2015 IL App (1st) 150300-U

No. 1-15-0300

Fifth Division
December 31, 2015

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PIER TRANSPORTATION, INC.,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	
	)	No. 14 L 8863
v.	)	
	)	The Honorable
THE BRAMAN AGENCY, LLC,	)	Raymond W. Mitchell,
	)	Judge Presiding.
Defendant-Appellee.	)	

JUSTICE GORDON delivered the judgment of the court.
Justices Lampkin and Palmer concurred in the judgment.

ORDER

¶1 *Held:* The trial court properly granted defendant's motion to dismiss plaintiff's complaint because it clearly appears that no set of facts could be proven which would entitle plaintiff to relief.

¶2 Plaintiff, Pier Transportation, Inc., appeals an order from the circuit court of Cook County granting defendant's, Braman Agency, LLC, motion to dismiss for failure to commence the action within the time allowed under the statute of limitations. 735 ILCS 5/13-205 (West 2012) (five years for breach of oral contract claims); 815 ILCS 505/10a(e) (West

2012) (three years for consumer fraud actions). Plaintiff filed a complaint for breach of oral contract and for violations of the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/2 (West 2012)), claiming that the actions were actually third-party contribution and indemnity actions, which would place the actions within the statute of limitations.

¶3 For the following reasons, we affirm the trial court's decision.

¶4 BACKGROUND

¶5 Plaintiff is an Illinois company that specializes in long-distance trucking and freight services. Defendant is an insurance agency doing business in the State of Illinois.

¶6 Liberty Mutual Insurance Company (Liberty Mutual) initiated a lawsuit against plaintiff claiming that plaintiff refused to pay the premiums for a workers' compensation insurance policy written by it.

¶7 Later, plaintiff filed a third-party negligence complaint against defendant, claiming that plaintiff instructed defendant to purchase workers' compensation insurance for its office employees only and defendant secured a workers' compensation policy that included truck drivers who plaintiff claimed were independent contractors, not subject to workers' compensation.

¶8 Liberty Mutual voluntarily dismissed the case, which it later refiled.

¶9 Plaintiff also filed a counterclaim against Liberty Mutual claiming violations of the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/2 (West 2012)). Liberty Mutual moved to dismiss the counterclaim, arguing that the three-year statute of limitations for consumer fraud claims had passed, citing section 505/10a(e) of the Act. On November 19, 2013, the trial court denied Liberty Mutual's motion to dismiss, and found that the counterclaim was timely filed under the savings statute, section

5/13-207 of the Code of Civil Procedure (Code) (735 ILCS 5/13-207 (West 2012)). Pier's counterclaim in the Liberty Mutual suit remains pending and is not at issue on this appeal.

¶10 Plaintiff refiled the same third-party action that was filed in the initial action against defendant in the refiled Liberty Mutual case.

¶11 Defendant then filed a motion to dismiss plaintiff's third-party complaint under section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2012)). Defendant argued that plaintiff's third-party action was essentially seeking contribution or indemnity from defendant for plaintiff's liability in the Liberty Mutual case. Defendant argued that such third-party actions were barred by the statute of limitations, because there cannot be a cause of action for indemnity or contribution for a breach of contract claim where the parties were not joint tortfeasors. Further, defendant argued that plaintiff's third-party action should be dismissed since plaintiff had not suffered damages to support a negligence claim because the case against Liberty Mutual had not been decided.

¶12 Plaintiff then filed, with leave of court, an amended third-party complaint against defendant that contained three counts. Count I was for negligence. Count II was brought under the Consumer Fraud and Deceptive Business Practice Act, claiming defendant acted fraudulently in procuring insurance from Liberty Mutual. Count III was for common law fraud.

¶13 Defendant then filed a motion to dismiss all three counts of plaintiff's amended third-party complaint. Defendant sought to dismiss count I on the same grounds as in its previous motion.

¶14 Defendant sought to dismiss count II under section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)), arguing that under the Consumer Fraud Act, a private cause of action cannot

arise unless a party can prove actual damages. Since plaintiff had not yet suffered damages in the Liberty Mutual case, defendant argued that count II failed to state a cause of action.

¶15 Finally, defendant sought to dismiss count III under section 2-615 of the Code, arguing that it, too, was premature because plaintiff had not yet suffered damages.

