2018 IL App (1st) 170355-U

FOURTH DIVISION
September 6, 2018

No. 1-17-0355

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

KEELER PROPERTIES, INC., GINA M. ILIOPOULOS, and EDWARD P. CAPLAN,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellants,	)	
v.	)	
BMO HARRIS BANK N.A.,	)	No. 15 L 5527
Defendant-Appellee	)	
(Marbro Construction Co.,	)	Honorable Sanjay Tailor, Judge Presiding.
Defendant).	)	

JUSTICE REYES delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming in part and reversing in part the judgment of the circuit court of Cook County dismissing two counts of plaintiffs' amended complaint.

¶ 2 Upon the entry of a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8,

2016), plaintiffs Keeler Properties, Inc., Gina M. Iliopoulos and Edward P. Caplan (collectively plaintiffs) appeal from an order of the circuit court of Cook County dismissing counts seven and eight of their amended complaint against defendant BMO Harris Bank N.A. with prejudice.[1] Plaintiffs contend the circuit court erred where counts seven and eight of the amended complaint were sufficiently pleaded and not time-barred. For the reasons that follow, we affirm in part, reverse in part, and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 Plaintiffs' initial seven-count complaint, filed on June 1, 2015, alleged the following facts. In May 2005, plaintiffs sought to construct two new single family homes in Chicago. Plaintiffs entered into a construction loan agreement with defendant to secure the financing for this project. To that end, the parties executed a promissory note in the amount of $880,000.

¶ 5 Subsequently, plaintiffs contracted with Marbro Construction Company (Marbro) to construct the two new single family homes in exchange for $682,000.[2] The homes were to be completed by October 1, 2005. A change order was later executed by the parties which increased the contract amount to $728,710. Marbro was to be paid from an escrow account funded by the note and controlled by defendant with payment to be made from that account upon the presentment of sworn statements by Marbro.

¶ 6 Marbro completed constructing the homes on June 30, 2006. In addition to the late delivery of the homes, there were numerous deficiencies in their construction in violation of the

[1] We note that plaintiffs named BMO, NA and Harris, NA as two individual defendants in their complaint before the circuit court. In its response brief, defendant observes that this is incorrect and the record indicates it appeared in the matter as BMO Harris Bank N.A. Accordingly, we have so corrected the caption on appeal.

[2] Marbro is not a party to this appeal and, in fact, subsequent to the filing of the notice of appeal in this case the matter against Marbro was settled and the remaining counts of the lawsuit were dismissed.

contract. Marbro then demanded an amount from plaintiffs in excess of the contract price, which plaintiffs did not pay. In their complaint, plaintiffs maintained that Marbro fraudulently obtained their approval, resulting in an overpayment from the escrow account in the amount of $60,776. Subsequently, on September 1, 2006, Marbro filed a lien on the property pursuant to the Mechanics Lien Act (770 ILCS 60/1 *et seq.* (West 2006)) for the amounts due. Marbro, however, did not file a claim in the circuit court pursuant to the Mechanics Lien Act and consequently on June 2, 2007, plaintiffs made a demand on Marbro under the Mechanics Lien Act to release its claim of lien.

¶ 7 Pertinent to this appeal, count seven of the complaint was for breach of fiduciary duty against defendant. Plaintiffs alleged defendant issued the loan to plaintiffs based on a promissory note that provided that no more than $880,000 would be lent to the plaintiffs or disbursed for their benefit and the escrow account was to be funded with $713,651.81. Plaintiffs asserted that defendant had a fiduciary duty to use due diligence to determine that the work for which payment was sought was performed in a reasonable manner, that all amounts to be paid from the escrow account were justified pursuant to the contract, and that any increase in price of the contract was properly documented. Plaintiffs further alleged that due to the breach of these duties, defendant authorized a payment to Marbro in the amount of $789,486, $60,776 in excess of the contract price and $75,834.19 in excess of the escrow amount.

¶ 8 Defendant filed a motion to dismiss count seven of the complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2016)). After the matter was fully briefed and argued, the circuit court dismissed count seven with prejudice finding it was time-barred by the five-year statute of limitations set forth in section 13-205 of the Code (735 ILCS 5/13-205 (West 2016)). Plaintiffs filed a motion to reconsider, which was

granted. As a result, plaintiffs were given leave to amend their complaint.

