2016 IL App (2d) 160151-U
No. 2-16-0151
Order filed September 30, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ROCKFORD STRUCTURES CONSTRUCTION COMPANY, Plaintiff-Appellant, v. SHRIVER, O'NEILL AND THOMPSON and DONALD L. SHRIVER, Defendants-Appellees.	)	Appeal from the Circuit Court of Winnebago County. No. 15-L-131 Honorable Brian Dean Shore, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Schostok and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed, pursuant to sections 2-615(a) and 2-619(a)(5) of the Code of Civil Procedure, plaintiff's untimely complaint for legal malpractice. The saving provision of section 13-207 of the Code, which allows counterclaims and setoffs to be pleaded despite expiration of the statute of limitations, does not apply to plaintiff's complaint, where plaintiff is not asserting a counterclaim or setoff in the present action, but seeks to essentially revive a disallowed counterclaim/setoff it attempted to raise in an earlier separate case its former counsel brought for fees. Affirmed.

¶ 2 After the statute of limitations had run, plaintiff, Rockford Structures Construction Company, sued defendants, Shriver, O'Neill & Thompson and Donald L. Shriver, alleging legal

malpractice. Defendants moved to dismiss plaintiff's complaint (735 ILCS 5/2-615(a), 2-619(a)(5) (West 2014)), and the trial court granted the motions, with prejudice. Plaintiff appeals, arguing that the saving provision in section 13-207 of the Code of Civil Procedure (Code) (735 ILCS 5/13-207 (West 2014)) rendered its claim timely. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On May 13, 2015, plaintiff filed a complaint, alleging legal malpractice against defendants. Plaintiff alleged that it had hired defendants to represent it in the case *Arc One, LLC v. Rockford Structures Construction Co.* (Winnebago case Nos. 08-CH-1278 and 08-CH-1477). The litigation (the Nu-Con litigation) involved plaintiff (the defendant in that case), which served as general contractor on a hotel construction project in Rockford, and several subcontractors. Plaintiff alleged that defendants failed to comply with their duty of professional care toward it (including professional responsibility rules concerning communications and billing) by: failing to adequately defend plaintiff and pursue claims relating to the Nu-Con litigation; failing to timely disclose expert witnesses; failing to pursue a post-verdict settlement on plaintiff's behalf in lieu of an appeal; failing to advise plaintiff of financial risks associated with an appeal; pursuing a frivolous appeal; and billing unreasonable fees for pursuing the frivolous appeal. Plaintiff argued that, but for defendants' negligence, it would not have agreed to defendants' advice and would not have allowed them to pursue the frivolous Nu-Con appeal on its behalf. Further, as a proximate result of the negligent advice, plaintiff alleged, it had sustained damages in excess of $50,000.

¶ 5 On June 6, 2015, defendants filed two motions seeking to dismiss plaintiff's complaint: one pursuant to section 2-619(a)(5) of the Code and the second pursuant to section 2-615(a) of the Code. In their 2-619(a)(5) motion, defendants moved to dismiss plaintiff's complaint for

failure to file suit within the two-year statute of limitations for professional negligence actions against attorneys (735 ILCS 5/13-214.3(b) (West 2014)). Defendants also noted that plaintiff's complaint failed to allege any specific dates of misconduct. They alleged that the Nu-Con trial resulted in a judgment against plaintiff on September 16, 2011. An appeal followed, and the reviewing court affirmed the trial court's judgment on November 26, 2012. *Arc One, LLC. v. Rockford Structures Construction Co.*, 2012 IL App (2d) 120215-U. Plaintiff's legal malpractice complaint, defendants noted, was filed *more* than two years after each of these dates.

¶ 6 In their 2-615(a) motion, defendants sought, in the alternative, a dismissal of plaintiff's complaint for failure to plead facts establishing that the case was timely filed, requiring that the complaint be made more definite. Defendants noted that plaintiff alleged no specific dates of misconduct, most significantly the dates when it discovered the alleged malpractice. Thus, its complaint was devoid of allegations establishing that the cause of action was filed within the statute of limitations for professional negligence. Defendants also alleged that plaintiff's complaint failed to allege dates that fell within the six-year statute of repose, which limits the filing of professional attorney negligence actions to "[n]o more than 6 years after the date on which the act or omission occurred." 735 ILCS 5/13-214.3(c) (West 2014). According to defendants, the Nu-Con suits were filed more than six years prior to plaintiff's malpractice complaint.[1]

