff continued to allow the defendants to practice medicine under his medical entity and to use his medical laboratory; in turn, the defendants were to pay him a percentage of the income and provide an accounting. Therefore, we disagree that *Skinner* is distinguishable from the present case.

¶ 19 We also reject the defendants' argument that by failing to make any payments after October 2004 and never provided an accounting, they had clearly repudiated the contract as of December 2004. However, in *Thread &Gage Co.*, the buyer never made any of the installment payments and expressly informed the seller that no payments would be forthcoming. Nonetheless, the reviewing court determined that the installment payment rule applied. See *Thread &Gage Co.*, 116 Ill. App. 3d 184-85.

¶ 20 According to the allegations of the complaint, from May 2003 to October 2004, the defendants made monthly payments on the oral agreement. The monthly payments ceased in December 2004; the plaintiff filed suit on March 8, 2011. Applying the installment rule, we hold that only those claims for payments due prior to March 8, 2006, are barred by the statute of limitations. We further hold that only those claims for an accounting for sums due prior to March 8, 2006, are barred by the statute of limitations. See *Skinner*, 723 F. Supp. at 54 (rejection of statute of limitations defense as to beach of contract claim required rejection of the same

defense to accounting claim).

¶ 21

II. *Laches*

¶ 22

A. *Standard of Review*

¶ 23 "Whether to apply *laches* rests within the trial court's discretion." *Whitlock v. Hilander Foods, Inc.*, 308 Ill. App. 3d 456, 464 (1999). In *O'Brien v. Meyer*, 281 Ill. App. 3d 832 (1996), the reviewing court explained that "the 'discretion' granted a trial judge in determining the question of *laches* is different from the discretion involved in a number of other rulings by a trial judge *** which involve to some degree the weighing of facts." *O'Brien*, 281 Ill. App. 3d at 834-35. Noting that a trial court abused its discretion if its decision was against the manifest weight of the evidence, the court reviewed the record to determine whether the finding that the plaintiff was guilty of *laches* was against the manifest weight of the evidence. *O'Brien*, 281 Ill. App. 3d at 835. "A decision is said to be against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the finding is unreasonable, arbitrary, or not based on the evidence presented." *Brynwood Co. v. Schweisberger*, 393 Ill. App. 3d 339, 351 (2009).

¶ 24

B. *Discussion*

¶ 25 Our supreme court has defined *laches* as " 'a neglect or omission to assert a right, taken in conjunction with a lapse of time of more or less duration, and other circumstances causing prejudice to an adverse party, as will operate to bar relief in equity.' " *Sundance Homes, Inc. v. County of DuPage*, 195 Ill. 2d 257, 270 (2001) (quoting *Meyers v. Kissner*, 149 Ill. 2d 1, 12 (1992)). "[A] suit is barred by *laches* ' "where and only where" ' there is '(1) [c]onduct on the

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part of the defendant giving rise to the situation of which complaint is made and for which the complainant seeks a remedy; (2) delay in asserting the complainant's rights, the complainant having had notice or knowledge of defendant's conduct and the opportunity to institute a suit; (3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit[;] and (4) injury or prejudice to the defendant in the event relief is accorded to the complainant." *O'Brien*, 281 Ill. App. 3d at 838 (quoting *Pyle v. Ferrell*, 12 Ill. 2d 547, 553 (1958)).

¶ 26 The allegation in the complaint that the defendants failed to comply with the terms of the oral agreement satisfies the first requirement for the application of *laches*. While the complaint alleges that at various times the plaintiff made demands on the defendants for payment and an accounting, the plaintiff did not allege when these demands were made. Therefore, the allegations of the complaint fail to establish that the defendants had notice or knowledge prior to March 8, 2006, that the plaintiff would assert his rights under the oral agreement. Moreover, the defendants correctly note that where the period of delay exceeds the applicable limitations period, the delay constitutes *laches*. *Rakstiene v. Kroulaidis*, 33 Ill. App. 3d 1067, 1072 (1975). In such cases, "the normal rule that *laches* requires both unexplained delay and a resulting prejudice to the adverse party is not applicable; the mere delay constitutes *laches*." *Rakstiene*, 33 Ill. App. 3d at 1072. Therefore, all of the requirements for the application of *laches* have been fulfilled.

¶ 27 The circuit court's determination that claims for payment and accounting that accrued prior to March 8, 2006, were barred by *laches* was not against the manifest weight of the

evidence and was not an abuse of discretion.

¶ 28 The claims for payment and accounting accruing after March 6, 2006, were not barred by the statute of limitations. We must now determine if the circuit court's dismissal of those claims based on *laches* was against the manifest weight of the evidence.

¶ 29 The facts and circumstances of each case determine whether the defense of *laches* applies. *LaSalle National Bank v. Dubin Residential Communities Corp.*, 337 Ill. App. 3d 345, 351 (2003). "[D]epending upon the particular circumstances before the court, equitable relief may be refused although the time fixed by the statute of limitations has not expired, or conversely, relief may be granted even though the limitations period has long since elapsed." *Sundance Homes, Inc.*, 195 Ill. 2d at 270. The party asserting the affirmative defense of *laches* bears the burden of establishing the defense by a preponderance of the evidence. *LaSalle National Bank*, 337 Ill. App. 3d at 351. The mere passage of time is not sufficient to establish *laches*; "[l]ack of diligence must result in some inequity to the adverse party such that it would be unfair and unjust to allow the belated assertion of the claim." *LaSalle National Bank*, 337 Ill. App. 3d at 351. Where the party asserting *laches* is not injured by the delay, *laches* is inapplicable. *LaSalle National Bank*, 337 Ill. App. 3d at 351.

¶ 30 The defendants made no showing that they were prejudiced by the plaintiff's delay in asserting his payment and accounting claims that accrued after March 8, 2006. Therefore, it was against the manifest weight of the evidence to apply the defense of *laches* to those claims. Since the decision was against the manifest weight of the evidence, the circuit court abused its discretion when it dismissed the claims accruing after March 8, 2006, based on *laches*.

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¶ 31

CONCLUSION

¶ 32 The dismissal of the claims for payment and accounting that accrued prior to March 8, 2006, is affirmed. The dismissal of the claims that accrued after March 8, 2006, is reversed, and the cause is remanded for further proceedings.

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