¶ 9 The amended complaint, filed on September 2, 2016, set forth two counts against defendant; count seven alleged breach of contract and count eight alleged a "failure to follow banking standards." In addition to the facts previously alleged in the original complaint, the amended complaint included claims specifically regarding the breach of the note and the note was attached as an exhibit. The note provided that the agreement was a "straight line of credit" and that once the total amount of principal ($880,000) had been advanced the borrower was not entitled to further loan advances. In regard to the advancement of funds, the note provided that such advances could be made orally or in writing by plaintiffs. Another document entitled "disbursement request and authorization" was executed contemporaneously with the note and was also attached to the amended complaint. This document explained that the note was a "variable rate nondiscloseable draw down line of credit to a corporation." It further set forth the disbursement instructions for the $880,000; $161,048.19 was to be paid to Chicago Title Insurance Company (Chicago Title) and $718,951.81 remained undisbursed.

¶ 10 Based on these documents, count seven of the amended complaint alleged defendant breached the terms of the note wherein it was not to have disbursed more than $880,000. Because defendant had disbursed $161,048.19 to Chicago Title, that left only $718,951.81 to fund the escrow account. Plaintiffs alleged defendant disbursed $789,486 to the escrow account for the payment of Marbro, $75,834.19 in excess of the limit on disbursement payments in breach of the note. Count eight of the amended complaint asserted allegations substantially similar to those of count seven of the original complaint.

¶ 11 Defendant filed a motion to dismiss counts seven and eight pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2016)) alleging the counts were insufficiently pleaded (735

ILCS 5/2-615 (West 2016)) and were also time-barred (735 ILCS 5/2-619(a)(5) (West 2016)). After the matter was fully briefed and argued, the circuit court dismissed the counts with prejudice, but did not set forth under which section of the Code it was dismissing the counts. Two days later, the circuit court entered an order pursuant to Rule 304(a) that there was no just reason for delaying the enforcement or appeal of the order dismissing counts seven and eight of the amended complaint. This appeal follows.

¶ 12 ANALYSIS

¶ 13 Defendant here presented a hybrid motion to dismiss under section 2-619.1 of the Code, citing both sections 2-615 and 2-619. 735 ILCS 5/2-619.1 (West 2016). Our review of an order granting a motion to dismiss is *de novo*, whether that motion is brought pursuant to sections 2-615 or 2-619 of the Code. *Phelps v. Land of Lincoln Legal Assistance Foundation, Inc.*, 2016 IL App (5th) 150380, ¶ 11. Under *de novo* review, we perform the same analysis that a circuit court would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 14 Generally, a section 2-615 motion challenges the legal sufficiency of a complaint by alleging defects apparent on its face. 735 ILCS 5/2-615 (West 2016); *In re Estate of Powell*, 2014 IL 115997, ¶ 12. In analyzing a section 2-615 motion, the court must determine whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Phelps*, 2016 IL App (5th) 150380, ¶ 11. A section 2-615 motion admits as true all well-pleaded facts, but not conclusions of law or factual conclusions that are unsupported by allegations of specific facts. *Id.* Exhibits attached to a complaint become part of the pleading for a motion to dismiss. *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 18.

¶ 15 In contrast, a motion to dismiss pursuant to section 2-619 (735 ILCS 5/2-619 (West

2016)) admits the legal sufficiency of the complaint, but asserts certain defects, defenses or other affirmative matters that appear on the face of the complaint or are established by external submissions that act to defeat the claim. *Wallace v. Smyth*, 203 Ill. 2d 441, 447 (2002). Specifically, subsection (a)(5) of section 2-619 allows dismissal when "the action was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2016). In ruling on a section 2-619 motion, all pleadings and supporting documents must be construed in a light most favorable to the nonmoving party, and the motion should be granted only where no material facts are in dispute and the defendant is entitled to dismissal as a matter of law. *Kheirkhahvash v. Baniassadi*, 407 Ill. App. 3d 171, 176 (2011).

¶ 16 We first turn to address defendant's argument under section 2-619(a)(5) that plaintiffs' claims are time barred by the statute of limitations. Defendant asserts that because plaintiffs alleged new theories of liability in their amended complaint, the date the amended complaint was filed is the appropriate date for determining whether the statute of limitations has passed. Since construction was completed on June 30, 2006, it is impossible that the amended complaint filed on September 2, 2016, could ever be considered timely.

