SIXTH DIVISION
June 17, 2016

No. 1-15-2359

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOZEF HARMATA,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 14 L 12065
	)	
SCOTT & KRAUS LLC,	)	Honorable
	)	John P. Callahan, Jr.,
Defendant-Appellee,	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court properly dismissed legal malpractice complaint with prejudice, where it was barred by a six-year statute of repose and defendant did not waive or forfeit that defense.

¶ 2 Plaintiff-appellant, Jozef Harmata, appeals from the circuit court's order dismissing his legal malpractice complaint against defendant-appellee, Scott & Krause LLC (S&K), after the circuit court concluded that the complaint was barred by a six-year statute of repose for such claims. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff filed his complaint against S&K on November 20, 2014. Therein, plaintiff alleged that he had retained S&K, a law firm, to provide legal services in connection with an

insurance coverage dispute involving property that was owned by plaintiff and which had been damaged in a fire. In 2006, S&K filed a lawsuit against three insurers on behalf of plaintiff, and subsequently filed an amended complaint in July of 2006. S&K's motion to withdraw as plaintiff's counsel in the underlying suit was granted on October 31, 2007. While S&K still represented plaintiff in the underlying suit, all three insurers filed motions for summary judgment and—according to plaintiff's instant complaint—S&K failed to produce all of the documents supporting plaintiff's underlying claims of damages in response to discovery requests.

¶ 5 On June 13, 2008, summary judgment was granted in favor of all three insurers in the underlying lawsuit with respect to the claims included in the amended complaint originally filed by S&K. However, the circuit court allowed plaintiff's new counsel to file a second amended complaint asserting a new claim against one of the insurers, Service Insurance Agency (Service). The underlying suit was voluntarily dismissed "because Plaintiff was barred from claiming damages based upon documents which had not been produced by [S&K]." The underlying case was refiled against Service in 2012, and a jury ultimately returned a $31,462.50 judgment in plaintiff's favor on the claim first raised by plaintiff's new counsel. Plaintiff and Service settled the underlying case for that amount in order to avoid the expense of any additional proceedings. Plaintiff's complaint further alleged that S&K, which had been paid $11,500 for its work in the underlying case, nevertheless asserted an attorney's lien on the underlying settlement to recover $47,893.94 in unpaid fees and $4,267.93 in unpaid costs.

¶ 6 Plaintiff contended that S&K was negligent in representing plaintiff in the underlying case by: (1) failing to plead a proper claim against Service, and (2) failing to produce all relevant documents in response to discovery requests, resulting in plaintiff being barred from claiming the full amount of his damages. Plaintiff sought a judgment against S&K because its negligence had

caused plaintiff to recover less in damages than he was otherwise entitled to receive in the underlying case.

¶ 7 S&K responded to plaintiff's complaint by filing a motion to dismiss, pursuant to section 2-619(a)(5) of the Code of Civil Procedure (Code). 735 ILCS 5/2-619(a)(5) (West 2014). In that motion, after noting that it had withdrawn from representing plaintiff in the underlying suit on October 31, 2007, and that plaintiff's instant suit was not filed until November 20, 2014, S&K contended that the instant suit was barred by the six-year statute of repose contained in section 13-214.3 of the Code. See 735 ILCS 5/13-214.3 (West 2012).

¶ 8 In his written response to S&K's motion to dismiss, plaintiff first asserted that "[t]he event creating the malpractice was the filing of the First Amended Complaint on July 11, 2006, which failed to set forth any viable cause of action. Thus, the statute of repose expired on July 11, 2012."

¶ 9 In addition, attached to plaintiff's response was a copy of a "Brief in Support of Attorneys Lien" filed by S&K in the underlying case on August 22, 2013. Therein, S&K contended that it had sent notice of its attorney's lien to Service on October 4, 2005, but nevertheless Service had incorrectly asserted that it had not received such notice in a "Motion to Adjudicate any Attorney's Liens from S&K" filed by Service in the underlying case on July 12, 2013. S&K's brief was thus purportedly filed in response to Service's motion, and sought to establish S&K's "right to proceeds from any judgment or settlement agreement" entered into between plaintiff and Service. S&K's brief further indicated that, while plaintiff had paid $11,500 in legal fees with respect to the underlying suit, S&K had provided over 300 hours of service and plaintiff still owed $47,893.94 in fees and $4,267.93 in costs.

