2018 IL App (1st) 172048-U

FIFTH DIVISION
June 8, 2018

No. 1-17-2048

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

CASABLANCA LOFTS, LLC, MICHAEL A. WIER, and ROBERTA WIER,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellants,	)	
v.	)	No. 15 L 134
CANMANN & CHAIKEN and DAVID CHAIKEN,	)	Honorable Janet A. Brosnahan,
Defendants-Appellees.	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: Affirming in part and reversing in part the judgment of the circuit court of Cook County where two of the three claims for legal malpractice were timely filed by plaintiffs within the repose period.

¶ 2 Plaintiffs, Casablanca Lofts, LLC (Casablanca Lofts), Michael A. Wier (Michael), and Roberta Wier (Roberta), appeal from a trial court order granting summary judgment in favor of Canmann & Chaiken, and one of its attorneys, David Chaiken (Chaiken) (collectively

defendants). Having found that the legal malpractice complaint filed by plaintiffs was outside the time permitted by the statute of repose, the trial court further denied their motion to reconsider. On appeal, plaintiffs contend the trial court erred by (1) improperly determining the date on which the statute of repose began to run, (2) concluding defendants were not the proximate cause of their injuries as set forth in count I of their complaint, and (3) concluding the motion to reconsider presented by plaintiffs was improper for allegedly raising new legal theories. Having found that two of the three claims for legal malpractice were timely filed by paintiffs, we affirm in part, reverse in part, and remand for further proceedings consistent with this order.

¶ 3 I. BACKGROUND

¶ 4 Plaintiffs' legal malpractice complaint alleged defendants negligently drafted various legal documents related to the development of the Casablanca Lofts condominium building located at the 1700 block of South Michigan Avenue (condominium). Casablanca Lofts was the developer of the mixed-use condominium and Michael was the manager of both Casablanca Lofts and its mixed-use condominium project. Plaintiffs retained defendants and informed them that they wished to (1) preserve their right to construct, within ten years, two additional condominium units on the roof of the condominium, without any restriction by the condominium association or unit owners, (2) assign four parking spaces to Casablanca Lofts, which could be transferred to the prospective owners of the additional rooftop units or retained by Casablanca Lofts in the event plaintiffs did not develop the units, and (3) assign a particular parking space to Michael and Roberta's unit in the condominium. Defendants then drafted a declaration for the condominium (the declaration) pursuant to the Illinois Condominium Property Act (Act) (765 ILCS 605/3, 4 (West 2012)), amendments to the declaration, and the warranty deed for Michael and Roberta's unit (property documents). Defendants advised plaintiffs that their three interests

enumerated above were preserved in the property documents. Defendants recorded the declaration with the Cook County Recorder of Deeds on December 1, 2005.[1] A portion of the recorded declaration purported to reserve plaintiffs' right to construct the two additional rooftop units within ten years and without restriction by the association or unit owners.

¶ 5 On November 29, 2006, defendants recorded the warranty deed for Michael and Roberta's unit in the condominium. Defendants left blank a space in the deed where a parking space number, which runs appurtenant to the unit, should have been entered.

¶ 6 Sometime later, plaintiffs sold the final unit and the power to amend the declaration, and thus control over the condominium transferred to the association.[2] At that time, the rooftop units had yet to be constructed and the four parking spaces plaintiffs intended to assign to Casablanca Lofts for those units remained unassigned.

¶ 7 Thereafter, plaintiffs submitted architectural renderings of their proposed rooftop units to the association. The association responded with a letter challenging plaintiffs' right to construct the rooftop units based on alleged deficiencies in the declaration. The association also attacked plaintiffs' right to assign the four previously unassigned parking spaces to Casablanca Lofts. According to the association, the unassigned parking spaces were common elements of the condominium owned by the association. The association further challenged Michael and Roberta's property interest in a parking space running appurtenant to their unit.

