2017 IL App (1st) 153653-U

FIFTH DIVISION
March 24, 2017

No. 1-15-3653

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

ANTHONY IVANKOVICH, Plaintiff-Appellant, v. MCKENNA LONG & ALDRIDGE LLP and DENTONS US LLP, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 15 L 7682 Honorable Margaret A. Brennan, Judge Presiding.

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

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County where plaintiff's lawsuit was properly dismissed pursuant to section 2-619(a)(5) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(5) (West 2014)).

¶ 2 Plaintiff Anthony Ivankovich appeals from an order of the circuit court of Cook County dismissing his complaint against defendants McKenna Long & Aldridge LLP and Dentons US LLP (collectively McKenna) for breach of contract pursuant to section 2-619 of the Code of

Civil Procedure (Code) (735 ILCS 5/2-619 (West 2014)). On appeal, plaintiff asserts the circuit court erred in dismissing his complaint with prejudice where: (1) his lawsuit was timely filed; (2) the release he signed does not purport to release McKenna as his escrow agent or anyone owing a duty to him directly; and (3) his complaint was sufficiently plead. Because we find the complaint was not timely filed, we affirm.

¶ 3 BACKGROUND

¶ 4 On July 29, 2015, plaintiff filed the instant one-count breach of contract complaint against McKenna which alleged the following facts. In 2005, plaintiff was a principal in a group of entities commonly known as Alliance, which purchased, owned, and sold multi-family residential properties. The properties were often financed with more than one layer of debt and were organized into what were commonly known as portfolios. That same year, three such portfolios were consolidated into the "PJ Portfolio." The PJ Portfolio consisted of three levels of debt. Relevant to this appeal, the lender on the third level of debt was LB Mezz Lender RTPJ, LLC, a subsidiary of Lehman Brothers (Lehman). As a result of the consolidation, the loans on the various properties also had to be consolidated. McKenna, a law firm, represented Lehman in the loan consolidation.

¶ 5 Among the numerous loan documents drafted was a personal guaranty to be signed by plaintiff and the other principals of Alliance. Prior to the closing, a written agreement was executed which provided that the signature pages for the loan documents, including plaintiff's signature page for his personal guaranty, would be delivered to McKenna. In turn, McKenna would hold the signature pages until after the loan closing. Thereafter, McKenna would attach the signatures to the final, negotiated documents.

¶ 6 The loan closing occurred on August 1, 2005. McKenna, however, attached plaintiff's

signature page to a prior draft of the personal guaranty (draft guaranty), and not to the final, negotiated guaranty (final guaranty). The draft guaranty contained a provision which provided that plaintiff's obligations under the guaranty would arise in the event that any other guarantor filed for bankruptcy. In contrast, the final guaranty did not contain this provision.

¶ 7 In 2008, one of the co-guarantors on the guaranty declared personal bankruptcy. Because the operative guaranty was the draft guaranty, the bankruptcy triggered plaintiff's personal liability on a $35 million debt. Thereafter, in June of 2008, plaintiff paid nearly $8 million to settle his personal liability on the draft guaranty. In addition, plaintiff incurred substantial attorneys fees both in 2008 to settle the matter and in a subsequent lawsuit he filed against his personal attorneys.

¶ 8 Plaintiff maintained that by attaching his signature page to the wrong guaranty, McKenna breached the written agreement and is therefore liable to him for damages, including the attorneys fees he incurred as a result of the breach. Plaintiff alleged the damages he incurred exceeded one million dollars.

