No. 2—10—0591
Order filed May 18, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

LAURA WALL,	)	Appeal from the Circuit Court
	)	of Kendall County.
Plaintiff,	)	
	)	
v.	)	No. 08—L—5
	)	
AMY EKSTRAND,	)	
	)	
Defendant and Third-Party Plaintiff-Appellant	)	
	)	
	)	Honorable
(Roger Wall, Third-Party Defendant-Appellee).	)	Timothy J. McCann,
	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

Held: The trial court properly dismissed defendant's third-party complaint as untimely; when plaintiff refiled her action against defendant pursuant to section 13—217 of the Code of Civil Procedure, she could not have timely sued third-party defendant; thus, pursuant to section 13—204, defendant's suit against third-party defendant was untimely. We affirmed the judgment of the trial court.

On May 15, 2007, plaintiff, Laura Wall, filed a complaint in the circuit court of Cook County against defendant, Amy Ekstrand, for damages sustained as a result of an April 6, 2005, motor vehicle accident. Ekstrand moved to transfer venue. On December 12, 2007, Laura moved to voluntarily

dismiss the case. The trial court granted Laura's motion, without prejudice, and gave her one year to refile the action outside of Cook County. On January 23, 2008, Laura refiled her complaint against Ekstrand in the circuit court of Kendall County. Thereafter, on September 14, 2009, Ekstrand filed a third-party complaint for contribution against third-party defendant, Roger Wall. On October 26, 2009, Roger moved to dismiss the third-party complaint under section 2—615 of the Code of Civil Procedure (the Code) (735 ILCS 5/2—615 (West 2008)), arguing that the complaint was untimely under sections 13—204(b) and (c) of the Code (735 ILCS 5/13—204(b), (c) (West 2008)). The trial court granted the motion. Following the denial of her motion for reconsideration, Ekstrand timely appealed.

We hold that the trial court properly dismissed the third-party complaint as untimely under section 13—204(c) (735 ILCS 5/13—204(c) (West 2008), because when Ekstrand sued Roger, the time had expired for Laura to Roger. Thus, we affirm.

The sole issue on appeal is whether the trial court properly dismissed the third-party complaint for contribution as time-barred. We note at the outset that Roger's motion to dismiss, which he brought under section 2—615 of the Code, should have been brought under section 2—619(a)(5) of the Code, which authorizes a court to dismiss a complaint if the complaint was "not commenced within the time limited by law." 735 ILCS 5/2—619(a)(5) (West 2008). Nevertheless, "[d]esignating a motion under a different paragraph of the Code is not fatal." *Cosman v. Ford Motor Co.*, 285 Ill. App. 3d 250, 254 (1996). Because Ekstrand has not been prejudiced by this error, we will treat the motion as if it had been filed under section 2—619(a)(5) of the Code. *Id.* We review *de novo* dismissals under section 2—619(a)(5). *Alvarez v. Pappas*, 229 Ill. 2d 217, 220 (2008).

Turning to the merits, Ekstrand contends that the trial court erred when it dismissed her complaint, because her cause of action for contribution did not " 'accrue[]' " until Laura refiled her complaint in 2008. Thus, according to Ekstrand, she filed her complaint for contribution within the time provided by section 13—204 of the Code. We disagree.

Section 13—204 of the Code (735 ILCS 5/13—204 (West 2008)) provides in pertinent part as follows:

"Contribution and indemnity.

(a) In instances where no underlying action seeking recovery for injury to or death of a person or injury or damage to property has been filed by a claimant, no action for contribution or indemnity may be commenced with respect to any payment made to that claimant more than 2 years after the party seeking contribution or indemnity has made the payment in discharge of his or her liability to the claimant.

(b) In instances where an underlying action has been filed by a claimant, no action for contribution or indemnity may be commenced more than 2 years after the party seeking contribution or indemnity has been served with process in the underlying action or more than 2 years from the time the party, or his or her privy, knew or should reasonably have known of an act or omission giving rise to the action for contribution or indemnity, whichever period expires later.

