2011 IL App (1st) 102660-U

THIRD DIVISION
November 30, 2011

No. 1-10-2660

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

EVANSTON INSURANCE COMPANY, a corporation,	)	
	)	Appeal from the Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	No. 05 L 14391
GEORGE E. RISEBOROUGH, individually and as agent of JACOBSON & RISEBOROUGH, and REID JACOBSON, individually and as agent of JACOBSON & RISEBOROUGH, and JACOBSON & RISEBOROUGH,	)	
	)	
Defendants-Appellees.	)	Honorable Allen S. Goldberg, Judge Presiding.

ORDER

JUSTICE SALONE delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment.

HELD: The trial court erred in dismissing plaintiff's second amended complaint pursuant to section 13-214.3 which contemplates an attorney-client relationship and is not applicable to a suit brought by a non-client against an attorney in the performance of professional services.

¶ 1 Plaintiff Evanston Insurance Company appeals from an order of the circuit court of Cook County dismissing its second amended complaint which alleged breach of implied warranty of authority, fraudulent misrepresentation, and negligent misrepresentation against defendants George E. Riseborough and Reid Jacobson individually and as agents of Jacobson & Riseborough, a law firm. The court found that plaintiff's complaint was barred by the 6 year statute of repose pursuant to section 214.3 of the Code of Civil Procedure (735 ILCS 5/13-214.3 (West 2008)). On appeal, plaintiff contends: (1) that its claims are not governed by 735 ILCS 5/13-214.3 which is only applicable to legal malpractice actions; (2) in the alternative, if 735 ILCS 5/13-214.3 is applicable, the second amended complaint was improperly dismissed because it relates back to the original complaint that was timely filed in December 2005; (3) the trial court erred in dismissing the original and first amended complaints as premature; and (4) the trial court erred in dismissing the motion to reconsider.

¶ 2 BACKGROUND

¶ 3 This case arises out of a personal injury action in which Kieferbaum Construction (Kierferbaum) was the general contractor for the construction of a warehouse. Two employees of Kieferbaum's subcontractor, International Crown, sustained injuries at the project site. Consequently, Matthew R. Larson, one of the employees injured at the site, filed a suit against Kieferbaum. Defendants represented Kieferbaum in this personal injury action. At the time of the incident, Kieferbaum had primary and excess liability coverage from its insurer, Statewide Insurance Company (Statewide), and was named as an "additional insured" under each of its subcontractors' insurance polices, including Steadfast Insurance (Steadfast), Transportation

Insurance Company (Transportation), and Evanston Insurance Company (Evanston).

¶ 4 After the personal injury case was filed against Kieferbaum, Statewide, Kieferbaum's primary insurer, filed a declaratory judgment action seeking a declaration that it owed no coverage under the insurance polices issued to Kieferbaum. Eventually, the subcontractors' insurers either filed suit or intervened in the case brought by Statewide. Each insurer sought declarations that they owed no coverage for the injuries sustained at the project site. These actions were consolidated into one case, hereinafter referred to as the declaratory judgment action.

¶ 5 In the personal injury action, the insurance carriers engaged in settlement negotiations in open court on October 19, 2000. Defendants, who represented Kieferbaum, did not object to the terms that were discussed. Thereafter, on October 23, 2000, the settlement terms were memorialized into a document titled the "Fund and Fight Agreement" (FFA), wherein the subcontractor's insurance carriers agreed to fund a settlement for the parties in the personal injury action. However, pursuant to the agreement, the insurers who funded the settlement were permitted to litigate policy and coverage defenses against the other insurers. Specifically, Statewide and Kieferbaum agreed to reimburse Steadfast, Transportation and/or Evanston if any of their claims are found to be "judicially valid." Defendants signed the FFA as the "duly authorized agent and representative of Kieferbaum Construction."

¶ 6 Thereafter, the parties in the personal injury action reached a settlement in the amount of $4,8777,500.00. Pursuant to the terms of the FFA, Evanston paid $1 million from an excess insurance policy issued to Kieferbaum's subcontractor.

¶ 7 The declaratory judgment action remained pending. Evanston intervened in this action after it contributed money to the settlement fund. Evanston alleged that Kieferbaum's primary insurer, Statewide, was obligated to exhaust its policy before Evanston was required to contribute to the settlement fund. Thus, Evanston sought repayment of the $1 million plus interest that it contributed towards the settlement of the personal injury action.

In response, Kieferbaum filed an affidavit that asserted that the defendants who represented them in the personal injury action and signed the settlement agreement as their "duly authorized agent and representative of Kieferbaum Construction" did not have authority to enter into the FFA on Kieferbaum's behalf.