¶ 10 In his response to the motion to dismiss, Plaintiff asserted that he had objected to S&K's assertion of a lien in the underlying case, citing S&K's negligence as a set-off. Thus, also attached to his response to S&K's motion to dismiss in the instant suit was the response filed by plaintiff to S&K's "Brief in Support of Attorneys Lien" in the underlying case. Therein, plaintiff asserted S&K's claim that it was owed additional legal fees was not reasonable and should be denied in light of the fact that: (1) summary judgment was granted against plaintiff on all the claims S&K had asserted against the insurers, and (2) a judgment in plaintiff's favor was entered five years later, and only upon a theory initially raised and tried by plaintiff's new counsel. Plaintiff contended that the amount S&K had been already paid was reasonable, and it should be entitled to no more.

¶ 11 Plaintiff further contended in his response to the motion to dismiss that an agreed order was entered in the underlying case which settled S&K's lien and which also "reserved Plaintiff's rights and claims against Scott & Kraus as well as Scott & Kraus' rights and defenses, if any, against Plaintiff." In support of this contention, plaintiff attached a copy of an agreed order entered in the underlying case on September 18, 2013. That agreed order includes findings that: (1) plaintiff and Service had settled the underlying case for $31,462.50, (2) S&K had submitted proof of $47,893.94 in unpaid fees and $4,267.93 in unpaid costs with respect to its representation of plaintiff, and (3) plaintiff's new counsel had presented proof of its 40% contingency fee agreement with plaintiff. The agreed order then specified, in relevant part, that: (1) $12,000 of the settlement would be paid to S&K, with this payment reducing the "outstanding amount currently due and owing" by plaintiff to $40,161.84, (2) by agreement between plaintiff and S&K, "the rights to undertake any and all actions" to collect the unpaid $40,161.84 were retained by S&K, (3) plaintiff "expressly reserves his rights, if any, with respect

to claims and defenses as to [S&K], and (4) S&K "expressly reserves its rights, if any, with respect to any other claims and defenses against [plaintiff]."

¶ 12 In light all these contentions and supporting attachments, plaintiff's response to the motion to dismiss contended that the statute of repose, an affirmative defense, had been waived or forfeited by: (1) S&K's assertion and adjudication of its lien in the underlying case after the statute of repose had expired, and/or (2) the entry of the underlying agreed order resolving S&K's lien, which explicitly preserved plaintiff's claim of legal malpractice against S&K.

¶ 13 In its written reply in support of its motion to dismiss, S&K acknowledged that the statute of repose was an affirmative defense that could be waived. However, S&K rejected plaintiff's contention that the statute of repose had been waived by any action it took in the underlying case, and also noted that it had immediately raised the statute of repose defense in its motion to dismiss the instant lawsuit.

¶ 14 On August 3, 2015, the circuit court granted S&K's motion and dismissed the instant case with prejudice. Plaintiff timely appealed.

¶ 15 II. ANALYSIS

¶ 16 On appeal, plaintiff contends that the circuit court improperly granted S&K's section 2-619 motion to dismiss.

¶ 17 A section 2-619 motion to dismiss admits the legal sufficiency of the complaint, but raises defects, defenses or other affirmative matter appearing on the face of the complaint or established by external submissions which defeat the action. 735 ILCS 5/2-619 (2014). When deciding a section 2-619 motion, a court accepts all well-pleaded facts in the complaint as true and will grant the motion when it appears no set of facts can be proved which would allow the plaintiff to recover. *Wilson v. Quinn*, 2013 IL App (5th) 120337, ¶ 11. Section 2-619(a)(5)

specifically allows a cause of action to be dismissed if it was not commenced within the time limited by law. 735 ILCS 5/2-619(a)(5) (2012); *Fireman's Fund Insurance Co. v. Rockford Heating & Air Conditioning, Inc.*, 2014 IL App (2d) 130566, ¶ 9. Our review of an order granting a section 2-619 motion is *de novo*. *Wilson*, 2013 IL App (5th) 120337, ¶ 11.