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[1] We acknowledge the declaration was initially recorded on November 29, 2005, and re-recorded on December 1, 2005. The parties referenced the November date in the trial court, and the trial court ultimately found this date governed the statute of repose. However, because both parties assert on appeal that the declaration was recorded on December 1, 2005, we will reference the December date. We should note that our analysis regarding the statute of repose is not affected by which date governs.

[2] We observe that while plaintiffs assert the final unit was sold in 2010, defendants correctly note that this fact does not appear in the record. Defendants, however, do not dispute this fact.

¶ 8 In February 2012, the plaintiffs filed a declaratory judgment action against the association, seeking to exercise their right to construct the rooftop units, assign four parking spaces to Casablanca Lofts, and assign a parking space to Michael and Roberta. The action settled in 2014 without a judgment being entered on any of plaintiffs' claims. Pursuant to the settlement agreement, plaintiffs dismissed their declaratory judgment action seeking to develop the rooftop units, but reserved Michael and Roberta's right to a parking space running appurtenant to their unit, and Casablanca Lofts was permitted to lease the four unassigned parking spaces from the association.

¶ 9 During the pendency of the declaratory judgment action, plaintiffs in 2012 filed a legal malpractice complaint in this case.[3] The three-count complaint alleged defendants negligently drafted and failed to amend the property documents. Count I of the complaint sought damages for plaintiffs' inability to construct the rooftop units. Count II sought damages for Casablanca Lofts' lost property rights to the four parking spaces. Count III sought to recover the legal fees plaintiffs incurred from obtaining the rights to the parking space running appurtenant to Michael and Roberta's unit. Defendants answered, raising as an affirmative defense the statute of repose and arguing plaintiffs' complaint was filed more than six years after the recording of the allegedly defective declaration.

¶ 10 Discovery commenced and Chaiken was deposed. He testified there were multiple methods he could have employed to protect plaintiffs' interest in the parking spaces and the declaration therefore did not have to be drafted in a particular manner to achieve this goal. According to Chaiken, Michael directed him to designate the parking spaces as common elements in the declaration. Prospective unit owners could then choose which parking space

[3] Plaintiffs voluntarily dismissed their first complaint in 2014 and re-filed a substantially similar complaint in 2015.

would be assigned to their unit, and the space would become a limited common element, *i.e.*, limited to the exclusive use of the unit to which it was assigned. Chaiken also testified he could have assigned the four parking spaces for the rooftop units any time prior to the sale of the final unit and that he failed to do so. Chaiken admitted, "there were steps we had anticipated doing that were not done."

¶ 11 Defendants subsequently filed a motion for summary judgment, arguing first that the claims raised by plaintiffs were barred by the statute of repose as they were filed more than six years after the declaration was recorded. Defendants, secondly, asserted that all of plaintiffs' damages arose directly from the language in the declaration. Lastly, Defendants argued, in the alternative, they were entitled to partial summary judgment on count I of the complaint as plaintiffs could not establish defendants proximately caused their inability to develop the rooftop units. According to defendants, the city of Chicago amended the zoning law governing the condominium prior to the sale of the final unit, therefore, rendering plaintiffs' rooftop development conditional on the zoning law changing. Plaintiffs, however, did not seek to change the law until after the sale of the final unit, but at that time the association and a majority of the unit owners opposed the change. Plaintiffs were ultimately unsuccessful in their pursuit and were therefore unable to develop the rooftop units regardless of the language in the declaration. In response, plaintiffs argued the negligent act which triggered the statute of repose was defendants' failure to amend the declaration prior to the sale of the final unit in 2010, when plaintiffs' ability to unilaterally amend the declaration transferred to the association pursuant to the Act.

¶ 12 Following a hearing, the trial court granted summary judgment in favor of defendants, finding that the alleged negligent act which triggered the statute of repose was the recording of the declaration in 2005, and plaintiffs' complaint was therefore untimely. The trial court further

held that defendants were not the proximate cause of plaintiffs' injuries regarding the rooftop units because the zoning law prohibited the development.