¶ 7 Upon being given the opportunity to amend, plaintiff filed an amended complaint (erroneously entitled "AMENDED COUNTERCLAIM") on September 11, 2015, adding allegations concerning settlement efforts during the Nu-Con litigation. Plaintiffs alleged that,

[1] Defendants also noted that plaintiff erroneously referred to itself as a "Counter/Third-Party Plaintiff in the "Wherefore" clause of its complaint.

prior to trial, extensive settlement discussions took place between the parties. Defendants calculated the total amount due to plaintiff under the contract with the developer as over $1.4 million and outlined an acceptable amount plaintiff would be willing to accept if certain conditions were met. The "bottom line" settlement amount was $259,752. Plaintiff alleged that, despite these figures, defendants recommended and advised that plaintiff settle with the developer for $150,000. Plaintiff also agreed to hold harmless the developer against Nu-Con's claim. Plaintiff further alleged that this left it to defend the Nu-Con litigation all by itself. Defendants, according to plaintiff, breached their professional duty to it by: advising plaintiff to accept $150,000; failing to procure an adequate settlement, failing to prosecute and defend the entire Nu-Con litigation, failing to pursue all claims against the developer and other parties; failing to adequately advise plaintiff that the $150,000 settlement would not cover damages and attorney fees that it would incur if plaintiff appealed the loss in the Nu-Con litigation; failing to timely disclose an expert witness; failing to pursue a post-verdict settlement in lieu of an appeal; pursuing a frivolous appeal; and billing unreasonable fees for pursuing the frivolous appeal.

¶ 8 Plaintiff attached to its amended complaint three documents: (1) calculations of amounts due and claims for settlement discussion purposes; (2) calculations of the $259,752 bottom-line settlement amount and certain conditions; and (3) a copy of an e-mail from Donald Shriver to Donald Manning (presumably Nu-Con's attorney), containing a final offer of settlement (specifically, the developer, Weitzel, would pay plaintiff $300,000 in full settlement, plaintiff would hold Weitzel and Nu-Con harmless; and Weitzel would hold plaintiff harmless with respect to Arc One and a union).

¶ 9 On October 8, 2015, defendants moved, pursuant to section 2-619(a)(5), to dismiss plaintiff's amended complaint for failure to file suit within the statute of limitations. Defendants

argued that plaintiff failed to plead all necessary dates to determine when its cause of action for professional negligence accrued. However, based upon the complaint allegations, defendants asserted, the relevant dates warranted dismissal of plaintiff's complaint with prejudice because plaintiff's suit was filed after the statute of limitations had expired, where each of the allegations of misconduct occurred more than two years prior to the filing. 735 ILCS 5/13-214.3(b) (West 2014) (two-year statute of limitations for professional negligence claims). Specifically, plaintiff's complaint, which was filed on May 13, 2015, was filed almost 4 years after the June 30, 2011, settlement in the Nu-Con litigation, over 3 ½ years after the September 16, 2011, trial court ruling in that litigation, and 2 ½ years after the November 26, 2012, appellate court order.

¶ 10 Defendants attached copies of several trial court orders in the case *they* had brought, seeking attorney fees for the Nu-Con litigation (No. 13-AR-532) (the fee case). On March 13, 2015, the trial court denied plaintiff's (who was the defendant in that case) motion for leave to file a counterclaim for legal malpractice. (The denial was without prejudice as to filing a separate action.) Defendants also attached to their motion a copy of a September 25, 2015, order in the fee case, wherein the trial court denied plaintiff's (again, it was the defendant in the fee case) motion to reconsider its motion for leave to file a counterclaim and its emergency motion to stay trial. A third document consisted of the trial court's September 16, 2011, order in the Nu-Con litigation. There, the trial court found that plaintiff (who was one of the defendants in that case) breached its subcontract with Nu-Con and that Nu-Con's mechanic's lien claim was valid and enforceable. It entered judgment in Nu-Con's favor and awarded it $86,831 in damages, plus attorney fees and costs. The final document defendants attached to their motion to dismiss in this case is a copy of the trial court's June 30, 2011, order in the Nu-Con cases, approving a settlement between plaintiff (which was one of the defendants in the cases), Doors Acquisition

(one of the plaintiffs in that cases), and Weitzel (another defendant in the cases), wherein Weitzel paid Doors $115,000 in release of a lien and settlement of all claims related to Doors.

¶ 11 In their 2-615(a) motion, defendants argued again that plaintiff failed to plead facts establishing that the case was timely filed because they alleged no specific dates of misconduct. Thus, they failed to allege dates that fell within the statute of limitations and statute of repose.

