2018 IL App (1st) 172880-U

FIRST DIVISION
December 24, 2018

No. 1-17-2880

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BOARD OF MANAGERS OF RAVINIA LOFTS CONDOMINIUM ASSOCIATION, Plaintiff-Appellant, v. THE RELIABLE BUILDING LLC; INLAND GREAT LAKES, LLC; NICHOLAS J. HELMER; THE STRUCTURAL SHOP, LTD.; HARTSTHORNE PLUNKARD, LTD.; M. B. B. ENTERPRISES OF CHICAGO, INC.; IGL GENERAL CONTRACTORS, LLC; IGL BROKERAGE CORP.; IGL REAL ESTATE BROKERS, LP; and THE RAVINIA LOFTS, LLC, Defendants, (The Structural Shop, Ltd., Defendant-Appellee).	)	Appeal from the Circuit Court of Cook County. No. 2008 L 11590 Honorable Brigid M. McGrath, Judge Presiding.

PRESIDING JUSTICE MIKVA delivered the judgment of the court.
Justices Griffin and Walker concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court's dismissal of plaintiff's breach of contract claim as time-barred is affirmed. Plaintiff's claim does not relate back to an earlier claim brought against defendant for breach of a different contract by a different party.

¶ 2 I. BACKGOUND

¶ 3 In 1999, a construction project to convert a 1920s building into condominiums began at the building now known as Ravinia Lofts, located at 2024 S. Wabash Avenue in Chicago. The many parties involved in the project included the developer and seller of the building, Reliable Building LLC (Reliable); the contractor, Inland Great Lakes, LLC (Inland Great Lakes); the architect, Hartshorne Plunkard, Ltd.; the project developer and general contractor, The Ravinia Lofts, LLC (Ravinia Lofts); the Board of Managers of Ravinia Lofts Condominium Association (Association); and the engineering firm, The Structural Shop, Ltd. (Structural Shop). The Association is the plaintiff in this case and Structural Shop is the defendant.

¶ 4 On June 24, 1999, Ravinia Lofts and Structural Shop entered into a contract (1999 Agreement), wherein Structural Shop agreed to the following:

> "Based on the latest drawings *** [and] our understanding of the scope of work required, we wish to make the following service proposal for the project known as RAVINIA LOFTS, 2024 S Wabash, Chicago, Illinois, consisting of an existing seven story building and a new one story building.
>
> We propose to furnish basic structural engineering services for the successful completion of this project *** . Those services to include consultation, design, drafting (CAD diskettes provided to us), specifications on our drawings, shop drawing review, and up to eight (8) site, office or Building Department visits."

The agreement was signed by Frank Gusinde, Jr., the president of Structural Shop, and Michelle Testoni, an authorized agent of Ravinia Lofts. Ms. Testoni's signature noted that her acceptance of the contract was "[f]or: The Ravinia Lofts LLC."

¶ 5 Some months later, in November 1999, Ravinia Lofts, Reliable, and other parties learned of structural defects in the façade of the building. The Association alleged that, over the ensuing years, additional building inspections were conducted and it was ultimately determined that the building's façade was deteriorating and required repairs and renovations. In 2002, Structural Shop sent three service proposals to Ms. Testoni at Reliable, offering to provide various inspection and repair services (2002 Proposals). In the first, dated July 8, 2002, Structural Shop proposed the following:

> "Based on our understanding of the scope of work required, we wish to make the following service proposal for the critical examination at 2024 S. Wabash in Indiana [*sic*].
>
> We propose to furnish structural engineering services for the critical inspection for the lump sum fee of six thousand five hundred dollars ($6,500). These services include inspection, photographs, a report & drawings and a maximum of six (6) site visits. Swing Stage, Rigging, Harness & Safety line shall be provided by others.
>
> Additional services can be performed at our normal rates."