¶ 17 Anticipating this argument, plaintiffs posited in their opening brief that the circuit court did not address the statute of limitations issue when ruling on the motion to dismiss and, regardless, the original complaint was timely filed on June 1, 2015, because the breaches occurred after June 1, 2005.

¶ 18 The applicability of a statute of limitations to a cause of action presents a legal question that is reviewed *de novo*. *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 345 (2002). Statutes of limitations "discourage the presentation of stale claims and *** encourage diligence in the bringing of actions." *Sundance Homes, Inc. v. County of Du Page*,

195 Ill. 2d 257, 265-66 (2001). A statute of limitations commences running "when the party to be barred has the right to invoke the aid of the court to enforce his remedy." *Id.* at 266. "Stated another way, a limitation period begins 'when facts exist which authorize one party to maintain an action against another.' " *Id.* (quoting *Davis v. Munie*, 235 Ill. 620, 622 (1908)).

¶ 19 The statute of limitations at issue here provides that "[a]ctions on *** written contracts or other evidences of indebtedness in writing *** shall be commenced within ten years next after the cause of action accrued." 735 ILCS 5/13-206 (West 2016).

¶ 20 In support of its argument that the new theories of liability alleged in the amended complaint render the new counts untimely, defendant relies on *Travelers Casualty & Surety Co. v. Bowman*, 229 Ill. 2d 461 (2008). That reliance, however, is misplaced. The portion of the *Travelers Casualty & Surety Co.* opinion cited by defendant states as follows: "a cause of action constitutes 'an action on a written contract' within the meaning of section 13-206 only when liability emanates from the breach of a contractual obligation.' [Citation.]" *Id.* at 467 (citing *Armstrong v. Guigler*, 174 Ill. 2d 281, 291 (1998)). While this statement of law is undoubtedly correct, it is inapplicable to the facts of this case. Unlike in *Travelers Casualty & Surety Co.*, the issue here is *not* which statute of limitations applies (see *id.* at 465-66), the issue is whether the new counts in the amended complaint relate back to the original complaint. If they do, then the new counts are not untimely because the date the original complaint was filed would govern our statute of limitations analysis.

¶ 21 Section 2-616(b) governs the relation-back doctrine and provides in relevant part as follows:

> "The cause of action, cross claim or defense set up in any amended pleading shall not be barred by lapse of time under any statute or contract prescribing or limiting the time

> within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted, or the defense or cross claim interposed in the amended pleading *grew out of the same transaction or occurrence* set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact or some other matter which is a necessary condition precedent to the right of recovery or defense asserted, if the condition precedent has in fact been performed, and for the purpose of preserving the cause of action, cross claim or defense set up in the amended pleading, and for that purpose only, an amendment to any pleading shall be held to relate back to the date of the filing of the original pleading so amended." (Emphasis added.) 735 ILCS 5/2-616(b) (West 2016).

¶ 22 The purpose of the relation-back doctrine of section 2-616(b) is to preserve causes of action against a loss by reason of technical default unrelated to the merits. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 106-07 (1996); *Boatmen's Nat'l Bank of Belleville v. Direct Lines, Inc.*, 167 Ill. 2d 88, 102 (1995). Courts should therefore liberally construe the requirements of section 2-616(b) to allow resolution of the litigation on the merits and to avoid elevating questions of form over substance. *Bryson*, 174 Ill. 2d at 106; *Boatmen's Nat'l Bank*, 167 Ill. 2d at 102. Additionally, both the statute of limitations and section 2-616(b) are designed to afford a defendant a fair opportunity to investigate the circumstances upon which liability is based while the facts are accessible. *Boatmen's Nat'l Bank*, 167 Ill. 2d at 102. Thus, it has been stated that the rationale behind the "same transaction or occurrence" rule is that a defendant is not prejudiced if " 'his attention was directed, within the time prescribed or limited, to the facts

that form the basis of the claim asserted against him.' " *Boatmen's Nat'l Bank*, 167 Ill. 2d at 102 (quoting *Simmons v. Hendricks*, 32 Ill. 2d 489, 495 (1965)). "[A] new claim will be considered to have arisen out of the same transaction or occurrence and will relate back if the new allegations as compared with the timely filed allegations show that the events alleged were close in time and subject matter and led to the same injury." *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 360 (2008). A court should consider the entire record, including depositions and exhibits, to determine whether the defendant had such notice. *Wolf v. Meister-Neiberg, Inc.*, 143 Ill. 2d 44, 46 (1991).