¶ 18 Further, this appeal requires us to construe the meaning of two sections of the Code. The rules applicable to this task are well-established, and were recently outlined in *Hendricks v. Board of Trustees of the Police Pension Fund*, 2015 IL App (3d) 140858, ¶ 14, 395 Ill. Dec. 472, 38 N.E.3d 969:

> "The fundamental rule of statutory interpretation is to ascertain and give effect to the intent of the legislature. [Citation.] The most reliable indicator of that intent is the language of the statute itself. [Citation.] In determining the plain meaning of statutory language, a court will consider the statute in its entirety, the subject the statute addresses, and the apparent intent of the legislature in enacting the statute. [Citations.] If the statutory language is clear and unambiguous, it must be applied as written, without resorting to further aids of statutory interpretation. [Citation.] A court may not depart from the plain language of the statute and read into it exceptions, limitations, or conditions that are not consistent with the express legislative intent. [Citation.]"

We review questions of statutory construction *de novo*. *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 267 (2003).

¶ 19 In relevant part, section 13-214.3 of the Code provides:

> "(a) In this Section: 'attorney' includes (i) an individual attorney, together with his or her employees who are attorneys, (ii) a professional partnership of attorneys, together with its employees, partners, and members who are attorneys, and (iii) a professional

service corporation of attorneys, together with its employees, officers, and shareholders who are attorneys; and 'non-attorney employee' means a person who is not an attorney but is employed by an attorney.

(b) An action for damages based on tort, contract, or otherwise (i) against an attorney arising out of an act or omission in the performance of professional services or (ii) against a non-attorney employee arising out of an act or omission in the course of his or her employment by an attorney to assist the attorney in performing professional services must be commenced within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought.

(c) Except as provided in subsection (d), an action described in subsection (b) may not be commenced in any event more than 6 years after the date on which the act or omission occurred." 735 ILCS 5/13-214.3(a), (b), (c) (West 2014).

¶ 20 "The statute of repose in a legal malpractice case begins to run as soon as an event giving rise to the malpractice claim occurs, regardless of whether plaintiff's injury has yet been realized." *Lamet v. Levin*, 2015 IL App (1st) 143105, ¶ 20. As our supreme court has further explained:

"In contrast to a statute of limitations, which determines the time within which a lawsuit may be commenced after a cause of action has accrued, a statute of repose extinguishes the action after a defined period of time, regardless of when the action accrued. [Citation.] A statute of repose is not tolled by the discovery rule. [Citation.] After the expiration of the repose period, '[t]he injured party no longer has a recognized right of action.' [Citation.] A plaintiff's right to bring an action is terminated when the event giving rise to the cause of action does not transpire within the period of time

> specified in the statute of repose." *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 16.

A statute of repose thus "gives effect to a policy different from that advanced by a statute of limitations; it is intended to terminate the possibility of liability after a defined period of time." *Ferguson v. McKenzie*, 202 Ill. 2d 304, 311 (2001).

¶ 21 On appeal, plaintiff and S&K dispute the date upon which the six-year statute of repose contained in section 13-214.3(c) began to run. Plaintiff once again contends that the event creating the malpractice was S&K's filing of the underlying first amended complaint on July 11, 2006, which allegedly failed to set forth any viable cause of action. Noting that plaintiff's complaint specifically contended that S&K was negligent both in failing to plead a proper claim against Service and in failing to produce all relevant documents, S&K contends that the "last possible date" it could have done either of those acts was the date it was granted leave to withdraw as plaintiff's counsel in the underlying case; *i.e.*, October 31, 2007.

¶ 22 However, it is undisputed that taking either July 11, 2006, or October 31, 2007, as the date the statute of repose began to run, the filing of plaintiff's instant complaint on November 20, 2014, occurred more than six years after S&K's alleged negligent act or acts occurred. Under the plain language of the statute, plaintiff's suit was therefore not timely filed and was properly dismissed. See *Goodman v. Harbor Market, Ltd.*, 278 Ill. App. 3d 684, 691 (1995) ("A statute of repose terminates the right to bring an action when the event giving rise to the cause of action does not transpire within the specified interval. The injured party no longer has a recognized right of action, and the harm that has been done is *damnum absque injura*—a wrong for which the law affords no redress.").

¶ 23 Recognizing this fact, plaintiff restates the arguments he made below: *i.e.*, that the statute of repose is an affirmative defense that S&K waived or forfeited. We disagree.