In the second proposal, dated that same day, Structural Shop offered to provide the same services, but with a maximum of eight site visits, for a fee of $18,500. And in the third and final proposal, dated October 21, 2002, Structural Shop offered its services for the "ongoing inspection and repair program examination at 2024 S. Wabash," including "inspection, photographs, a report and a maximum of one (1) site visit," for a fee of $750. The 2002 Proposals were all signed by a representative of Structural Shop but were never executed by a second party.

¶ 6 In November 2003, however, Structural Shop and Ravinia Lofts both entered into an agreement, wherein Structural Shop agreed to provide "engineering services for the critical inspection" of the building, including "inspection, photographs, a report & drawings and a maximum of four (4) site visit(s)."

¶ 7 Several years later, on October 17, 2008, the Association sued Reliable, Inland Great Lakes, and Mr. Helmer, an Inland Great Lakes employee, for negligence, breach of contract, and breach of the implied warranties of habitability and good workmanship. On May 13, 2010, the Association also added claims against Ravinia Lofts.

¶ 8 On August 27, 2010, the developers—Ravinia Lofts, Reliable, and Inland Great Lakes—jointly filed a counterclaim and third-party complaint, in which they brought their own claims against Structural Shop for contribution under the Joint Tortfeasor Contribution Act (740 ILCS 100/0.01 *et seq.* (West 2010)). Reliable additionally brought a claim against Structural Shop for breaching "a series of agreements" with Reliable, entered into beginning in July 2002, in which Structural Shop agreed "to perform structural engineering services including the design and inspection of certain elements required for the Project and consultation on the façade of the Project for compliance with all applicable codes." The claim, titled "Count IV – Breach of Contract, Reliable v. The Structural Shop, Ltd.," requested a judgment for Reliable and alleged that Reliable had incurred and become liable for costs and expenses as a direct and proximate result of Structural Shop's breach of contract. Confusingly, the claim also alleged that Structural Shop had "breached its agreements *with Ravinia*" (emphasis added) by "[f]ailing to properly design certain elements of the Project" and "[f]ailing to adequately inspect the façade of the Project and specify or recommend appropriate work for compliance with all applicable codes." No contract (or series of contracts) supporting this claim was attached to the pleading.

¶ 9 Structural Shop moved to dismiss Reliable's breach of contract claim, arguing that it had never contracted with Reliable. Instead, it had contracted with Ravinia Lofts in June 1999 to provide basic structural engineering services and again in November 2003 to perform a critical inspection. Structural Shop attached to its motion copies of both agreements.

¶ 10 In support of Reliable's breach of contract claim, the developers attached to their response brief unexecuted copies of the 2002 Proposals, which Structural Shop had sent to Michelle Testoni at "Reliable Building L.L.C." The developers also stated, on the basis of the 1999 Agreement, "it is evident that Ravinia [Lofts] is also able to plead sufficient facts to allege a counterclaim against Structural Shop for breach of contract. *** Thus, Counterplaintiffs request leave to amend their Amended Counterclaim so that Ravinia may also allege a count for breach of contract against Structural Shop." In a footnote the developers also said, "Counterplaintiffs Reliable and Ravinia will *both* assert causes of action for breach of contract against Structural Shop in the amended pleading." (Emphasis added.) However, Ravinia Lofts never did file a claim for breach of contract against Structural Shop.

¶ 11 In August 2015, the Association purportedly settled its claims with the developers. As a part of that settlement, Ravinia Lofts assigned any claims it might have had against Structural Shop regarding the Ravinia Lofts condominium building to the Association.

¶ 12 On April 1, 2016, the Association filed what was by then its fourth amended complaint, which included a claim—brought by the Association as the assignee of Ravinia Lofts—that Structural Shop breached the 1999 Agreement by failing to adequately inspect the building's façade to determine a reasonable and necessary remedy for the defects and by failing to redesign the parapet walls of the building.