¶16 The trial court granted defendant's motion to dismiss all three counts for failure to state a cause of action for which relief could be granted, without prejudice.

¶17 Plaintiff then filed a second amended third-party complaint that contained two counts. Count I sought indemnification from defendant, alleging that defendant acted negligently in procuring insurance from Liberty Mutual. Plaintiff argued that defendant's negligence derivatively caused plaintiff's liability for breaching its insurance contract with Liberty Mutual. Thus, count I sought indemnification from defendant for the full amount of any damages the court determined plaintiff owed to Liberty Mutual for breach of contract.

¶18 Count II alleges that defendant owes plaintiff contribution under the Joint Tortfeasor Contribution Act (Joint Tortfeasor Act) (740 ILCS 100/2 (West 2012)) for any liability determined in the Liberty Mutual lawsuit. In count II, plaintiff alleges that defendant intentionally concealed, misrepresented, or omitted the material fact that the insurance policy it procured from Liberty Mutual included coverage for plaintiff's truck drivers, despite plaintiff's request to exclude them from coverage as independent contractors. Plaintiff argues that "[i]f judgment is entered against [plaintiff] on the complaint for non-payment of premiums brought by [Liberty Mutual], [plaintiff] is entitled to judgment against Third-Party Defendant [defendant], in an amount commensurate with that percentage of culpability attributable to Third-Party Defendant [defendant], in causing the damages suffered by [Liberty Mutual]."

¶19 Defendant moved to dismiss both counts of plaintiff's second amended third-party complaint under section 2-619(a)(9) of the Code. Defendant argued that count I for indemnity was barred by the statute of limitations.

¶20 Defendant argued that plaintiff's contribution claim failed to state a cause of action under section 2-615 of the Code because plaintiff and defendant were not joint tortfeasors liable to Liberty Mutual.

¶21 On April 4, 2014, the trial court granted defendant's motion to dismiss, finding that plaintiff's allegations did not constitute grounds for either indemnification or contribution. The trial court found that indemnity was not an appropriate remedy because "a stranger to a contract between two parties cannot be compelled to indemnify one of the parties for breach of contract absent the stranger's express agreement to indemnify."

¶22 The trial court similarly found that since defendant was not a party to the insurance contract, defendant's alleged liability for negligence would not be derivative of plaintiff's breach and thus contribution was also an improper remedy. The order stated that "[defendant] is a non-party and cannot be held to contribute for another party's alleged breach of contract."

¶23 In its ruling the court added that "[u]nder the Illinois Code of Civil procedure, without derivative liability, a third party complaint is not proper." Thus, the trial court noted that if plaintiff wished to recover from defendant, "[t]he claim must be brought in a separate action."

¶24 On May 5, 2014, plaintiff filed a motion to reconsider or, in the alternative, to find that there was no just reason to delay enforcement or appeal. On May 13, 2014, the trial court denied that motion.

¶25 On June 12, 2014, plaintiff filed a notice of appeal from the trial court's dismissal of plaintiff's second amended third-party complaint against defendant. This court dismissed this appeal on September 5, 2014, for lack of jurisdiction.

¶26 On August 22, 2014, plaintiff filed a separate two-count complaint against defendant. Count I was entitled "Breach of Contract/Indemnification" and alleges that defendant breached its duty to plaintiff by failing to procure workers' compensation insurance that excluded truck drivers from coverage. Plaintiff argued that as a result of defendant's negligence, "[i]f judgment is entered against [plaintiff] on [Liberty Mutual]'s complaint for non-payment of worker's compensation premiums, [plaintiff] is entitled to indemnification from [defendant] for the amount of the judgment."

¶27 Count II was entitled "Violation of the Consumer Fraud and Deceptive Practices Act" and alleges that defendant acted fraudulently in procuring insurance from Liberty Mutual.

¶28 On September 19, 2014, that suit was consolidated with the Liberty Mutual suit.

¶29 Defendant again moved to dismiss plaintiff's complaint as time-barred under section 2-619(a)(5) of the Code (735 ILCS 2-619(a)(5) (West 2012)). Defendant argued that the relevant statutes of limitations for plaintiff's claims had passed, and that plaintiff's indemnity claim alleged nothing more than a breach of an oral contract, and thus the applicable statute of limitations for count I was the five-year statute of limitation for oral contract claims.