¶ 23 An amendment which states a distinct claim that is based on a different set of facts than the claim in the timely filed complaint will not relate back. *Stevanovic v. City of Chicago*, 385 Ill. App. 3d 630, 633 (2008) (citing *Porter*, 227 Ill. 2d at 358-59). However, " 'relation back is appropriate where a party seeks to add a new legal theory to a set of previously alleged facts.' " *Id.* (quoting *Porter*, 227 Ill. 2d at 358).

¶ 24 Therefore, we conclude that counts seven and eight of the amended complaint relate back to the original complaint. The original complaint alleged plaintiffs had obtained a construction loan from defendant to finance the project and that an escrow account was set up whereby defendant would release funds into the escrow account at the direction of plaintiffs. The construction loan was issued to plaintiffs based upon a promissory note which provided that no more than $880,000 would be lent to the plaintiffs or disbursed for their benefit without authorization in writing from the makers of the note. Plaintiffs alleged that only $713,651.81 of the $880,000 was being held in escrow by Chicago Title. Plaintiffs maintained that defendant was not to allow the release of more than $713,651.81 and by doing so defendant breached its fiduciary duty to plaintiffs.

¶ 25 After the breach of fiduciary duty count was dismissed by the circuit court with prejudice, plaintiffs filed their amended complaint asserting two new claims against defendant, a breach of contract count and another count based on the failure to follow banking standards. These counts arise from the same transaction and occurrence as alleged in the original complaint. The allegations of the original complaint, particularly the general allegation about defendant allowing escrow disbursals in excess of the amount of the promissory note, supplied the appropriate notice to defendant. See *Porter*, 227 Ill. 2d at 362. We therefore conclude that count seven of the amended complaint relates back to the original complaint and was thus timely filed within the statute of limitations (735 ILCS 5/13-206 (West 2016)).

¶ 26 While count seven (the breach of contract claim) is clearly derived from the contract between plaintiffs and defendant, the same cannot be said for count eight. As previously iterated, plaintiffs assert that their claims are not time barred under section 13-206 of the Code, which provides that "[a]ctions on *** written contracts or other evidences of indebtedness in writing *** shall be commenced within ten years next after the cause of action accrued." 735 ILCS 5/13-206 (West 2016). Count eight does not allege that defendant's "failure to follow banking standards" consists of a breach of duty set forth in any written contract between the parties. See *Armstrong*, 174 Ill. 2d at 290 ("[T]he fact that the origin of a cause of action may ultimately be traced to a writing has never been sufficient, standing alone, to automatically warrant application of the period of limitations governing written contracts."); *Miller v. Harris*, 2013 IL App (2d) 120512, ¶ 19 (providing that a "claim for breach of fiduciary duty is not 'founded on' a contract, even if the parties' relationship that gives rise to the fiduciary duty is based on a contract"). Accordingly, section 13-206 does not apply to count eight of plaintiffs' amended complaint.

¶ 27 As count eight is not based on a written contract between the parties, we turn to section 13-205 of the Code, a catch-all provision setting a five-year limitation on actions sounding in, *inter alia*, breach of fiduciary duty. Section 13-205 provides, "actions on unwritten contracts, express or implied, *** and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued." 735 ILCS 5/13-205 (West 2016). The limitations period commences when a party knows or reasonably should know that an injury has occurred and knows or reasonably should know that an injury was wrongfully caused. *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 20. Although not an expressly recognized cause of action, we observe that the "failure to follow banking standards" as alleged in plaintiffs' amended complaint could also be construed as allegations of a breach of fiduciary duty. Breach of fiduciary duty allegations fall under section 13-205. See *DeSantis v. Brauvin Realty Partners, Inc.*, 248 Ill. App. 3d 930, 933-34 (1993) (applying section 13-205 to actions in fraud and breach of fiduciary duty).