¶ 13 On February 14, 2017, Structural Shop moved to dismiss this claim as time-barred, pursuant to the four-year statute of limitations applicable to construction claims (735 ILCS 5/13-214(a) (West 2016)). Structural Shop contended that the assignor Ravinia Lofts "knew or should have known of any wrongful act or omission" by Structural Shop regarding the 1999 Agreement when the Association served its complaint against Ravinia Lofts in 2009. Thus, Structural Shop argued that the Association's 2016 assigned claim was filed several years after the statute of limitations for that claim had expired.

¶ 14 The circuit court heard oral arguments on the motion on August 29, 2017, requested supplemental briefing on whether the 2016 assigned claim related back to the 2010 breach of contract claim, and held further oral argument on that issue.

¶ 15 On October 18, 2017, the circuit court dismissed the Association's 2016 assigned claim as time-barred. It rejected the Association's argument that the claim that Structural Shop breached the 1999 Agreement entered into with Ravinia Lofts related back to Reliable's 2010 claim alleging Structural Shop had breached of a "series of agreements" beginning in July 2002. The court explained that the 2016 claim did not "grow out of the same transaction or occurrence" as the 2010 claim because it was "brought by an entirely different entity" because it "allege[d] a breach of an entirely different contract[.]" This appeal followed.

¶ 16 II. JURISDICTION

¶ 17 The circuit court dismissed the Association's fourth amended complaint with prejudice on October 18, 2017, and the Association timely filed its notice of appeal on November 6, 2017. We have jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered by the circuit court in civil cases. Ill. S. Ct. Rs. 301 (eff. Feb. 1, 1994), 303 (eff. July 1, 2017).

¶ 18 III. ANALYSIS

¶ 19 The Association argues on appeal that the circuit court erred in dismissing its fourth amended complaint as untimely, pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2016)), because the breach of contract claim assigned to it by Ravinia Lofts relates back to Reliable's 2010 breach of contract claim against Structural Shop. Dismissal is proper under section 2-619 Code when a defendant's motion " 'raises defects, defenses, or other affirmative matters that appear on the complaint's face or that are established by external submissions acting to defeat the complaint's allegations.' " *Village of Willow Springs v. Village of Lemont*, 2016 IL App (1st) 152670, ¶ 23. (Internal quotation marks omitted.) Pursuant to subsection 5 of that section, dismissal is proper if a claim is time-barred. 735 ILCS 5/2-619(5) (West 2016). In deciding whether to grant such a motion, the trial court "must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party." *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008). We review a trial court's dismissal pursuant to section 2-619 dismissal *de novo*. *Id.*

¶ 20 A contract claim brought against a party "for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property shall be commenced within 4 years from the time the person bringing an action *** knew or should reasonably have known of such act or omission." 735 ILCS 5/13-214(a) (West 2016). However, the "relation back" doctrine states that a claim asserted in an amended pleading is *not* time-barred if (1) the time prescribed had not expired when the original pleading was filed and (2) it appears from the original and amended pleadings that the new claim "grew out of the same transaction or occurrence set up in the original pleading." 735 ILCS 5/2-616(b) (West 2016).

¶ 21 Here, the parties dispute neither that Reliable's 2010 breach of contract claim against Structural Shop was timely filed within the prescribed four-year limitations period, nor that the 2016 claim the Association brought as the assignee of Ravinia Lofts—if it does not relate back—was filed outside of that period. The sole issue on appeal is therefore whether the two claims grew out of the same transaction or occurrence.

¶ 22 The relation back doctrine is meant to preserve a cause of action that may otherwise be lost only due to a technical pleading rule. *Boatmen's National Bank of Belleville v. Direct Lines, Inc.*, 167 Ill. 2d 88, 102 (1995). The justification for this doctrine is that a defendant will not be prejudiced by a new claim that arises later in an amended pleading if his attention was timely directed to the facts that form the later claim asserted against him. *Simmons v. Hendricks*, 32 Ill. 2d 489, 495 (1965). The original complaint must provide the defendant with the information necessary for defending himself against the claim arising in the amended complaint. *Boatmen*, 167 Ill. 2d at 102.