¶ 13 Plaintiffs thereafter filed a motion to reconsider, arguing the trial court misapplied the law regarding the statute of repose and proximate cause. The trial court denied the motion on the basis that plaintiffs improperly argued new theories of negligence. This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, plaintiffs argue the trial court erred in granting defendants' motion for summary judgment and denying their motion to reconsider. Specifically, plaintiffs contend the trial court erred by (1) determining the statute of repose began to run when the declaration was recorded, (2) concluding defendants were not the proximate cause of their injuries as set forth in count I of their complaint, and (3) concluding plaintiffs' motion to reconsider was improper for allegedly raising new legal theories. In response, defendants advance the same arguments they asserted before the trial court. We address each of plaintiffs' contentions below.

¶ 16 Summary judgment is appropriate where the pleadings, depositions, admissions on file, and exhibits, when viewed in the light most favorable to the nonmoving party, indicate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012); *Koczor v. Melnyk*, 407 Ill. App. 3d 994, 998 (2011). We review cases involving summary judgment *de novo*. *Id*. Under *de novo* review, we perform the same analysis the trial court would perform. *Jones v. Live Nation Entertainment, Inc.*, 2016 IL App (1st) 152923, ¶ 28.

¶ 17 The purpose of a motion to reconsider is to bring to the trial court's attention newly discovered evidence, changes in the law, or errors in the trial court's previous application of existing law. *Spencer v. Wayne*, 2017 IL App (2d) 160801, ¶ 25. Defendants contend that since

plaintiffs' motion to reconsider relied on new legal theories, the trial court's ruling should be reviewed for an abuse of discretion. See *Muhammad v. Muhammad-Rahmah*, 363 Ill. App. 3d 407, 415 (2006). We observe, however, that regardless of new arguments, when the appellant's ultimate contention is that the trial court misapplied the law, our review is *de novo*. *Bank of America, N.A. v. Ebro Foods, Inc.*, 409 Ill. App. 3d 704, 709 (2011).

¶ 18 In this case, the trial court granted summary judgment in favor of defendants on the basis that plaintiffs' complaint was not timely filed within the period provided by the statute of repose. The statute of repose for legal malpractice claims states, "An action described in subsection (b) [involving legal malpractice] 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(c) (West 2012). Once the statute of repose has expired, the plaintiff no longer has a recognized right of action to redress any harm that has been done. *Trogi v. Diabri & Vicari, P.C.*, 362 Ill. App. 3d 93, 96 (2005). Unlike the statute of limitations, which begins to run after a cause of action has accrued, the statute of repose begins to run as soon as the event creating the malpractice occurs, regardless of whether any injury has yet resulted so as to cause the action to accrue. *Mauer v. Rubin*, 401 Ill. App. 3d 630, 639 (2010). We must therefore determine the date on which the act or omission which created the malpractice occurred in order to determine when the statute of repose began to run. 735 ILCS 5/13-214.3(c) (West 2012); *Mauer*, 401 Ill. App. 3d at 639.

¶ 19 On appeal, plaintiffs argue the repose period commenced when the final unit in the condominium was sold in 2010, because prior to that date defendants could have amended the declaration to preserve plaintiffs' interests and thus no cause of action had accrued. Plaintiffs further contend their motion to reconsider demonstrated the trial court's misapplication of the law and was improperly denied.

¶ 20 In response, defendants argue the trial court correctly determined the statute of repose commenced when they recorded the declaration because their failure to correct or amend the declaration did not trigger a new repose period. As each negligent act alleged by plaintiffs occurred on a different date, we accordingly address each count in turn.