¶ 12 In its response to defendants' motions, plaintiff argued that its amended "Counterclaim" was timely filed because it was originally intended as a counterclaim to defendants' fee suit and, as such, under the saving provision in the Code, it was timely and the court could take judicial notice of the dates and facts that demonstrated its timeliness.

¶ 13 On January 28, 2016, the trial court issued its findings by letter to the parties. The court granted defendants' motions, dismissing plaintiffs' amended complaint with prejudice and without leave to further amend the claim. As to the 2-615 motion, the court granted the motion, finding that plaintiff's complaint was devoid of any facts showing that it was brought within the statute of limitations. It noted that, although plaintiff was granted leave to correct deficiencies in its original complaint, it had failed to do so. As to the 2-619(a)(5) motion, the trial court found that section 13-207 of the Code, the saving provision, does not apply to a filing—here, the amended complaint—made in a separate action. The court noted that plaintiff attempted to file its counterclaim in the fee case only "long after the action had commenced and after partial summary judgment" had been entered against it. The trial court stated that, if plaintiff believed the ruling on the counterclaim was made in error, it could have filed an appeal in that case to preserve the issue. It did not do so, but chose to file a separate matter (*i.e.*, the malpractice case from which the current appeal arises). "What they, in essence, are arguing is that, in the second case [*i.e.*, this case], the judge should act as an appellate court, finding that the first court should

have allowed the counterclaim, and fashioning some type of remedy that ignores the statutory framework of the saving clause and allows the claim to stand." The court ordered defendants to prepare an order consistent with its letter, incorporating the letter into the order. On February 10, 2016, the trial court entered such an order, granting defendants' motions with prejudice. Plaintiff appeals.

¶ 14 II. ANALYSIS

¶ 15 Plaintiff argues that the trial court erred in dismissing its complaint, urging that the saving provision rendered its complaint timely filed. For the following reasons, we disagree.

¶ 16 A motion to dismiss pursuant to section 2-615 of the Code tests the legal sufficiency of the complaint, whereas a motion to dismiss under section 2-619 of the Code admits the legal sufficiency of the complaint, but asserts an affirmative defense that defeats the claim. *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 578-79 (2006). In considering a motion to dismiss pursuant to either section 2-615 or 2-619, we accept all well-pleaded facts in the complaint as true, drawing all reasonable inferences from those facts in favor of the nonmoving party. *Morris v. Harvey Cycle & Camper, Inc.*, 392 Ill. App. 3d 399, 402 (2009). When reviewing a decision to grant a motion pursuant to section 2-615, our inquiry is whether the allegations of the complaint, construed in the light most favorable to the nonmoving party, are sufficient to establish a cause of action upon which relief may be granted. *Weidner v. Karlin*, 402 Ill. App. 3d 1084, 1086 (2010). "The statute of limitations is normally an affirmative defense appropriate only to motions to dismiss pursuant to section 2-619; however, where it appears from the face of the complaint that the statute of limitations has run, such a defense can also be raised in a section 2-615 motion to dismiss." *Cangemi v. Advocate South Suburban Hospital*, 364 Ill. App. 3d 446, 456 (2006). Section 2-619(a)(5) of the Code permits a court to

dismiss a complaint if it was "not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2014). We review *de novo* dismissals under section 2-615(a) or 2-619(a)(5). *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 112148, ¶ 32.

¶ 17 The primary goal in construing a statute is to ascertain and give effect to the legislature's intent. *Slepicka v. Illinois Department of Public Health*, 2014 IL 116927, ¶ 14. The most reliable indicator of legislative intent is the language of the statute, given its plain and ordinary meaning. *Id.* A court presumes the General Assembly, in its enactment of legislation, did not intend absurdity, inconvenience, or injustice. *Land v. Board of Education of the City of Chicago*, 202 Ill. 2d 414, 422 (2002). The construction of a statute is a question of law that is reviewed *de novo*. *In re Andrew B.*, 237 Ill. 2d 340, 348 (2010).

¶ 18 Section 13-207 of the Code, the saving provision, states:

> "Counterclaim or set-off. 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. This section shall not affect the right of a bona fide assignee of a negotiable instrument assigned before due." (Emphasis added.) 735 ILCS 5/13-207 (West 2014).