¶ 23 To determine whether this requirement is satisfied, courts employ the "sufficiently-close-relationship test," under which a new claim will be found "to have arisen out of the same transaction or occurrence and will relate back" if the alleged events "were close in time and subject matter and led to the same injury." *Porter*, 227 Ill. 2d at 360.

¶ 24 The Association contends that its 2016 assigned claim for breach of the 1999 Agreement relates back to Reliable's timely filed 2010 claim for breach of the 2002 Proposals because both claims arose out of the same transaction—the provision, by Structural Shop, of "structural engineering services" in connection with the Ravinia Lofts condominium building. The Association argues that Structural Shop's attention was obviously "directed to" the 1999 contract in 2010 because it attached it to its motion to dismiss. The Association also insists that Structural

Shop is not prejudiced because the new claim amounts to no more than a substitution of parties.

¶ 25 In response, Structural Shop argues that the 2016 claim does not relate back to the 2010 claim because the facts alleged in the two claims "are separated by a significant lapse of time, are different in character and were alleged to support different alleged injuries." Structural Shop also asserts that it would be prejudiced if it had to defend itself against the 2016 claim and refutes the Association's argument that there is a factual dispute over which party entered into the 1999 Agreement with Structural Shop.

¶ 26 We agree with Structural Shop. Because the 2016 assigned breach of contract claim was brought on behalf of a different party and concerned a different purported agreement or "series of agreements" than the 2010 claim, the new claim does not relate back to the earlier one.

¶ 27 The situation is similar to the one we considered in *Onsite Engineering & Management, Inc. v. Illinois Tool Works, Inc.*, 319 Ill. App. 3d 362 (2001). There, the plaintiff staffing firm allegedly entered into two separate agreements: a services agreement with a technology company, in which the plaintiff agreed to provide an undetermined amount of labor as needed, and a separate oral agreement with the same technology company, in which the plaintiff agreed to provide labor for a specific project. *Id.* at 364. In its first complaint, the plaintiff alleged that the technology company owed unpaid compensation for the labor it had provided generally. *Id.* The plaintiff later moved to amend the complaint to also encompass the labor staffing services it provided the technology company for a specific project. *Id.* at 368. The court denied the motion, however, concluding that the two complaints were not based on the same transaction because they concerned different contracts. *Id.* at 369.

¶ 28 Here, a claim brought by Reliable for breach of the 2002 Proposals in no way encompasses a claim brought by Ravinia Lofts for breach of the 1999 Agreement. Not only do

the claims reference different purported contracts, but those contracts are between different parties. Reliable and Ravinia Lofts acknowledged as much when, in their joint brief opposing Structural Shop's motion to dismiss Reliable's 2010 claim, they stated that Ravinia Lofts was "*also* able to plead sufficient facts to allege a counterclaim against Structural Shop for breach of contract" and would do so by filing a separate breach of contract claim against Structural Shop (emphasis added). Ravinia Lofts never followed through on that promise. But it correctly acknowledged that it would need to do so in order to assert a timely breach of contract claim against Structural Shop.

¶ 29 The Association's reliance on *Boatmen's* and *Simmons* does not persuade us otherwise. The courts in those cases found that an amended complaint substituting the plaintiff for a previously named individual related back to the original complaint because both the initial and the amended pleading asserted identical claims; a wrongful death claim for the death of the same decedent in *Boatmen's*, 167 Ill. 2d at 104-05, and Dram Shop claims based on loss of support from the same decedent in *Simmons*, 32 Ill. 2d at 491. Here, however, more than a mere substitution of parties is at issue. Although the 1999 Agreement and 2002 Proposals each generally refer to Structural Shop as a provider of "structural engineering services," the actual services to be provided by Structural Shop under each were distinct; the 1999 Agreement encompassed consulting and design services for the initial condo conversion, while the 2002 Proposals were for performance of a "critical inspection" three years later.