¶30 Defendant argued that the relevant statute of limitations for count II was the three-year statute of limitations on claims brought under the Consumer Fraud Act.

¶31 Plaintiff filed a response to defendant's motion to dismiss, claiming that count I of its complaint should not be dismissed under the statute of limitations, because count I was an action for indemnity from defendant, not a claim for breach of an oral contract.

¶32 Plaintiff further argued that count II should not be dismissed as time-barred because count II was actually an action for contribution from defendant, as a joint tortfeasor with Liberty Mutual.[1] Thus, plaintiff argued, the actions should not be time-barred before plaintiff's liability in the Liberty Mutual suit has been determined.

¶33 On December 30, 2014, the trial court granted defendant's motion to dismiss. The trial court found that plaintiff was barred from bringing the claims in its complaint by their respective five- and three-year statutes of limitations for breach of oral contract and consumer fraud claims. The order stated:

¶34 "Pier Transportation's breach of oral contract and consumer fraud claims are based on actions and representations that took place in 2004 and an insurance policy that ended May 14, 2006. The statute of limitations for oral contracts is five years. 725 ILCS 5/13-205. The statute of limitations for consumer fraud claims is three years. 815 ILCS 505/10a(e). Pier Transportation filed its complaint in August 2014, well beyond the three- and five-year limitations periods."

¶35 In its opinion the trial court additionally found that "Pier Transportation attempts to avoid the statute of limitations by asserting that its claims are not for breach of contract and consumer fraud, but indemnification and contribution." The trial court reasoned that "[t]he Braman Agency did not expressly agree to indemnify Pier Transportation, and there is no basis upon which to imply such an agreement." Regarding contribution, the order provided that "Pier Transportation is not entitled to contribution under the Joint Tortfeasor Contribution Act for its alleged breach of contract." The order further provided that "Pier

[1] We note that this is not a properly structured cause of action for contribution, as noted by the trial court in its December 31, 2014, order, and as discussed in depth in the analysis section below.

Transportation cannot seek contribution from The Braman Agency as a joint tortfeasor on its own consumer fraud counterclaim against Plaintiffs LM Insurance and Liberty Insurance Corporation."

¶36 On January 23, 2015, plaintiff filed a motion to reconsider the court's previous denial of 304(a) language in the April 4, 2014, order dismissing its third-party complaint against defendant. The trial court denied that motion on January 27, 2015. On January 28, 2015, plaintiff filed a notice of appeal appealing the December 30, 2014, dismissal of its complaint.

¶37 ANALYSIS

¶38 On appeal, plaintiff argues that the trial court erred in granting defendant's motion to dismiss because (1) plaintiff alleged a proper cause of action for implied indemnity against defendant as a result of their principal-agent relationship; (2) plaintiff had a proper basis for seeking contribution from defendant under the Joint Tortfeasor Act based on plaintiff's allegation that defendant acted in concert with Liberty Mutual to violate the Consumer Fraud Act; and, accordingly, (3) plaintiff's claims for indemnity and contribution should not have been time-barred by the statutes of limitations governing consumer fraud and breach of oral contract claims, but instead should be allowed under the statute of limitations governing contribution and indemnity actions.

¶39 For the following reasons, we affirm the trial court's dismissal of plaintiff's indemnity and contribution claims as time-barred.

¶40 I. Jurisdiction

¶41 Initially, although not discussed by the parties, we must assess our jurisdiction to decide this case. In the case at bar, while plaintiff's complaint was dismissed by the trial court, Liberty Mutual's suit, which was consolidated with the instant case, remains active.

Generally, "[i]f multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both." Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010).

