2015 IL App (1st) 141864-U

FIRST DIVISION
March 30, 2015

No. 1-14-1864

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

STEVE STAVROPOULOS and JARILYN STAVROPOULOS, Plaintiffs-Appellants, v. THE PREMCOR REFINING GROUP, INC., a, Delaware Corporation, formerly known as Clark Refining and Marketing, Inc., Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 12 L 8292 Honorable Sanjay Tailor, Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 ***Held:*** The trial court properly granted summary judgment in favor of defendant and denied plaintiffs' cross-motion for partial summary judgment as moot. The statute of limitations governing contracts expired before plaintiffs filed their complaint.

¶ 2 Plaintiffs Steve and Jarilyn Stavropoulos appeal the decision of the trial court granting summary judgment in favor of defendant, The Premcor Refining Group, Inc. (Premcor). The trial court held that plaintiffs filed their breach of contract complaint beyond the 10-year statute

of limitations and, therefore, their cause of action was time-barred. Plaintiffs also appeal the denial of their cross-motion for partial summary judgment. We affirm.

¶ 3 BACKGROUND

¶ 4 On August 14, 1997, plaintiffs and Premcor entered into a five-year service station/convenience store lease for the property in Maywood, Illinois. Premcor's use of the premises included the retail sale of gasoline and petroleum products, the operation of a convenience grocery store, and the retail sale of merchandise associated with such operations.

¶ 5 The lease included a section detailing the lessee's environmental responsibilities regarding the property. Section 7.01(a) defined "Environmental Laws" as "any local, state or federal law, rule or regulation pertaining to environmental regulation, contamination or clean-up, including, without limitation, 'CERCLA,' 'RCRA,' or state environmental clean-up statutes." Section 7.01(b) stated that "Tenant represents and agrees that it shall comply with all Environmental Laws applicable to the Leased Premises during the term of the Lease." According to section 7.01(d), the lessee was responsible for remediation and clean-up costs for environmental damage during the term of the lease:

> "Tenant shall, at its own cost and expense, take all actions required by IEPA to remediate and cleanup environmental contamination over that described in the Environmental Baseline Determination and arising after the Commencement Date and prior to the Termination Date of this Lease or the last possession date by Tenant, whichever shall last occur, even though the completion of such remediation and cleanup shall not have been completed until after the Termination Date of this Lease."

Finally, section 7.01(e) stated "Tenant shall notify Landlord within forty-five (45) days of the occurrence of any event of a reportable nature pursuant to applicable Environmental Laws."

¶ 6 As to assignment and subletting of the lease, section 8.05 stated that "[t]he Lease Premises may be occupied and/or used, sublet or assigned, in whole or in part by Tenant without Landlord's consent and any such assignment or subletting shall be effective upon written notice of the same to Landlord. Notwithstanding any assignment or subtenancy, the Tenant shall remain liable for Tenant's obligation under this Lease." Section 8.06, entitled "Surrender And Termination," provided:

> "Upon the termination of this Lease, whether by lapse of time or otherwise, Tenant shall, without demand, surrender and deliver up the Leased Premises and Leased Personal Property peaceably to Landlord subject to any continuing obligations under this Lease and under Environmental Laws, in broom clean condition subject to ordinary wear and tear, excepting any damage caused by fire, the elements, acts of God, civil war, insurrection or other unavoidable casualty."

¶ 7 On July 6, 1999, Premcor assigned the lease to OTC (Holdings), Inc. (OTC), which assumed operation of the service station and convenience store. Shortly thereafter, OTC changed its name to Clark Retail Enterprises, Inc. (CRE). Premcor and OTC notified plaintiffs in writing of both the assignment of the lease and the name change.

¶ 8 On October 30, 2001, a storage tank safety specialist from the Office of the Illinois State Fire Marshal's Division of Petroleum and Chemical Safety conducted an on-site inspection of the service station. The specialist issued CRE a "Certification Audit" and a "Notice of Violation," which required the service station's three underground storage tanks (USTs) to be internally inspected for compliance with environmental regulations under the Illinois

Administrative Code (41 Ill. Adm. Code § 170 (eff. July 5, 2001)). CRE did not notify plaintiffs as required by section 7.01(e) of the lease that the fire marshal had issued a Notice of Violation.

¶ 9 On November 30, 2001, the State Fire Marshal notified CRE in writing that it qualified as a candidate for the "Timely Compliance Opportunity" (TCO) program, which included a "one time, 60-day window to come into compliance." The fire marshal's letter stated that "[i]f compliance is not made by January 30, 2002, your underground storage tank system will be RED TAGGED." A red tag prohibits the operator of the service station from having product placed into the USTs. The fire marshal issued CRE two permits to inspect and internally line the USTs. The permit listed Brian McCormick of McCormick Contracting Inc. as the contractor performing the work on the USTs. The fire marshal permitted CRE to continue operating the service station until January 30, 2002, so long as the USTs were brought into compliance by that date.