¶ 21 A. Count I: Rooftop Units

¶ 22 Plaintiffs' complaint alleged defendants failed to protect their interest in developing the rooftop units in either the declaration or in subsequent amendments to the declaration prior to 2010. The general rule is that the statute of repose commences once the event giving rise to the malpractice claim occurs. *Terra Foundation for American Art v. DLA Piper LLP*, 2016 IL App (1st) 153285, ¶ 31; *Mauer*, 401 Ill. App. 3d at 639. Thus, a defendant's subsequent failure to correct the past negligence does not trigger a later repose period if the subsequent acts do not exacerbate the injuries caused by the initial malpractice. *Terra Foundation*, 2016 IL App (1st) 153285, ¶ 53; see *Mauer*, 401 Ill. App. 3d at 645. Accordingly, this court has declined to extend the repose period until the completion of the last affirmative act of representation when the negligent act does not occur on the same date. *Terra Foundation*, 2016 IL App (1st) 153285, ¶¶ 36, 42-46. Similarly, in *Mauer* the court held that while an attorney has an ongoing duty to correct any malpractice committed, this duty does not delay the beginning of the repose period. *Mauer*, 401 Ill. App. 3d at 646.

¶ 23 We find *Terra Foundation* to be instructive. In *Terra Foundation*, the defendant law firm represented the plaintiff in connection with a real estate sale wherein the plaintiff retained ownership of the retail portions of the parcel. *Terra Foundation*, 2016 IL App (1st) 153285, ¶¶ 3-4. The plaintiff also received an upfront payment which was to be adjusted and credited at the closing based on the final size of the retail space upon the project's completion. *Id.* ¶¶ 4-5. The

plaintiff and the buyer ultimately executed a purchase agreement. *Id.* ¶ 8. The first amendment to the agreement identified the specific method of calculating the retail space, and the defendant negligently failed to exclude the common space in the building from the calculation. *Id*. ¶ 9. The plaintiff and buyer subsequently executed multiple amendments and other agreements, all of which failed to exclude the common space in calculating the retail space. *Id*. ¶¶ 7, 10-12. The plaintiff and buyer disputed the amount of retail space subject to the credit and arbitrated the matter multiple times before the closing. *Id*. ¶¶ 16, 19. Based on the arbitrator's calculation of the retail space using the defendant's deficient language in the amendments and agreements, the plaintiff was required to credit the buyer at the closing and post a line of credit following the arbitration. *Id*. The plaintiff later filed a claim for legal malpractice against the law firm which represented it in the sale based on the firm's negligent failure to exclude common space in the calculation of the retail space. *Id*. ¶ 20-21. The trial court dismissed the complaint as untimely under the statute of repose, finding the complaint was filed more than six years after the execution of the negligently drafted first amendment to the purchase agreement. *Id*. ¶ 24.

¶ 24 On appeal, the plaintiff argued the defendant's negligence continued with the execution of each deficient amendment and agreement, and the statute of repose commenced on the closing of the sale. *Id*. ¶ 30. This court disagreed and affirmed the trial court's dismissal, holding the negligent act giving rise to the plaintiff's injuries regarding the retail space credit was the execution of the first amendment, which selected the method for measuring the retail space and failed to exclude the common space. *Id*. ¶ 33. The court also noted that the plaintiff's injuries flowed directly from the first amendment. *Id*. The court rejected the plaintiff's argument that the defendant's subsequent failures to correct the issue, or the completion of the last affirmative act of representation (*i.e.*, the closing), triggered a later repose period. *Id*. ¶¶ 36, 52-3. The court

reasoned that the failure to include the exclusionary language in the subsequent agreements did not exacerbate the injuries which were caused by the first amendment and therefore did not toll the repose period. *Id*. ¶ 53.