¶ 30 Nor are we persuaded by the Association's attempts to distinguish *Onsite*, on the basis that that case involved two independently valid contracts, whereas this case involves an executed agreement and a series of unsigned proposals. The Association's theory appears to be that because Structural Shop knew it could not be sued under the 2002 Proposals, it should have

concluded that Reliable's reference to the proposals in the 2010 claim was really a reference to the 1999 Agreement. This is nonsense. A party served with a poorly drafted breach of contract claim based on a series of unexecuted documents may certainly expect to prevail on that claim as it is stated. That party may know there is another, executed contract, that it could be sued for breaching. But until someone *actually* sues the party for breaching the executed contract, the statute of limitations continues to run. Nor should Structural Shop have concluded that the 2010 claim was based on the 1999 Agreement simply because, as the Association asserts, that was "the only contract [Structural Shop] ever entered into relating to the Condominium." The record reflects that Structural Shop entered into a separate agreement with Ravinia Lofts in August 2003 to perform "critical inspection" services.

¶ 31 The Association characterizes Structural Shop's assertion that "[f]or years now, [it] has operated under the reasonable assumption that it was never going to be sued for breach of the 1999 Contract" as "poppycock." We disagree. A party to litigation is informed by, and entitled to rely upon, the specific claims articulated against it in the pleadings. The fact that Structural Shop knew in 2010 that it had potential *exposure* under the 1999 Agreement is not at all the same as knowing that it had actually been sued for breach of that agreement. And once the four-year statutory limitations period had expired and Ravinia Lofts had not—although it had threatened to do so—brought a claim against Structural Shop for breach of the 1999 Agreement, Structural Shop was indeed entitled to conclude that no such claim would be brought.

¶ 32 The Association's additional arguments are all attempts to get around the fact that the claims at issue involve different parties and different purported contracts. It seizes, for example, on a single reference in the 2010 claim that Structural Shop "breached its agreement *with Ravinia*." (Emphasis added.) Whether this reference was a typographical error or intentional, it is

clear—from the heading setting out the claim ("Reliable v. The Structural Shop, Ltd.") to the request that a judgment against Structural Shop be entered in *Reliable*'s favor—that the 2010 claim was brought by Reliable and not by Ravinia Lofts.

¶ 33 We likewise reject the Association's unsupported speculation that "[p]erhaps Ms. Testoni intended to sign the [1999] proposal on behalf of Reliable, the owner of the building, instead of Ravinia Lofts." Whatever Ms. Testoni's affiliation with other entities involved in this case may have been, she made sure to indicate that her acceptance of the 1999 Agreement was "[f]or: The Ravinia Lofts LLC." That Structural Shop's invoices were sent to Inland Great Lakes, or that the reports it later prepared indicate it knew the owner of the building was Reliable, not Ravinia Lofts, are examples of parol evidence considered only where a contract is ambiguous on its face. *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 349 (2000) ("where the terms [of a contract] are clear and unambiguous, parol evidence may not be considered"). The 1999 Agreement unambiguously states it was entered into between Structural Shop and Ravinia Lofts.

¶ 34 Finally, the Association's suggestion, made for the first time in its reply brief, that "the worst that should happen may be to make this an oral contract rather than a written contract," is akin to it saying that Structural Shop should be held liable to the Association under some contract, any contract, regardless of what has previously been alleged. That is not how the rules governing pleadings and statutory limitations periods work. A claim, to be actionable, must be articulated and filed within the applicable limitations period. It does not hover indefinitely around the litigation, waiting to take on some new form.

¶ 35 The trial court correctly dismissed the Association's 2016 assigned breach of contract claim as time-barred. That claim was filed more than four years after the assignor, Ravinia Lofts, knew or should reasonably have known of the cause of action, and it does not relate back to an

earlier claim brought by a different party for the breach of other purported agreements.

¶ 36 IV. CONCLUSION

¶ 37 For the foregoing reasons, the judgment of the trial court is affirmed.

¶ 38 Affirmed.