¶ 10 McCormick Contracting inspected the USTs on January 22, 2002 and January 28, 2002. The inspection revealed that two of the USTs, the premium and regular gas tanks, required relining, a process in which a chemical is sprayed inside the UST to ensure against content leakage. The mid-grade gas tank was not approved for relining because the structural integrity of the UST had failed. If a UST cannot be relined, it must either be replaced or filled with concrete slurry and abandoned in place.

¶ 11 CRE did not reline or replace the three USTs by January 30, 2002, which meant the USTs were no longer environmentally compliant. The fire marshal red-tagged the service station, which meant CRE could no longer operate its business from that location. CRE did not notify plaintiffs that the service station had been red-tagged.

¶ 12 On February 7, 2002, CRE sent a letter to plaintiffs notifying them that CRE declined to exercise its option to extend the lease and would terminate the lease as of August 13, 2002 (the

date of lease expiration). CRE stated that it would cease operations on February 7, 2002, but provided no explanation why it was halting its business 7 months before the lease termination date.

¶ 13 On May 21, 2002, CRE's compliance coordinator, Kathy Juresic, received a call from Tom McCormick of McCormick Contracting. McCormick informed Juresic that plaintiffs asked him to line two of the USTs and abandon a third, but wanted the permits for the work to be under CRE's name. Plaintiffs told McCormick that CRE was aware of the need to reline the tanks and that they would be splitting the cost of the work with CRE. McCormick confirmed in his deposition that he was approached by Steve Stavropoulos in May 2002 about relining two of the USTs and abandoning the third UST. In his deposition, Steve Stavropoulos acknowledged "[i]t's possible" he knew about the faulty USTs in May 2002 and approached a contractor to discuss relining them.

¶ 14 Juresic sent Tom McCormick an email on June 4, 2002, stating that she spoke to Steve Stavropoulos, who denied contacting anyone about performing work at the service station. A contractor called Stavropoulos to tell him a line was cut during some tank work. Juresic confirmed CRE did not agree to reline the two USTs and abandon the third.

¶ 15 On August 14, 2002, plaintiffs and CRE entered into a lease termination agreement (LTA). The LTA included a clause releasing CRE "from any and all liability, claims and damages of any kind or nature that exists or may arise with respect to or in connection with the Lease or Lessee's occupation or use of the property." The LTA identified CRE, not Premcor, as the Lessee.

¶ 16 Plaintiffs filed their complaint against Premcor on July 24, 2012. The complaint did not allege a specific named cause of action against Premcor. Paragraphs 5 through 25 of the

complaint are set forth under a heading entitled "Facts." Paragraph 10 of the complaint states that "[n]otwithstanding the assignment of the Lease and the LTA, Premcor remains liable for the obligations under the lease," citing section 8.05 of the lease. Paragraph 13 of the complaint quotes the entirety of section 8.06 of the lease, which requires the tenant to return the property in satisfactory condition. Plaintiffs did not specifically allege a violation of section 8.06 in their complaint. Paragraph 14 states that "[t]he continuing obligations referred to in Section 8.06 include post term taxes and expenses (Section 2.03 and 2.04), damages for failure to maintain the premises under Section 3.01, required remediation for any non-compliance with Environmental Laws (as defined and provided for in Section VII), and obligation to provide notice of 'any event of reportable nature pursuant to any applicable Environmental Laws' (Section 7.01(e))."

¶ 17 The only paragraph in the complaint alleging a specific breach of the lease is paragraph 16:

> "Moreover, CRE did not perform its obligations under the LTA, and failed to disclose material facts to Stavropoulos prior to the execution of the LTA. Specifically, CRE failed to disclose the prior known defective condition of the tanks, notwithstanding that Section 7.01 required them to do so within forty-five (45) days of the occurrence. CRE initiated an investigation by the State Fire Marshal who determined on or about October 30, 2001 that all three tanks on the Property had to be re-lined as the tanks had failed a lining inspection. Pursuant thereto, CRE was issued a Timely Compliance Opportunity permit, allowing the facility sixty (60) days to comply. CRE allowed the permit to expire without performing the work and then closed the gas station without notifying Stavropolus of the TCO green tag expiration date of January 30, 2002."