(c) The applicable limitations period contained in subsection (a) or (b) shall apply to all actions for contribution or indemnity and shall preempt, as to contribution and indemnity actions only, all other statutes of limitation or repose, *but only to the extent that the claimant in an underlying action could have timely sued the party from whom contribution or*

indemnity is sought at the time such claimant filed the underlying action[.]" (Emphasis added.) 735 ILCS 5/13—204 (West 2008).

Here, Laura initially filed the underlying action on May 15, 2007. Subsequently, on December 12, 2007, Laura moved to voluntarily dismiss the original complaint (see 735 ILCS 5/2—1009(a) (West 2008)), and the trial court granted the motion without prejudice to Laura's refiling of the complaint within one year. See 735 ILCS 5/13—217 (West 2008) (granting a plaintiff who voluntarily dismisses her complaint the right to refile within "one year or within the remaining period of limitation, whichever is greater"); *Case v. Galesburg Cottage Hospital*, 227 Ill. 2d 207, 215 (2007). Under section 13—217 of the Code, Laura had until December 12, 2008, to refile her complaint. Laura complied with section 13—217 when she refiled her complaint on January 23, 2008.

Under the language of section 13—204(b) of the Code, it would appear that Ekstrand had two years (until January 23, 2010) to file her contribution action against Roger. However, section 13—204(c) makes clear that the provisions of subsection (b) shall apply "only to the extent that the claimant in an underlying action could have timely sued the party from whom contribution or indemnity is sought at the time such claimant filed the underlying action[.]" 735 ILCS 5/13—204(c) (West 2008). Here, Laura ("the claimant in the underlying action") could not have timely sued Roger ("the party from whom contribution or indemnity is sought") when she refiled the underlying action, because at that time (January 23, 2008) the statute of limitations on any negligence action that Laura had against Roger had expired. See 735 ILCS 5/13—202 (West 2008) ("Actions for damages for an injury to the person *** shall be commenced within 2 years next after the cause of action accrued"). Laura's cause of action accrued on April 6, 2005, the date of the car accident, and thus

she had until April 6, 2007, to file her negligence action. Laura's right to refile her complaint against Ekstrand outside of the two-year statute of limitations arose pursuant to section 13—217 of the Code, but she had no similar right as to Roger. Because Laura could not have filed a complaint against Roger when she refiled her complaint against Ekstrand, subsection (b) does not apply, and the trial court properly dismissed the third-party complaint as untimely.

Parenthetically, we note that Laura's original complaint was *untimely* filed on May 15, 2007; however, Ekstrand did not challenge the complaint on that basis prior to the court's granting of Laura's motion for a voluntary dismissal. Had Ekstrand done so, it is highly unlikely we would be dealing with the issue of whether a third-party complaint was even necessary let alone appropriate.

Our conclusion is supported by *Board of Managers of Wespark Condominium Ass'n v. Neumann Homes, Inc.*, 388 Ill. App. 3d 129 (2009). There, when condominium owners (Wespark) learned in June 1999 that there were several defects in a condominium complex being built by Neumann, Wespark and Neumann entered into a " 'Standstill Agreement,' " under which Wespark agreed to refrain from suing Neumann for one year, and Neumann agreed to the tolling of the statute of limitations for one year. *Id.* at 130. TBS, a subcontractor, was not a party to the Standstill Agreement. On June 1, 2004, Wespark sued Neumann for breach of contract based on the defects discovered in June 1999. In turn, Neumann filed a third-party complaint against TBS, who, in turn, moved to dismiss the third-party complaint as untimely. The trial court found the complaint timely, but granted TBS's motion to certify the question for immediate appeal. On appeal, the court reversed. The reviewing court found that, even though the third-party complaint was filed less than two years after Wespark sued Neumann (and thereby came within the two-year period established in section 13—204(b)), the third-party complaint did not meet the additional limitation of section