¶ 19 Section 13-207 is a saving provision that "allows a counterclaim to proceed despite the failure to comply with the appropriate statute of limitations period." *Barragan v. Casco Design Corp.*, 216 Ill. 2d 435, 441, 446 (2005) (also noting that the counterclaim "may be pled in a *pending* action" pursuant to the statute's requirements) (emphasis added). The provision's purpose "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." *Cameron General Corp. v. Hafnia Holdings, Inc.*, 289 Ill. App. 3d 495, 506 (1997). As one court has elaborated:

> "Section 13-207 appears to recognize the fact that potential litigants do not necessarily promptly file every possible claim they may have. Instead, some litigants may refrain from filing until they are haled into court as a defendant. The original purpose of section 13-207 appears to be to prevent a plaintiff from gaining a tactical advantage by delaying his [or her] filing so that, while his [or her] pleading comes within the time period of the statute of limitations, any counterclaim would be outside the period and therefore barred. However, regardless of the original purpose of this section, courts have long recognized that application of section 13-207 is based on the theory that a plaintiff waives application of the statute of limitations with regard to potential counterclaims. More importantly, a plaintiff is not free to withdraw this waiver at will; once application of the statute of limitations has been waived, it remains waived even if the claim which triggered the waiver is later dismissed." (Citations omitted.) *Mermelstein v. Rothner*, 349 Ill. App. 3d 800, 804 (2004).

Section 13-207 "does the opposite of a statue of limitations. Instead of barring a claim after a specified period or setting a date for accrual of the claim, it saves otherwise barred claims." *Barragan*, 216 Ill. 2d at 449.

¶ 20 Plaintiff argues that the trial court improperly declined to apply the saving provision. It contends that it diligently attempted to bring its claim, but was twice denied leave to file a counterclaim in the fee suit and "told" to file a separate claim, which the court dismissed. Plaintiff's theory is that its amended complaint was timely by operation of the saving provision because it was brought *directly in response to*, and *originally intended as a counterclaim to*,

defendants' fee suit. By filing the fee suit, plaintiff argues, defendants waived the statute of limitations defense as to a *directly-related* legal malpractice claim.

¶ 21 We reject plaintiff's argument. It cites to no relevant authority for the proposition that its amended complaint was timely because it was intended to be a counterclaim in the fee suit. We find unconvincing plaintiff's assertion that its claim is directly related to and seeks what is essentially a setoff for defendants' fee claims. A setoff is a type of counterclaim (735 ILCS 5/2-608(a) (West 2014)), and it is pleaded as part of an answer (735 ILCS 5/2-608(b) (West 2014)). The answer is "[t]he first pleading by the defendant," the pleading that is filed immediately after, and in *response* to, the complaint (735 ILCS 5/2-602 (West 2014)). Here, plaintiff brought a separate complaint for legal malpractice; it did not file a counterclaim or setoff as a defendant in a case in which it seeks to assert section 13-207.

¶ 22 Again, the statute provides, in relevant part:

> "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." (Emphases added.) 735 ILCS 5/13-207 (West 2014).

¶ 23 As to the 2-619 dismissal, plaintiff contends that its complaint satisfies section 13-207's requirements. It asserts that: its claim is a set-off; owned by defendant (here, plaintiff, who was a defendant in the fee suit); to any action (here, the fee suit brought by defendants); owned by plaintiff; and brought before plaintiff's claim expired due to the statute of limitations. Plaintiff argues that the saving provision does not only apply to a defendant in an existing action.

¶ 24 Plaintiff's reading is strained. It selectively flips the parties listed in an earlier portion of the statute, but not the latter portion, to obtain a reading it desires, while also ignoring that the

statute unambiguously contemplates only *one* action. The statute clearly provides that only a *defendant* may assert a setoff or counterclaim that is otherwise barred by the statute of limitations in the *same* suit. Plaintiff could have fully prosecuted its counterclaim in the fee suit by filing an appeal, but it chose not to do so (and does not argue that the trial court erred in denying it leave). Nor does plaintiff explain why it could not timely file its malpractice suit. In the present case, it is precluded from asserting the saving provision because it is, again, a plaintiff here, not a defendant. Further, the statute contains no reference to multiple actions. The statute's plain language clearly contemplates that the action owned by a plaintiff and for which a *defendant* pleads a setoff or counterclaim are one and the same, not multiple suits. In other words, only a defendant in an existing action may rely on the saving provision. Plaintiff's reading has no support in the statutory language.