In short, plaintiffs only alleged a specific breach of section 7.01, which includes compliance with environmental laws and regulations, and notice requirements in the event of a violation. Paragraph 20 states that Premcor's "failure to cure the defaults constitutes a material breach of the Lease," but again, the only "defaults" alleged originate from section 7.01 of the lease. Finally, paragraph 25 states that "[a]s a result of Premcor's breach of the Lease, Stavropoulos has been damaged in an amount in excess of $220,000.00, plus all costs, expenses, including attorney's fees incurred to enforce Premcor's obligations under the Lease." Plaintiffs prayed for damages "incurred for repairing the tanks."

¶ 18 On December 23, 2013, Premcor moved for summary judgment, arguing plaintiffs' complaint was barred by the 10-year statute of limitations for breaches of contract under section 13-206 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/13-206 (West 2012)). Premcor also argued that it had no duty to repair or replace the service station's three "obsolete" USTs.

¶ 19 On March 16, 2014, the trial court entered an agreed order giving plaintiffs leave to file their response to Premcor's motion and their cross-motion for partial summary judgment. Plaintiffs argued that their complaint was filed timely and that Premcor breached the lease "by failing to re-line the premium and regular tanks and replace the mid-grade tank, or at least performing the requisite tasks to abandon the mid-grade tank in place." Plaintiffs asserted that section 8.06 of the lease required Premcor to deliver the property in the required condition and in accordance with the environmental obligations under section 7.01 of the lease as of the August 14, 2002 lease termination date. Plaintiffs contended the August 14, 2002 termination of the lease constituted the date of breach for purposes of considering when the statute of limitations under section 13-206 began to run.

¶ 20 On May 15, 2014, the trial court heard argument on the parties' motions. No report of proceedings from the argument is included in the record. Following argument, the court ruled plaintiffs' complaint was time-barred by the 10-year statute of limitations. The court granted summary judgment in favor of Premcor and denied as moot plaintiffs' cross-motion for partial summary judgment. This appeal followed.

¶ 21 ANALYSIS

¶ 22 Plaintiffs argue the trial court erred when it ruled their complaint was time-barred under section 13-206 of the Code. Plaintiffs assert the 10-year limitations period began to accrue on the August 14, 2002 lease termination date because Premcor failed to return the property in working order under section 8.06 of the lease. Plaintiffs contend the failure to send the required notice under section 7.01(e) of the lease is not the breach upon which they claim damages in their complaint. Plaintiffs argue CRE's failure to perform in accordance with section 7.01 "was merely a repudiatory act." Plaintiffs did not act upon the repudiation at its occurrence, did not elect to cancel the contract or materially change their position because of and in reliance of the act, nor in any way indicate that they regarded or accepted the repudiation as final.

¶ 23 Standard of Review

¶ 24 Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). As the parties here have filed cross-motions for summary judgment, they concede the absence of a genuine issue of material fact and invite the court to decide the questions presented as a matter of law. *Steadfast Insurance Co. v. Caremark Rx, Inc.*, 359 Ill. App. 3d 749, 755 (2005). Summary judgment should not be granted unless the movant's right to judgment is free

and clear from doubt. *Mitchell v. Special Education Joint Agreement School District No. 208*, 386 Ill. App. 3d 106, 111 (2008). We review a trial court's entry of summary judgment *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 25 Application of the Ten-Year Statute of Limitations Under Section 13-206

¶ 26 Plaintiffs acknowledge in their reply brief that "Premcor may have by its conduct committed a breach prior to the August 14, 2002 lease termination date." Nevertheless, plaintiffs argue that they "had the right not to declare an immediate total breach of the lease and terminate the lease." According to plaintiffs, the doctrine of anticipatory repudiation applies because CRE manifested its intent not to comply with section 7.01 of the lease. Plaintiffs contend CRE had the ability to cure the default and to deliver the premises in the required condition when the lease terminated. Plaintiffs assert they had the right to not declare a total breach and "instead wait as they did for the time fixed in the Lease for final performance" under section 8.06 of the lease. As plaintiffs filed their complaint on July 24, 2012, within 10 years of the August 14, 2002 lease termination date, they contend section 13-206 of the Code does not bar their claims.

¶ 27 Under section 13-206 of the Code, the applicable statute of limitations for written contracts is 10 years:

> "Except as provided in Section 2-725 of the 'Uniform Commercial Code,' actions on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidence of indebtedness in writing *** shall be commenced within 10 years next after the cause of action accrued." 735 ILCS 5/13-206 (West 2012).