¶ 9 Attached to the complaint was the alleged written agreement, dated August 1, 2005, which provided:

> "The undersigned have delivered to McKenna Long & Aldridge LLP ("MLA") their signed counterpart signature pages (collectively, the "Borrower Parties' Signature Pages") for various documents related to the referenced transactions. The undersigned acknowledge and agree that under no circumstances shall the Borrower Parties' Signature Pages be deemed to have been delivered in the legal sense, nor shall any of the transactions to which the Borrower Parties' Signature Pages relate be deemed to have been consummated, unless and until (i) final documentation is completely agreed to

> among legal counsel for the undersigned and MLA on behalf of LB Mezz, and (ii) all net refinancing proceeds as shown on the Sources and Uses Statement for the Wachovia refinancing in an amount not less than $45,000,000.00 have been wired to LB Mezz pursuant to the wire transfer instructions previously provided.
>
> The undersigned further agree that this letter constitutes the confirmation and agreement of the undersigned that that [*sic*] the undersigned have authorized their legal counsel, and the undersigned do hereby expressly authorize their legal counsel, to complete negotiations of and the finalization of the forms of all documentation to which the Borrower Parties' Signature Pages relate and that such documentation as negotiated and agreed to by legal counsel for the undersigned shall constitute the legally binding agreements of the undersigned once the Borrower Parties' Signature Pages are attached to same. Andrew W. Schor is signing this letter agreement in both his individual capacity and in his capacity as President of each of the Alliance entities which are parties to the transaction documents, as signed by him as President."

The purported written agreement was signed by plaintiff, but not by McKenna or Lehman.

¶ 10 McKenna filed a motion to dismiss pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2014)) setting forth three arguments. First, pursuant to section 2-619(a)(5), McKenna argued that the complaint was time barred (a) under the 6-year statute of repose in section 13-214.3(c) of the Code (735 ILCS 5/13-214.3(c) (West 2014)), as McKenna's conduct arose out of professional services, (b) under the 2-year statute of limitations in section 13-214(b) of the Code (735 ILCS 5/13-214.3(b) (West 2014)), and (c) under the five-year statute of limitations in section 13-205 of the Code (735 ILCS 5/13-205 (West 2014)) because the purported written agreement was not a written contract to which McKenna was a party. Second,

pursuant to section 2-619(a)(6) of the Code, McKenna argued that plaintiff's claim was barred by the plain language of a release signed by plaintiff in 2008 pursuant to the settlement of the guaranty. Third, McKenna maintained that the complaint failed to state a claim pursuant to section 2-615 of the Code where McKenna was not a party to the purported written agreement and the agreement does not create any obligations of McKenna to plaintiff.

¶ 11 In response, plaintiff asserted that his complaint was based on McKenna's role as his escrow agent, not as its role as the lender's attorneys. Accordingly, as an escrow agent, McKenna is an impartial third party and must play a role separate and apart from its role as an attorney for one of the parties. Plaintiff maintained that because McKenna had a fiduciary duty as his escrow agent pursuant to a written escrow agreement, the ten-year statute of limitations applies. Regarding the release, plaintiff argued that it (1) does not specifically name McKenna, and (2) he is not suing McKenna in its capacity as Lehman's attorneys, but as his own escrow agent and thus the release is not a defense to his claim. Plaintiff further argued in the alternative that even if the release did apply, it was void because prior to the settlement McKenna was "fully aware of the drama it had caused by its mistaken handling of Ivankovich's signature." Thus, McKenna "fraudulently concealed its liability and fraudulently self dealt in negotiating a release for itself" and the release is void for fraud.

¶ 12 In support of his arguments, plaintiff attached the partial discovery deposition testimony of David Broderick (Broderick) and Patrick McGeehan (McGeehan), two attorneys who worked for McKenna. The portions of testimony, acquired during plaintiff's litigation against his own prior counsel in regards to the transaction, included Broderick and McGeehan's use of the terms "escrow" and "escrow letter."

¶ 13 After the matter was fully briefed and argued, the circuit court granted McKenna's

motion to dismiss with prejudice finding, in pertinent part, that plaintiff's action was time barred pursuant to the 13.214(c) statute of repose. This appeal follows.