¶42 However, "Rule 304(a) does not necessarily apply to all actions involving multiple claims or parties." *Nationwide Mutual Insurance Co. v. Filos*, 285 Ill. App. 3d 528, 532 (1996). Where a consolidated case concerns several actions involving an inquiry into the same event only in its general aspects and is limited to a joint trial, but each action retains separate docket entries, verdicts, and judgments, "an order dismissing one of the actions is deemed final and immediately appealable." *Nationwide*, 285 Ill. App. 3d at 532. In that situation, Rule 304(a) language is not required before the appellate court will have jurisdiction. *Nationwide*, 285 Ill. App. 3d at 532. Conversely, where multiple actions fully merge into a single action, thereby losing their individual identities, they must be disposed of as one lawsuit, and Rule 304(a) language would be required before a dismissal of less than all counts could be heard on appeal. *Nationwide*, 285 Ill. App. 3d at 532 (citing *Kassnel v. Village of Rosemont*, 135 Ill. App. 3d 361, 364 (1985)). See also *In re Adoption of S.G.*, 401 Ill. App. 3d 775, 781 (2010).

¶43 In the case at bar, plaintiff is appealing the trial court's dismissal of plaintiff's complaint against defendant that was consolidated into Liberty Mutual's lawsuit against plaintiff. However, plaintiff's action against defendant retained its own docket number, and plaintiff's legal rights in the action against defendant can be determined independently from the issues in the Liberty Mutual lawsuit, without affecting that suit's outcome. The separate actions

were consolidated for the sake of efficiency, and they are not intertwined to the extent that they have lost their "individual identity." Thus, even though the Liberty Mutual suit remains pending, the trial court's dismissal of plaintiff's action against defendant was final and appealable without Rule 304(a) language, and we have jurisdiction to hear the case.

¶44 II. Standard of Review

¶45 Under a section 2–619 dismissal, our standard of review is *de novo*. *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006); *Morr–Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 488 (2008). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶46 Under section 2–619(a)(5), a defendant may raise a statute of limitations issue in a motion to dismiss. *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 84 (1995). When a defendant does so, the plaintiff must provide enough facts to show the court that the motion should be denied. *Hermitage Corp.*, 166 Ill. 2d at 84.

¶47 When reviewing "a motion to dismiss under section 2–619, a court must accept as true all well-pleaded facts in plaintiffs' complaint and all inferences that can reasonably be drawn in plaintiffs' favor." *Morr–Fitz*, 231 Ill. 2d at 488. "In ruling on a motion to dismiss under section 2–619, the trial court may consider pleadings, depositions, and affidavits." *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 262 (2004). Even if the trial court dismissed on an improper ground, a reviewing court may affirm the dismissal if the record supports a different ground for dismissal. *Raintree*, 209 Ill. 2d at 261 (when reviewing a section 2–619 dismissal, we can affirm "on any basis present in the record"); *In re Marriage of Gary*, 384 Ill. App. 3d 979, 987 (2008) ("we may affirm on any basis supported by the record, regardless of whether the trial court based its decision on the proper ground").

¶48 III. Statute of Limitations

¶49 On appeal, plaintiff argues that the trial court erred by dismissing its claims against defendant as time-barred by the statutes of limitations governing a breach of an oral contract and consumer fraud actions. Plaintiff argues the court should have properly applied the statute of limitations governing contribution and indemnity actions, under which its claims would not have been barred.

¶50 Initially, we note that the statute of limitations governing contribution and indemnity cannot apply to plaintiff's claims in this case on strictly procedural grounds. Contribution and indemnity claims are third-party actions, which allow a defendant to bring an additional party into a lawsuit for the purpose of establishing derivative liability. *Kerschner v. Weiss & Co.*, 282 Ill. App. 3d 497, 502 (1996). In other words, "[i]n a proper third-party action, the liability of the third-party defendant is dependent upon the liability of the third-party plaintiff to the original plaintiff." *Kerschner*, 282 Ill. App. 3d at 502.

¶51 However, plaintiff's action against defendant in the instant case is a separate action that was consolidated with the Liberty Mutual case. The complaint against defendant does not seek to add defendant as a codefendant in the Liberty Mutual case, but rather initiates a separate action in which Braman is a defendant against plaintiff. Accordingly, the statutes of limitations respectively governing breach of oral contract and consumer fraud claims must apply, not the statute of limitations for third-party indemnity and contribution actions. We note that, while plaintiff initially filed a third-party complaint against defendant, plaintiff is not appealing the dismissal of that complaint in this appeal, but is appealing only the dismissal of its separately filed complaint.

¶52 Since plaintiff does not argue on appeal that its claims would survive if the statutes of limitations for breach of oral contract and consumer fraud claims apply, we affirm the decision of the trial court dismissing plaintiff's claims as time-barred under those limitation periods.