¶ 25 Pursuant to the rationale discussed above in *Terra Foundation*, we find that the statute of repose regarding count I of plaintiffs' complaint commenced when defendants recorded the declaration on December 1, 2005, because the declaration allegedly failed to preserve plaintiffs' right to construct the rooftop units. See *id*. ¶¶ 31, 53. Similar to the negligent act in *Terra Foundation*, the recording of the declaration in this case was the event from which plaintiffs' injuries flowed and which gave rise to plaintiffs' malpractice claim. See *id*. ¶¶ 31, 33. Furthermore, similar to the subsequent actions of the defendant in *Terra Foundation*, defendants' failure to amend the declaration in this case did not exacerbate the injuries caused by the deficient language in the original declaration. See *id*. ¶ 53; *Mauer*, 401 Ill. App. 3d at 645-46. Additionally, while defendants had opportunities to cure the alleged negligence by amending the declaration, this court has declined to extend the beginning of the repose period based on a defendant's failure to correct a past mistake. See *id*. ¶¶ 52-3; *Mauer*, 401 Ill. App. 3d at 646.

¶ 26 Plaintiffs seek to distinguish *Terra Foundation* from the present case because in *Terra Foundation*, the plaintiff's injuries were sustained immediately following the negligent act, and in the present case plaintiffs' injuries were not sustained until 2010, five years after the declaration was recorded. *Terra Foundation*, 2016 IL App (1st) 153285, ¶ 33. Plaintiffs cite *Lucey v. Law Offices of Pretzel and Stouffer, Chartered*, 301 Ill. App. 3d 349, 353 (1998), for the similar proposition that had they filed their lawsuit prior to 2010 it would have been dismissed as premature for lack of damages. Plaintiffs, however, confuse the statute of limitations, which begins to run after a cause of action accrues, with the statute of repose. See *Mauer*, 401 Ill. App.

3d at 639. As we explained above, the statute of repose begins to run as soon as an event creating the malpractice occurs, regardless of whether any injury has yet resulted so as to cause an action to accrue. See *id*. The court in *Lucey* observed that the statute of repose, therefore, may cut off many legal malpractice claims before they accrue. *Lucey*, 301 Ill. App. 3d at 361. The accrual date of plaintiffs' injuries or claims thus has no relevance to our analysis of the statute of repose. 735 ILCS 5/13-214.3(c) (West 2012); see *Mauer*, 401 Ill. App. 3d at 639.

¶ 27 Since the declaration was recorded on December 1, 2005, plaintiffs had until December 1, 2011, to file their action relating to the rooftop units. See 735 ILCS 5/13-214.3(c) (West 2012); *Terra Foundation*, 2016 IL App (1st) 153285, ¶¶ 31, 52-3; *Mauer*, 401 Ill. App. 3d at 639, 645-46. Because plaintiffs' complaint was filed in 2012, count I is barred by the statute of repose. See 735 ILCS 5/13-214.3(c) (West 2012). As plaintiffs' claim regarding the rooftop units is barred by the statute of repose, we need not address the issue of proximate cause. We affirm the trial court's orders granting summary judgment in favor of defendants and denying plaintiffs' motion to reconsider as to count I of plaintiffs' complaint.

¶ 28 B. Count II: The Four Rooftop Unit Parking Spaces

¶ 29 Unlike plaintiffs' first claim, which arose from the defective declaration, plaintiffs' claim regarding the four parking spaces arose from defendants' failure to ever draft and record a document which would assign the parking spaces to Casablanca Lofts.

¶ 30 We find plaintiffs' claim to be identical to the plaintiffs' claim in *Koczor*, wherein the defendant failed to record a document to protect the plaintiffs' rights within the time permitted by statute. *Koczor*, 407 Ill. App. 3d at 999. In *Koczor*, the plaintiffs retained the defendant to represent them in the purchase of two parcels of land. *Koczor*, 407 Ill. App. 3d at 995. The plaintiffs discovered ten years after their purchase that the defendant had failed to record the

deed for one of the parcels. *Id*. When the plaintiffs filed a legal malpractice lawsuit against the defendant, this court held that the statute of repose commenced on the last day the applicable statutes permitted the defendant to record the deed. *Id*. at 999.