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. *Hermitage Corp. v. Contactors Adjustment Co.*, 166 Ill. 2d 72, 77 (1995); *West American*

Insurance Co. v. Sal E. Lobianco & Son, Co., 69 Ill. 2d 126, 132 (1977). Otherwise, a plaintiff could delay filing suit after the contract is breached in order to increase damages. *Id.*

¶ 28 In this case, section 8.05 of the lease stated that Premcor remained liable for its obligations under the lease, even after it was assigned to CRE. Section 7.01(e) of the lease required Premcor to provide plaintiffs notice within 45 days of the October 30, 2001 notice of violation it received from the state fire marshal for the noncompliant USTs. Premcor breached the lease as early as December 15, 2001, when it failed to notify plaintiffs of the environmental violation. The fire marshal issued a "red tag" on January 30, 2002, which required the service station to cease operations for failure to comply with the 60-day TCO program. Premcor breached section 7.01(e) of the lease a second time on March 16, 2002 (45 days after January 30, 2002) because it failed to notify plaintiffs of the red tag.

¶ 29 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 or she was aware of an injury. *Hermitage Corp.*, 166 Ill. 2d at 77-78. The discovery rule delays the commencement of the statute of limitations until the plaintiff knows or reasonably should have known that he or she was injured and that the 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). Furthermore, "where a contract expressly provides for notice, before liability accrues, the period of limitation fixed by statute within which to bring action will not commence until such notice is given, according to the requirements of the contract." *Toledo, P.&W. R.R. v. Brown*, 375 Ill. 438, 449 (1940).

¶ 30 In this case, applying the discovery rule does not save this action. Although plaintiffs clearly did not know of the environmental violations as required under section 7.01 of the lease, the undisputed facts show Steve Stavropoulos knew by May 2002 that the USTs were noncompliant. Accordingly, because plaintiffs knew Premcor breached the lease by May 2002, they had 10 years from that time to file their complaint, but did not do so until July 24, 2012 – two months too late.

¶ 31 Plaintiffs' attempt to circumvent these facts by arguing anticipatory repudiation applies is also futile. Our supreme court has summarized the doctrine of anticipatory repudiation as follows:

> "The doctrine of anticipatory repudiation requires a clear manifestation of an intent not to perform the contract on the date of performance. The failure of the breaching party must be a total one which defeats or renders unattainable the object of the contract. [Citation.] That intention must be a definite and unequivocal manifestation that he will not render the promised performance when the time fixed for it in the contract arrives. [Citation.] Doubtful and indefinite statements that performance may or may not take place are not enough to constitute anticipatory repudiation." *In re Marriage of Olsen*, 124 Ill. 2d 19, 24 (1988).

Moreover, "[a]bsent an express provision in the lease, the doctrine of anticipatory repudiation does not apply to leases under Illinois law." *Infinity Broadcasting Corp. of Illinois v. Prudential Insurance Co. of America*, 869 F.2d 1073, 1078 (7th Cir. 1989) (citing *People ex rel. Nelson v. West Town State Bank*, 373 Ill. 106, 111-12 (1940)).

¶ 32 Here, the lease contains no express provision providing for anticipatory repudiation as a remedy for breach. Thus, the doctrine of anticipatory repudiation does not apply in this case. *Infinity Broadcasting Corp. of Illinois v. Prudential Insurance Co. of America*, 869 F.2d 1073, 1078 (7th Cir. 1989) (citing *People ex rel. Nelson v. West Town State Bank*, 373 Ill. 106, 111-12 (1940)). Nevertheless, plaintiffs simply conclude that CRE's failure to perform in accordance with section 7.01 of the lease "was merely a repudiatory act." Plaintiffs do not explain what evidence supports "a clear manifestation of an intent not to perform the contract" and the record does not support such a conclusion. CRE sent plaintiffs a February 7, 2002 letter notifying them that it would decline to exercise its option to extend the lease. This letter did not include a clear manifestation of an intent not to comply with section 7.01 of the lease. Anticipatory repudiation is not applicable here.

¶ 33 Plaintiffs also argue they were allowed to wait until the termination of the lease on August 14, 2002 to claim a breach of the lease under section 8.06. Plaintiffs' argument is misplaced, however, because they never pled in their complaint that Premcor breached the lease under section 8.06. Therefore, the only breach that could give rise to a cause of action was Premcor's failure to comply with section 7.01 of the lease, as alleged in paragraph 16 of the complaint.

¶ 34 In sum, plaintiffs knew as early as May 2002 that their tenant, Premcor, breached section 7.01 of the lease, but did not file their complaint until July 24, 2012, which is beyond the 10-year statute of limitations period. 735 ILCS 5/13-206 (West 2012). Accordingly, we find the trial court properly granted summary judgment in favor of Premcor because plaintiffs' complaint is time-barred. We also agree the trial court correctly denied plaintiffs' cross-motion for partial summary judgment as moot due to the ruling in favor of Premcor.

¶ 35 CONCLUSION

¶ 36 We affirm the decision of the trial court granting summary judgment in favor of defendant and denying plaintiffs' cross-motion for partial summary judgment as moot.

¶ 37 Affirmed.