¶53 Furthermore, even if plaintiff brought its complaint as a third-party action, its claims for contribution and indemnity would still fail to state a cause of action under the facts of this case. Thus, applying the statute of limitations governing contribution and indemnity actions would be improper.[2]

¶54 For the purpose of addressing plaintiff's arguments on appeal, we will analyze the substantive legal sufficiency of what plaintiff argues are its claims for indemnity and contribution. The critical inquiry is whether the allegations in the complaint are sufficient to state a cause of action upon which relief may be granted. *Wakulich v. Mraz*, 203 Ill. 2d 223, 228 (2003). In making this determination, all well-pleaded facts in the complaint, and all reasonable inferences that may be drawn from those facts, are taken as true. *Young*, 213 Ill. 2d at 441. In addition, we construe the allegations in the complaint in the light most favorable to the plaintiff. *Young*, 213 Ill. 2d at 441. We acknowledge that a cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts could be proven which would entitle the plaintiff to relief. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 488 (1994).

¶55 A. Indemnity

¶56 In the case at bar, the trial court granted defendant's motion to dismiss plaintiff's

[2] Since we find that the statute of limitations for contribution and indemnity actions does not apply in this case, we need not address whether plaintiff's claims would have been timely under that limitations period.

indemnity claim against defendant, finding that since plaintiff's allegations constituted a breach of an oral contract claim, the indemnity action was barred under the five-year statute of limitations governing breach of oral contract claims. In its order dismissing the indemnity claim, the trial court found that since defendant did not expressly agree to indemnify plaintiff, there is no basis upon which to imply such an agreement, and thus the court could not apply the statute of limitations governing indemnity actions to the complaint. On appeal, plaintiff argues that its complaint was improperly dismissed under the breach of oral contract statute of limitations, because an indemnity action would have been timely filed and that plaintiff and defendant's principal-agent relationship formed a proper basis for indemnity. We do not find this argument persuasive.

¶57 As noted, a third-party claim allows a defendant to bring an additional party into a lawsuit for the purpose of establishing derivative liability. *Kerschner v. Weiss & Co.*, 282 Ill. App. 3d 497, 502 (1996). In other words, "In a proper third-party action, the liability of the third-party defendant is dependent upon the liability of the third-party plaintiff to the original plaintiff." *Kerschner*, 282 Ill. App. 3d at 502.

¶58 Indemnity and contribution are mutually exclusive third-party claims that allocate a plaintiff's damages among multiple joint tortfeasors. *Kerschner*, 282 Ill. App. 3d at 502. While contribution apportions the distribution of loss among joint tortfeasors based on relative degrees of fault, indemnity shifts the entire loss to the joint tortfeasor who was actually at fault. *Kerschner*, 282 Ill. App. 3d at 502. The right to indemnity may be either express in the form of a written contract, or implied by law. *Kerschner*, 282 Ill. App. 3d at 502.

¶59 In this case, the parties had no written agreement to indemnify, and thus we will only

discuss whether plaintiff's complaint alleges a proper basis for an implied right to indemnity from defendant. Under implied indemnity, the law implies a promise to indemnify where a blameless party is derivatively liable to the underlying plaintiff based on that party's relationship with a third party who actually caused the plaintiff's injury in tort. *Kerschner*, 282 Ill. App. 3d at 503.

¶60 To state a proper cause of action for implied indemnity, a third-party complaint must allege: (1) a pre-tort relationship between the third-party plaintiff and the third-party defendant that gave rise to an implied duty to indemnify; and (2) a qualitative distinction between the conduct of the third-party plaintiff and the third-party defendant. *Frazer v. A.F. Munsterman, Inc.*, 123 Ill. 2d 245, 255 (1988); *Kerschner*, 282 Ill. App. 3d at 503. Classes of pre-tort relationships that have traditionally given rise to a duty to indemnify include lessor-lessee, employer-employee, owner-lessee, and master-servant relationships. *Kerschner*, 282 Ill. App. 3d at 503-04.

¶61 In the case at bar, plaintiff argues that its principal-agent relationship with defendant satisfies the pre-tort relationship element, and thus the facts plaintiff alleges in its complaint stated a proper cause of action. However, defendant correctly argues that the requisite pre-tort relationship cannot exist where the underlying lawsuit is based solely on breach of contract.