¶ 31 Here, defendants intended to record a document assigning four parking spaces to Casablanca Lofts, and, according to defendants, they could have done so any time before an unspecified date in 2010. As in *Koczor*, the statute of repose for plaintiffs' claim commenced on the last day defendants could have recorded such a document. See *id*. Because plaintiffs' complaint was filed in 2012, the claim was well within the repose period. See 735 ILCS 5/13-214.3(c) (West 2012).

¶ 32 According to defendants, the alleged negligent act was their failure to include language in the original declaration which would have protected Casablanca Lofts' interest in any remaining unassigned parking spaces after plaintiffs could no longer amend the declaration. Chaiken's own testimony, however, defeats this argument. Chaiken identified multiple methods he could have employed to protect Casablanca Lofts' interest in the four parking spaces, and he stated the declaration did not have to be drafted in a particular manner in order to do so. In fact, rather than assign each of the parking spaces to a random unit in the original declaration, Michael directed Chaiken to designate the spaces as common elements which could be assigned to each unit as a limited common element when each unit was sold. By Chaiken's own admission, the parties anticipated that plaintiffs would complete construction of the rooftop units and defendants would assign four parking spaces to those units or to Casablanca Lofts prior to the sale of the final unit. According to this method of assignment, there would not be any remaining unassigned parking spaces for defendants to address in the declaration. When the rooftop units were not constructed and the four parking spaces remained unassigned common elements, Chaiken admitted "there

were steps we had anticipated doing that were not done." The language defendants allege should have been included in the declaration would not have been necessary but for defendants' subsequent failure to assign the parking spaces. We are therefore not persuaded that the alleged negligent act was defendants' failure to include in the declaration one of the multiple methods to protect Casablanca Lofts' interests that the parties never intended to utilize. Rather, as we discussed above, the alleged negligent act was defendants' failure to record the necessary document within the time permitted by law. See *Koczor*, 407 Ill. App. 3d at 999.

¶ 33 Accordingly, we reverse the trial court's orders granting defendants' motion for summary judgment and denying plaintiffs' motion to reconsider as to count II of plaintiffs' complaint.

¶ 34 C. Count III: Michael and Roberta's Parking Space

¶ 35 The parties maintain similar arguments regarding the commencement of the statute of repose for count III of plaintiffs' complaint. Defendants contend the statute of repose commenced in 2005 when they recorded the declaration which failed to preserve Michael and Roberta's right to the parking space. Plaintiffs argue the statute commenced in 2010 when defendants could no longer amend the declaration to protect Michael and Roberta's interest.

¶ 36 Plaintiffs' complaint states defendants prepared and recorded Michael and Roberta's warranty deed and that the deed "includes a blank spot where a parking space number which runs appurtenant to [their unit] should have been entered." The association later challenged the assignment of a parking space for Michael and Roberta's exclusive use. Defendants' alleged negligent drafting and recording of the warranty deed, rather than the declaration, was clearly the event giving rise to plaintiffs' malpractice claim. See *Terra Foundation*, 2016 IL App (1st) 153285, ¶ 31. Accordingly, the alleged negligent act with regard to the parking space was defendants' recording of the defective warranty deed, and the statute of repose commenced the

day it was recorded on November 29, 2006. 735 ILCS 5/13-214.3(c) (West 2012); see *Terra Foundation*, 2016 IL App (1st) 153285, ¶ 31. Because plaintiffs' complaint was filed on May 10, 2012, it was timely filed with regard to this claim. 735 ILCS 5/13-214.3(c) (West 2012).

¶ 37 We therefore reverse the trial court's orders granting defendants' motion for summary judgment and denying plaintiffs' motion to reconsider as to count III of plaintiffs' complaint.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm in part and reverse in part the judgment of the circuit court of Cook County, and remand for further proceedings consistent with this order.

¶ 40 Affirmed in part, reversed in part, and remanded.