¶ 14 ANALYSIS

¶ 15 Defendant presented a hybrid motion to dismiss under section 2-619.1 of the Code, citing both section 2-615 and 2-619 of the Code. 735 ILCS 5/2-619.1 (West 2014). 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). In that same vein, we may affirm for any basis that appears in the record. *Joyce v. DLA Piper Rudnick Gray Cary LLP*, 382 Ill. App. 3d 632, 638 (2008).

¶ 16 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 2014); *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.*

¶ 17 In contrast, a motion to dismiss pursuant to section 2-619 (735 ILCS 5/2-619 (West 2014)) 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 2014). 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); *Mayfield v. ACME Barrel Company*, 258 Ill. App. 3d 32, 34 (1994). In this instance, we find the issue of plaintiff's noncompliance with the statute of repose to be dispositive.

¶ 18 Under section 13-214.3, an action for damages based on tort, contract, or otherwise against an attorney "arising out of an act or omission in the performance of professional services *** 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(b), (c) (West 2014). There is no dispute that the act or omission which formed the basis for plaintiff's complaint was McKenna's failure to attach plaintiff's signature page to the correct guaranty on August 1, 2005, when the loan closing occurred. Plaintiff filed his complaint on July 29, 2015. Thus, if the repose provision in section 13-214.3(c) applies to the complaint, it was properly dismissed as having been filed more than four years after the expiration of the six-year repose period.

¶ 19 Plaintiff contends that his claim is not barred by the statute of repose because McKenna was not his attorney and the duty, as alleged in the complaint, arose solely from McKenna's role as his escrow agent. Plaintiff further asserts that the duty McKenna owed him (as that of an escrow agent) did not involve legal services.

¶ 20 The pertinent questions before this court, therefore, are (1) whether the statute of repose applies to McKenna even though plaintiff was not McKenna's client and, if so, (2) whether plaintiff's claim arises out of professional services performed by McKenna.

¶ 21 The former question is easily disposed. In *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, our supreme court considered whether section 13-214.3 applies to claims asserted by a non-client against an attorney who rendered professional services. In examining the plain language of the statute, our supreme court concluded it does:

> "The appellate court's conclusion that section 13-214.3 applies only to a claim asserted by a client of the attorney is contrary to the plain language expressed in the statute. There is nothing in section 13-214.3 that requires the plaintiff to be a client of the attorney who rendered the professional services. The statute does not refer to a 'client' nor does it place any restrictions on who may bring an action against an attorney. The statute simply provides that an action for damages against an attorney 'arising out of an act or omission in the performance of professional services' is subject to the six-year repose period. Thus, under the express language of the statute, it is the nature of the act or omission, rather than the identity of the plaintiff, that determines whether the statute of repose applies to a claim brought against an attorney." *Id.* ¶ 19.

¶ 22 As our supreme court has concluded section 13-214.3 applies to non-clients, we next turn to consider whether the allegations against McKenna arose out of an act or omission in the performance of professional services. Plaintiff maintains that his claim does not arise out of the performance of professional services because McKenna was merely an escrow agent and "also happened to be the attorney for the other party (Lehman) to the escrow." Plaintiff, citing to the comments of the Illinois Rules of Professional Conduct, asserts that escrow services are not legal services. Plaintiff concludes that because McKenna held the signature pages only in the capacity of escrowee, his claims are not against an attorney and thus do not arise out of an attorney performing professional services. We disagree.

¶ 23 Once again, we find *Evanston Insurance Co.* to be instructive as the court found that *all* of the claims brought in that case by a third-party, non-client against a number of defendant attorneys were in fact time-barred by the plain language of section 13-214.3. *Id.* ¶¶ 1, 23. As our supreme court reasoned, any more narrow reading of the statute would:

> "[O]verlook[ ] the language in the statute that the repose period applies to claims *'arising out of* an act or omission in the performance of professional services.' (Emphasis added.) 735 ILCS 5/13-214.3(b), (c) (West 2008). The 'arising out of' language indicates an intent by the legislature that the statute apply to all claims against attorneys concerning their provision of professional services. There is no express limitation that the professional services must have been rendered to the plaintiff. Nor does the statute state or imply that it is restricted to claims for legal malpractice. Had the legislature wished to do so, it could have limited the statute to legal malpractice actions or to actions brought by a client of the attorney. Instead, the statute broadly applies to 'action[s] for damages based on tort, contract, or *otherwise* *** arising out of an act or omission in the performance of professional services,' which encompasses a number of potential causes of action in addition to legal malpractice. (Emphasis added.) 735 ILCS 5/13-214.3(b) (West 2008). *** The statute unambiguously applies to all claims brought against an attorney arising out of actions or omissions in the performance of professional services." *Evanston*, 2014 IL 114271, ¶ 23.

Thus, our supreme court interpreted section 13-214.3 broadly, which would necessarily include a liberal reading of the term "professional services." See *Terra Foundation for American Art v. DLA Piper LLP*, 2016 IL App (1st) 153285, ¶ 38.

¶ 24 Despite this interpretation of the statute by our supreme court, plaintiff maintains that

because McKenna held the signature pages only in the capacity of escrowee, his claims do not arise out of the performance of professional services. In so arguing, plaintiff relies on the case of *Wells Fargo Bank Minnesota, NA v. Envirobusiness, Inc.*, 2014 IL App (1st) 133575, ¶ 40, for the proposition that, "An escrow agent has a fiduciary duty to the party making the deposit and the party for whose benefit the deposit is made. [Citation.] As a result, an escrow agent must act impartially toward all of the parties. [Citation.]" Plaintiff, however, neglects to consider the remaining paragraphs of *Envirobusiness, Inc.* wherein this court found that the circuit court's use of the term "escrow agent" in regards to the opposing party's counsel was "inaccurate" as "the court clearly knew that Wells Fargo's counsel was not a neutral individual." *Id.* ¶ 41. The same is true here. In coming to an agreement that McKenna would hold the signature pages until after the loan closing was completed, plaintiff knew that the signature pages were not being held by an impartial party. The terms of the agreement further support this conclusion as the term "escrow" is not utilized. Furthermore, plaintiff's reliance on Broderick and McGeehan's depositions (in which they referred to this arrangement with McKenna as an "escrow" agreement) was certainly not dispositive of McKenna being an "escrow agent" in the technical sense where it was known to all parties involved that McKenna represented Lehman in the transaction. Thus, McKenna is not a neutral party. See *id.*

¶ 25 As previously observed, the liberal construction of the statute of repose includes a broad interpretation of the phrase "performance of professional services." See *Terra Foundation for American Art*, 2016 IL App (1st) 153285, ¶ 38 ("[t]he statute contains no limiting language as to *** 'performance of professional services' "). Accordingly, McKenna's services, which included negotiating and assembling the legal documents to evidence the parties' refinancing of multimillion dollar loans, constituted the performance of professional services under the statute.

¶ 26 Plaintiff further asserts that escrow services are not legal services, citing to the comments to Rule 1.15 of the Illinois Rules of Professional Conduct. See Ill. S. Ct. Code of Prof. Res., R. 1.15 cmt. 5 (eff. July 1, 2015). Comment five provides, "The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule." *Id.* As we have already determined that McKenna's alleged breach arose out of the performance of professional services, we find this provision is not applicable.

¶ 27 We conclude section 13-214.3 applies to all claims that arise from the provision of professional legal services and plaintiff's allegations relate to McKenna in its professional capacity. 735 ILCS 5/13-214.3 (West 2014); *Evanston Insurance Co.*, 2014 IL 114271, ¶ 23. Accordingly, the court did not err in finding that plaintiff's claims against the attorney defendants were untimely.

¶ 28 CONCLUSION

¶ 29 For the reasons stated above, the judgment of the circuit court of Cook County is affirmed.

¶ 30 Affirmed.