¶62 This court has previously found that the requisite pre-tort relationship cannot exist in an implied indemnity action where the underlying lawsuit is solely for breach of contract, which is not a tort. *Schulson v. D'Ancona & Pflaum LLC*, 354 Ill. App. 3d 572, 577 (2004) (citing *Talandis Construction Corp. v. Illinois Building Authority*, 23 Ill. App. 3d 929, 935 (1974), and *Board of Education of High School District No. 88 v. Joseph J. Duffy Co.*, 97 Ill. App. 2d

158, 162 (1968)). In keeping with this precedent, an implied right of indemnity requires that the underlying lawsuit concerns "tortious conduct of some kind, where the courts attempt to determine which party must bear primary responsibility for the injury." *Talandis*, 23 Ill. App. 3d at 934.

¶63 Plaintiff argues that *Schulson* is distinguishable from the instant case, and thus should not prevent plaintiff's right to indemnity from defendant.

¶64 In *Schulson*, the third-party plaintiff, Schulson, was the defendant in an underlying lawsuit for breach of contract brought against him by a bank after he failed to pay a loan. *Schulson*, 354 Ill. App. 3d at 574. Schulson sought indemnification from his lawyer, Sonnenschein, for negligently providing legal advice that caused him to default on the loan. *Schulson*, 354 Ill. App. 3d at 574. However, the appellate court found that Schulson's indemnity action was improper where the underlying lawsuit was solely for breach of contract, and the third-party defendant was a stranger to that contract. *Schulson*, 354 Ill. App. 3d at 577.

¶65 Plaintiff attempts to distinguish *Schulson* from the instant case by arguing that in *Schulson*, "the attorney's actions in drafting the clause played no role in why the contract was breached," whereas in the case at bar, defendant's actions in procuring plaintiff's insurance coverage are directly related to plaintiff's alleged breach of the insurance contract. This distinction bore no influence on the *Schulson* court's finding that Schulson had no right to indemnity from his lawyer where the underlying lawsuit was solely for breach of contract. *Schulson*, 354 Ill. App. 3d at 577 (finding that "[a]n implied indemnity action against Sonnenschein was not available to Schulson in the underlying breach of contract claim

because Sonnenschein was a stranger to the contract. There can be no pre-tort relationship under such circumstances.").

¶66 Plaintiff cites *Roberson v. Knupp Insurance Agency*, 125 Ill. App. 2d 373 (1970), in support of its position that a right of indemnity exists between a party liable for breaching an insurance contract and a stranger to that contract, where the stranger to the contract acted as the breaching party's insurance agent in forming the contract. However, *Roberson* does not stand for this proposition, nor does any other Illinois case.

¶67 In *Roberson*, the plaintiff in the underlying lawsuit sued his employer, L.H. Cavender, for personal injury arising out of his employment as a lumber cutter. *Roberson*, 125 Ill. App. 2d at 375. The trial court entered a judgment against Cavender, who in turn filed a third-party complaint against Roberson Brothers Lumber Company. *Roberson*, 125 Ill. App. 2d at 375. Cavender alleged that Roberson Brothers had procured workers' compensation insurance covering himself and all persons working for him in connection with work done exclusively for Roberson Brothers, and sought judgment against Roberson Brothers in the amount he owed to his injured employee. *Roberson*, 125 Ill. App. 2d at 375. Roberson Brothers then filed its own third-party complaint against Knupp Insurance Agency, which alleged "that Knupp failed to obtain riders, endorsements and amendments to Workmen's Compensation Insurance Policy *** and alleged that Roberson Brothers relied upon the advice of and procurement by Knupp of endorsements to said policy; and that the policy procured for plaintiffs by Knupp did not provide the benefits requested and that Knupp caused plaintiff and Cavender to rely upon the policy." *Roberson*, 125 Ill. App. 2d at 376. The appellate court found that Roberson Brothers had a proper basis for its indemnity claim, reasoning that "when an agent or broker, who, with a view to compensation for his services, undertakes to

procure insurance for another, and, unjustifiably or through his own fault or neglect, fails to do so, he is liable for any damages resulting therefrom." *Roberson*, 125 Ill. App. 2d at 377.