¶ 25 In addition, to adopt plaintiff's reading would allow plaintiffs unlimited time to file counterclaim or setoffs by filing such claims in separate suits. This would effectively eliminate statutes of limitation. *Land*, 202 Ill. 2d at 422 (court presumes the legislature did not intend absurdity, inconvenience, or injustice). We agree with defendants that, under such a scenario, a defendant could defend a case, wait to see if a judgment is rendered against it (and limit its litigation costs); if a judgment were rendered, it could file a new suit against the plaintiff, asserting a saved claim. Plaintiff's reading of the statute would increase litigation and waste judicial resources. *Id.*

¶ 26 In *Pastis v. Zion-Benton Township High School*, 234 Ill. App. 3d 232 (1992), a sufficiently analogous case that supports our reading, a passenger in the plaintiff's vehicle was injured in a collision with a school bus. In other litigation (the Taylor proceeding), the passenger sued the school district and the bus driver. In the case on appeal, the plaintiff had sued the

school district and the driver, alleging negligence and seeking damages for his own injuries. The school district moved to dismiss, arguing that the one-year statute of limitations had run. In response, the plaintiff moved to voluntarily dismiss the action because the Taylor proceeding was pending and concerned the same facts. He attached a copy of the school district's third-party complaint in that case in which it sought contribution from the *plaintiff* for any liability it had for the passenger's injuries. The trial court granted the school district's motion to involuntarily dismiss the plaintiff's complaint with prejudice. It also granted the bus driver's motion to dismiss on the ground of the statute of limitations.

¶ 27 On appeal, the plaintiff relied on section 13-207 to argue that the school district waived application of the statute of limitations. The *Pastis* court held that section 13-207 did not apply to the current action, but was available in an action where the plaintiff was *defending*. *Id.* at 236. "We have found no direct authority to support [the] plaintiff's argument that his claim may survive in an original proceeding when the adverse party has filed a claim against him in another proceeding." *Id.* The court noted that the school district was required to file its contribution claim in the Taylor proceeding because that suit was already pending and that the plaintiff had a right to file a third-party contribution claim *and raise section 13-207 there*. *Id.*

¶ 28 Unlike *Pastis*, here, plaintiff is not a defendant and therefore, section 13-207 is not available to save its otherwise untimely professional negligence claim. In *Pastis*, the plaintiff in the second action was a third-party defendant in the first action (the Taylor proceeding), and the court held that the saving provision was available in that first action where the plaintiff was *defending*. *Id.*

¶ 29 Turning to the section 2-615 dismissal of plaintiff's amended complaint, the trial court here granted the motion, finding that plaintiff's complaint was devoid of any facts showing that it

was brought within the statute of limitations and noted that, although plaintiff was granted leave to correct deficiencies in its original complaint, it had failed to do so. Plaintiff argues that it corrected the deficiencies noted as to the original filing and provided additional facts to apprise the trial court of the timeliness of its claims. Specifically, it notes that it pleaded additional facts related to defendants' representation and conduct in the Nu-Con litigation and their alleged breach of their duty to plaintiff. Plaintiff again points out that its complaint was intended to be a counterclaim to the underlying fee case. Also, it notes that, when it filed its motion for leave to file a counterclaim in the fee case (on December 4, 2013), its claim was still timely within the two-year statute of limitations for legal malpractice suits. On March 13, 2015, plaintiff was denied such leave. Here, it argues that the saving provision renders its malpractice claim timely because it is directly related to the defendants' claims for fees in their fee suit.

¶ 30 Plaintiff's argument fails because it did not plead any relevant dates in its complaint to address the deficiencies the trial court identified. It points to the exhibits attached to its complaint, but they consist of documents concerning the details of the Nu-Con settlement. They do not contain any dates upon which plaintiff could even attempt to show that its complaint was timely filed. Further, we are not persuaded by plaintiff's assertion that the trial court should have taken judicial notice of the underlying fee case to determine the timeliness of plaintiff's amended complaint. See, *e.g.*, *Ashland Savings & Loan Ass'n v. Aetna Insurance Co.*, 18 Ill. App. 3d 70, 77 (1974) (courts may take judicial notice of facts that are a matter of common and general knowledge and that are established and known within the limits of the court's jurisdiction). Even if we take judicial notice of the filings in the fee case, our conclusion that the saving provision does not apply to plaintiff's malpractice complaint does not change. There is no information in the filings in the earlier suit that change the circumstances of the filing here.

¶ 31 In summary, the trial court did not err in dismissing plaintiff's amended complaint.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, the judgment of the circuit court of Winnebago County is affirmed.

¶ 34 Affirmed.