13—204(c), that the claimant in the underlying action must have been able to timely sue the party from whom contribution was sought at the time the claimant filed the underlying action. The reviewing court stated:

> "Wespark, the claimant in the underlying action here, filed the underlying action against Neumann in June 2004. As of that time, the four-year period for a direct action against TBS had expired [(see 735 ILCS 5/13—214(a) (West 1998))]. Wespark had no standstill agreement with TBS, and section 13—217 gave Wespark no rights because Wespark had not filed any action against TBS. If Wespark had sued TBS directly in June 2004, the limitations provision in section 13—214 would have required the court to dismiss the suit as untimely. That is, Wespark could not have timely sued TBS, the party from whom Neumann sought contribution or indemnity, at the time Wespark filed the underlying action." *Id.* at 132.

So too is the case here. Section 13—217 of the Code gave Laura no right to sue Roger after the two-year statute of limitations had expired, because Roger was not a party to Laura's original action. Had Laura attempted to do so, the court would have been required to dismiss the suit as untimely. Because Laura could not have timely sued Roger when she refiled her action, Ekstrand cannot do so either.

In support of her contention that the court erred in dismissing her third-party complaint, Ekstrand relies on *Highland v. Bracken*, 202 Ill. App. 3d 625 (1990), and *Brooks v. Illinois Central R.R. Co.*, 364 Ill. App. 3d 120 (2005). Neither case is analogous to the present case. In *Highland*, the third-party plaintiff filed her contribution action outside of the one-year limitations period provided by the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (Ill. Rev. Stat. 1987, ch. 85, par. 8—101). The third-party defendant moved to

dismiss on that basis. The court held that the third-party plaintiff's contribution action "accrued" on the date she was sued by the plaintiff and, therefore, using the filing date of the underlying complaint as the accrual date, the court found that the third-party complaint was timely. However, when *Highland* was decided, section 13—204 provided only:

> "Contribution among tortfeasors. No action for contribution among joint tortfeasors shall be commenced with respect to any payment made in excess of a party's pro rata share more than 2 years after the party seeking contribution has made such payment towards discharge of his or her liability." Ill. Rev. Stat. 1987, ch. 110, par. 13—204.

Ekstrand cites *Highland* for the proposition that her right of contribution did not vest for purposes of limitations until the date the underlying action was filed against her. While the *Highland* case certainly stands for that proposition, it was decided well before the effective date of section 13—204(c), which controls in this case.

In *Brooks*, the court held that section 13—204(c) of the Code operates to override the one-year limitations period of the Tort Immunity Act (745 ILCS 10/8—101 (West 2002)). *Brooks*, 364 Ill. App. 3d at 123. This has no bearing on the issue before us.

In her reply brief, Ekstrand also directs our attention to *Guzman v. C.R. Epperson Construction, Inc.*, 196 Ill. 2d 391 (2001). In *Guzman*, homeowners brought a breach of contract action in September 1992 against the general contractor who built their home. Almost four years later, the homeowners voluntarily dismissed the complaint only to refile it less than a month later. Five months later, in September 1996, after the General Assembly amended section 13—204, the general contractor filed a third-party complaint against its subcontractors. The issue in *Guzman* was narrow, specifically only whether the amendment to section 13—204 (which the court found

shortened the limitations period on the general contractor's action from four years to two years) applied retroactively to the general contractor's third-party complaint. After concluding that it did, the issue became whether the general contractor filed its claim within a reasonable period after the amendment went into effect. The court was not called upon to address, nor did it address, whether the third-party complaint was otherwise timely as restricted by the homeowners' ability to sue the subcontractors when the homeowners filed their underlying action.

At this stage, Ekstrand is left without a remedy. However, given the clear language of the statute, we must apply it as written. See *Neal v. Yang*, 352 Ill. App. 3d 820, 828 (2004).

Based on the foregoing, we affirm the judgment of the circuit court of Kendall County.

Affirmed.