¶68 Plaintiff correctly asserts that the *Roberson* court found that an implied right of indemnity existed based on a pre-tort relationship between the third-party plaintiff and its insurance broker. *Roberson*, 125 Ill. App. 2d at 375. It is also true that the pre-tort relationship in *Roberson* was in many ways similar to the parties' relationship in the instant case. However, the legally relevant distinction between *Roberson* and the instant case is that in *Roberson* the lawsuit underlying the third-party indemnity claim was not for breach of contract, but rather for personal injury, which is a tort. *Roberson*, 125 Ill. App. 2d at 375. Thus, while *Roberson* alleged an implied right of indemnity based on a principal-agent relationship between the insured and his insurance broker where the underlying lawsuit was predicated on tort liability, that case is not applicable here, where the underlying suit is based solely on breach of contract without any predication on tort liability.

¶69 We find plaintiff's reliance on *Kerschner v. Weiss & Co.*, 282 Ill. App. 3d 497 (1996), and *Anixter Brothers, Inc. v. Central Steel & Wire Co.*, 123 Ill. App. 3d 947 (1984), to be unpersuasive for similar reasons. Again, plaintiff correctly asserts that in both of these cases the appellate court found that an implied right of indemnity existed based on a pre-tort principal-agent relationship, similar to that between the parties in this case. *Kerschner*, 282 Ill. App. 3d at 504; *Anixter Brothers, Inc.*, 123 Ill. App. 3d at 952-53. However, the appellate court upheld a right of indemnity in these cases because, unlike in the instant case, the lawsuits underlying the indemnity claims concerned tort liability. *Kerschner*, 282 Ill. App. 3d at 500, 507 (wrongful termination of partnership, breach of fiduciary duty, and tortious interference with contract); *Anixter Brothers, Inc.*, 123 Ill. App. 3d at 948 (product liability).

As such, neither case establishes or supports a right of implied indemnity where the underlying suit is solely for breach of contract.

¶70 Plaintiff also argues that section 2-2201 of the Insurance Placement Liability Act (735 ILCS 5/2-2201 (West 2012)) provides a cause of action for indemnity. Section 2-2201(a) states that "[a]n insurance producer, registered firm, and limited insurance representative shall exercise ordinary care and skill in renewing, procuring, binding, or placing the coverage requested by the insured or proposed insured." 735 ILCS 5/2-2201(a) (West 2012). This statute codifies a duty of care that insurance brokers must exercise in procuring coverage on behalf of their clients. However, it does not speak to the issue in this case. A third-party indemnity action is not an appropriate remedy for a defendant liable solely for a breach of contract, absent an express agreement to indemnify. Further, Pier has cited no authority, and our own research has discovered none, where this statute has been used to support a cause of action for indemnity.

¶71 Since the law does not provide an implied right of indemnification in a breach of contract case from a party who was a stranger to the contract, the trial court properly applied the statute of limitations governing the breach of an oral contract for a dismissal of Pier's indemnification claim.

¶72 B. Contribution

¶73 We next address whether plaintiff alleged a proper cause of action for contribution in count II that would have allowed the trial court to assess the timeliness of plaintiff's claim under the statute of limitations governing contribution. We again find that count II was properly dismissed under the statute of limitations governing consumer fraud claims, not that

governing contribution claims, because a third-party plaintiff cannot seek contribution in an underlying lawsuit based solely on breach of contract. Here, we have the same issue again.

¶74 The trial court granted defendant's motion to dismiss count II of plaintiff's complaint under the statute of limitations for consumer fraud claims rather than applying the statute of limitations governing contribution actions. The trial court found that plaintiff was "not entitled to contribution under the Joint Tortfeasor Contribution Act for its alleged breach of contract," and that since count II alleges that defendant was liable to plaintiff for consumer fraud violations, the three-year statute of limitations for consumer fraud claims bars the claim.

¶75 Plaintiff argues that the trial court erred by failing to understand the nature of its contribution claim. Rather than seeking contribution from defendant for any liability incurred in the underlying Liberty Mutual suit, plaintiff argues that count II sought to include defendant as a codefendant with Liberty Mutual for the consumer fraud violations. However, plaintiff's argument has a number of fatal flaws.