¶ 24 It is certainly true that this court has previously recognized that "statutes of repose are affirmative defenses subject to forfeiture." *McRaith v. BDO Seidman, LLP*, 391 Ill. App. 3d 565, 584 (2009). However, plaintiff's first claim of waiver or forfeiture relies upon his contention that the statute of repose began to run on July 11, 2006, expired on July 11, 2012, and the assertion of S&K's lien in the underlying case after the statute of repose had expired "should constitute an equitable waiver or forfeiture its right to assert the statute of repose." Even if we accepted plaintiff's calculation of the expiration of the statute of repose, we would not accept the remainder of this argument.

¶ 25 Plaintiff essentially analogizes this case to the type of situation contemplated by section 13-207 of the Code, which provides that "[a] defendant may plead a set-off or counterclaim barred by the statute of limitation, while held and owned by him or her, to any action, the cause of which was owned by the plaintiff or person under whom he or she claims, before such set-off or counterclaim was so barred, and not otherwise." 735 ILCS 5/13-207 (West 2014). As this court has previously recognized:

> "Pursuant to this provision, a defendant is allowed to file a counterclaim even though if no suit had been commenced by the plaintiff, defendant's claim would have been time barred. [Citation.] Under section 13-207, a party waives its statute of limitations defense against a set-off or counterclaim brought by his opponent, even if the counterclaim is not related to the claims in his primary complaint, as long as the counterclaim was not barred when the cause of action forming the basis of the claims in the primary complaint arose. [Citations.] ***

> The stated purpose of section 13-207 is to prevent plaintiffs from intentionally filing their claims as late as possible in order to preclude defendants from a reasonable opportunity to file their counterclaim within the original limitations period. [Citation.]" *Cameron General Corp. v. Hafnia Holdings, Inc.*, 289 Ill. App. 3d 495, 506 (1997).

While plaintiff himself recognizes that section 13-207 "applies to counterclaims and the statute of limitations," he contends that "similar policy concerns" applied to S&K's assertion of its lien in the underlying case and that deciding to do so "constitutes an equitable waiver or forfeiture its right to assert the statute of repose."

¶ 26 However, section 13-207 is inapplicable here. S&K was not acting as a "plaintiff" in the underlying suit by simply filing an attorney's lien in connection with its representation of plaintiff in the underlying case, and then asserting that lien following the settlement of the underlying case when Service moved to adjudicate it. Nor was plaintiff ever a "defendant" in a suit filed by S&K, such that section 13-207 might arguably allow it to assert an otherwise time-barred counterclaim or set-off. Furthermore, a statute of repose is at issue here, while section 13-207 only addresses and applies to statute of limitations. See *U.S. Bank National Ass'n v. Manzo*, 2011 IL App (1st) 103115, ¶ 42 (noting that the "plain language" of section 13-207 "explicitly permits a counterclaim to be filed only if barred by a 'statute of limitation' ").

¶ 27 Most importantly, whatever policy concerns underlie section 13-207 of the Code, those concerns have been clearly and explicitly expressed by the legislature in the text of that statute. To graft those policy concerns onto section 13-214.3 would be contrary to the clear and unambiguous language of that statute, would interfere with the requirement that we apply section 13-214.3 as written, and would improperly read into it exceptions, limitations, or conditions that are not consistent with the express legislative intent contained in the language of section 13-

214.3. See *Ferguson*, 202 Ill. 2d at 311 (recognizing that a statute of repose reflects a policy to "terminate the possibility of liability after a defined period of time.").

¶ 28 Plaintiff next argues that the September 18, 2013, agreed order entered below specifically "reserved Plaintiff's claims against [S&K]" and constituted a "knowing and voluntary waiver of the statute of repose." At the very least, plaintiff contends that the circumstances surrounding the entry of the agreed order "clearly justify the equitable determination that the statute of repose does not apply." We disagree.

¶ 29 The agreed order specifically provides both that plaintiff "expressly reserves his rights, *if any*, with respect to claims and defenses as to [S&K]," and S&K "expressly reserves its rights, *if any*, with respect to any other claims and defenses against [plaintiff]." (Emphasis added.) We fail to see how such language reflects S&K's "knowing and voluntary waiver of the statute of repose," particularly when—calculating from plaintiff's own proffered date—the statute of repose had already expired on July 11, 2012. As to plaintiff's contention that we should decline to apply the statute of repose on an "equitable" basis in light of the agreed order, we again refuse to deviate from the plain language of section 13-214.3 of the Code.

¶ 30 III. CONCLUSION

¶ 31 For the foregoing reasons, we affirm the judgment of the circuit court

¶ 32 Affirmed.