¶ 28 Here, plaintiffs alleged in their amended complaint that the project was completed in March 2006. According to the amended complaint, plaintiffs and defendant Marbro sought relief for the escrow overage amounts from each other pursuant to the Mechanics Lien Act in 2007. Plaintiffs' June 2, 2007, demand pursuant to the Mechanics Lien Act specifically referenced the sums that exceeded the original escrow amount. Thus, plaintiffs had knowledge, by at least June 2, 2007, that they may have been damaged by the administration of the escrow account. As discussed above, plaintiffs' amended complaint relates back to the original complaint filed June 1, 2015, which was filed eight years after plaintiffs had knowledge of or reasonably should have known about their claim. Accordingly, plaintiff's claim as alleged in count eight is barred by the five-year statute of limitations (735 ILCS 5/13-205 (West 2016)) and was properly dismissed by

the circuit court with prejudice pursuant to section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2016)). See *BMO Harris Bank, N.A. v. Porter*, 2018 IL App (1st) 171308, ¶ 54 (the reviewing court may affirm on any reason for which there is a factual basis in the record regardless of the circuit court's reasoning).

¶ 29 In sum, we conclude that while both counts seven and eight of the amended complaint relate back to the original complaint, only count seven was timely filed pursuant to section 13-206 of the Code (735 ILCS 5/13-206 (West 2016)).

¶ 30 Based on this conclusion, we next turn to consider plaintiffs' contentions under section 2-615 of the Code (735 ILCS 5/2-615 (West 2016)) as they relate to count seven of the amended complaint. Plaintiffs maintain that the circuit court erred in dismissing count seven because it sufficiently set forth that defendant breached the terms of the promissory note, as it specifically provides that, "Once the total amount of principal has been advanced, Borrower is not entitled to further loan advances."

¶ 31 In response, defendant maintains the circuit court properly dismissed count seven where plaintiffs failed to set forth facts demonstrating defendant breached any provision of a contract between the parties. According to defendant, the promissory note allowed up to $880,000 to be disbursed for plaintiffs' benefit and it is "undisputed" that it did not disburse more than $880,000 "to Plaintiffs or to Marbro for Plaintiffs' benefit."

¶ 32 The elements of a cause of action for breach of a contract, whether oral or written, are: (1) the existence of a valid and enforceable contract; (2) the plaintiff's performance of all contractual conditions; (3) a breach by the defendant; and (4) resulting damages. See *Sheth v. SAB Tool Supply Co.*, 2013 IL App (1st) 110156, ¶ 68; *Unterschuetz v. City of Chicago*, 346 Ill. App. 3d 65, 69 (2004). Irrespective of whether the contract at issue is written or oral, to plead

the existence of a valid contract, the plaintiff must allege facts indicating the terms of the contract. *Razor Capital v. Antaal*, 2012 IL App (2d) 110904, ¶ 30.

¶ 33 We conclude plaintiffs sufficiently alleged a breach of contract claim. The parties here do not dispute that there was a valid, enforceable contract (the promissory note) nor do they dispute plaintiffs' performance of the contract or that there were damages. What is in dispute is whether plaintiffs adequately pleaded that a duty pursuant to the promissory note was breached. Plaintiffs' amended complaint, along with the exhibits attached (specifically the promissory note and the "disbursement request and authorization") sufficiently allege a breach of a duty under the promissory note. Taken together, these documents establish: that defendant provided plaintiffs with a straight line of credit in the amount of $880,000; that plaintiffs were not entitled to loan advances exceeding $880,000; that on May 16, 2005, defendant paid Chicago Title $161,048.19 from plaintiffs' line of credit and that $718,951.81 remained undisbursed; that defendant subsequently disbursed $789,486, which was in excess of what it was allowed. Furthermore, regardless of whether the amount that remained undisbursed was $718,951.81 (as indicated in the "disbursement request and authorization") or $716,679.98 (as indicated in other parts of the record), plaintiffs adequately alleged the amount disbursed by defendant exceeded the amount allowed under the promissory note by approximately $70,000. Accordingly, we conclude plaintiffs set forth a cause of action for breach of contract and that count seven of the amended complaint was dismissed in error.

¶ 34 CONCLUSION

¶ 35 For the reasons stated above, we affirm in part, reverse in part, and remand for further proceedings.

¶ 36 Affirmed in part, reversed in part, and remanded for further proceedings.