¶76 First, if we accepted plaintiff's characterization of count II as an attempt to add defendant to plaintiff's pending counterclaim against Liberty Mutual, we would be deprived of jurisdiction. As we discussed in the beginning of our analysis, we only have jurisdiction to consider the dismissal of plaintiff's complaint because it retains its own distinct character even after being consolidated with the Liberty Mutual suit. See¶41-43. However, if count II of plaintiff's complaint is merely an attempt to add a party to plaintiff's counterclaim in the Liberty Mutual suit, then that distinct character is lost and we would be deprived of jurisdiction in the absence of a Rule 304(a) finding.

¶77 Furthermore, even if reading plaintiff's complaint as distinct from the Liberty Mutual case, plaintiff's argument is based on an incorrect reading of the Joint Tortfeasor Act. Section 2(a) of the Joint Tortfeasor Act (740 ILCS 100/2 (West 2012)) provides that "Except as otherwise provided in this Act, where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them, even though judgment has not been entered against any or all of them." Contribution is a remedy available to a "tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share." 740 ILCS 100/2 (West 2012). Therefore, contribution is a legal mechanism by which a party that has suffered losses in tort liability to an injured party can recover a proportionate share of those losses from a third-party tortfeasor jointly liable to the same injured party for the same injury.

¶78 In the case at bar, plaintiff's contribution complaint fails to state a cause of action, because plaintiff's liability in the underlying Liberty Mutual suit is limited solely to the damages from a breach of contract action. Plaintiff cannot state a cause of action for contribution on the facts of this case because the right of contribution exists only among parties jointly liable in tort, and not between one party liable for breach of contract and a third-party stranger to that contract. *J.M. Krejci Co. v. Saint Francis Hospital of Evanston*, 148 Ill. App. 3d 396, 397-98 (1986) (finding that the text of the contribution statute "expressly requires each party to the contribution action to be 'subject to liability in tort' to the injured party"). As a result, the trial court could have dismissed this case for failure to state a cause of action.

¶79 Additionally, the right of contribution arises from joint liability in tort causing injury to person or property, and does not exist where economic loss is the only damage. *J.M. Krejci Co.*, 148 Ill. App. 3d at 397-98. Although in some cases a breach of contract could result in tort liability for the party in breach, the economic loss doctrine provides "that there is no recovery in tort for purely economic losses that result from a breach of contract." *J.M. Krejci Co.*, 148 Ill. App. 3d at 398.

¶80 Thus, plaintiff's complaint appears to conflate two distinct legal concepts, in an attempt to create a contribution claim where the facts do not support one. Plaintiff's complaint nominally states a claim against defendant alleging that Liberty Mutual and defendant's tortious consumer fraud precipitated plaintiff's breach of contract. However, by plaintiff's own admission, this count of its complaint "is essentially Pier's Retitled Counterclaim for Contribution [*sic*]." Plaintiff also sought to impose the section 13-204(b) statute of limitations governing contribution in this action, further suggesting that it intended this claim to seek contribution from defendant in the Liberty Mutual case, rather than damages resulting from Liberty Mutual and defendant's alleged tortious conduct.

¶81 However, attempting to fashion a workable contribution claim by alleging that Liberty Mutual and defendant engaged in tortious conduct still fails to state a valid cause of action. In order to state a proper claim for contribution from defendant in this case, the parties would have to be jointly liable in tort to Liberty Mutual. Instead, plaintiff argues that defendant and Liberty Mutual are jointly liable to plaintiff in tort. This is a fundamental misunderstanding of contribution as a third-party action, and it fails to state a claim for which relief can be granted.

¶82 Further, no party alleges injury to person or property, and thus the only damages in the lawsuit are economic losses. Contribution is therefore not available to plaintiff on the facts alleged in its complaint against defendant.

¶83 Thus, the trial court correctly found that plaintiff's complaint failed to state a proper contribution claim, and it properly dismissed count II as untimely under the statute of limitations governing consumer fraud actions.

¶84 CONCLUSION

¶85 For the foregoing reasons, we find that the trial court properly dismissed counts I and II of plaintiff's complaint against defendant as time-barred by the three- and five-year statutes of limitations governing breach of oral contracts and consumer fraud claims, respectively.

¶86 Affirmed.