¶ 8 After Kieferbaum filed its affidavit in the declaratory judgment action, Evanston and Statewide reached an agreement to settle their dispute. Statewide agreed to pay Evanston $612,000 in exchange for a release of claims. This case was then dismissed by agreement of the parties.

¶ 9 Subsequently, Statewide tendered a check to Evanston in the amount of $612,500; however, Statewide entered into liquidation and the check was not honored.

¶ 10 On December 22, 2005, Evanston filed a three count complaint against defendants alleging breach of implied warranty of authority, fraudulent misrepresentation, and negligent misrepresentation. Evanston subsequently filed its first amended complaint citing the same allegations as set forth in its original complaint. Each complaint specifically alleged that the defendants lacked authority to sign the FFA on Kieferbaum's behalf. The trial court dismissed each complaint respectively, pursuant to section 2-615 of the Code of Civil Procedure.

Evanston's second amended complaint is the subject of this appeal.

¶ 11 Evanston also filed a petition pursuant to section 2-1401 of the Code of Civil Procedure in the declaratory judgment action. In its 2-1401 petition, Evanston sought to vacate the agreed order entered earlier dismissing Statewide from the declaratory judgment proceedings. In granting Evanston's section 2-1401 petition, the trial court found that defendants lacked authority to execute the FFA on behalf of Kieferbaum and that Kieferbaum had not ratified said FFA.

¶ 12 Thereafter, in the case at bar, Evanston filed a second amended complaint against the defendants. Evanston's complaint set forth the same allegations as the original and first amended complaints, including breach of implied warranty of authority, fraudulent misrepresentation, and negligent misrepresentation. Defendants filed a motion pursuant to section 2-619 of the Code of Civil Procedure. Defendants argued that Evanston's second amended complaint was barred by the statute of repose pursuant to 735 ILCS 5/13-214.3 (West 2008). In its response, Evanston argued that the statute does not apply to a cause of action brought against an attorney by a non-client. The court granted defendants 2-619 motion to dismiss, finding that the statue of repose barred plaintiff's cause of action.

¶ 13 Thereafter, Evanston filed a motion to reconsider and to vacate the trial court's dismissal of Evanston's second amended complaint. The court denied both motions.

¶ 14 Evanston timely filed this appeal.

¶ 15 ANALYSIS

¶ 16 Plaintiff has raised the following issues on appeal: (1) whether the statute of repose codified in 735 ILCS 5/13-214.3 applies to actions brought against an attorney by a non-client;

(2) in the alternative, assuming that the statute of repose applies, whether the second amended complaint relates back to the timely filed original complaint; (3) whether the trial court erred in dismissing the original and first amended complaints as premature; and (4) whether the trial court erred in dismissing the motion to reconsider.

¶ 17 Evanston first contends that the statute of repose does not apply to extinguish a cause of action when a non-client brings suit against an attorney. Specifically, Evanston asserts the trial court incorrectly interpreted the language "arising out of an act or omission in the performance of professional services" as applying to defendants who never had an attorney-client relationship with the plaintiff.

¶ 18 A 2-619 motion to dismiss admits the legal sufficiency of the plaintiff's claim, but asserts an affirmative defense or other matter that defeats the claim. *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006). A section 2-619 motion to dismiss admits all well pleaded facts and any reasonable inferences therefrom. *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008). A trial court's dismissal pursuant to 2-619 is reviewed *de novo*. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006).

¶ 19 Section 13-214.3 of the Code sets forth the limitations and repose period applicable to actions for legal malpractice. It states, in relevant part, as follows:

> "(b) An action for damages based on tort, contract, or otherwise (i) against an attorney arising out of an act or omission in the performance of professional services or (ii) against a non-attorney employee arising out of an act or omission in the course

> of his or her employment by an attorney to assist the attorney in performing professional services must be commenced within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought.
>
> (c) * * * an action described in subsection (b) 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 2008).

¶ 20 Our primary objective in interpreting a statute is to ascertain and give effect to the intent of the legislature, which can be found in the plain and ordinary language of the statute. *Solon v. Midwest Medical Records Association, Inc.*, 236 Ill. 2d 433, 440 (2010). We must consider the statute in its entirety along with the intent of the legislature in determining the plain meaning. *Solon,* 236 Ill. 2d at 440. When the statutory language is clear and unambiguous, it must be applied as written, without resort to extrinsic aids of statutory construction. *Solon*, 236 Ill. 2d at 440. Statutory interpretation is a question of law, so our standard of review is *de novo*. *Solon,* 236 Ill. 2d at 439.

¶ 21 With these principles in mind, we now address Evanston's contention that the statute of repose applies only to those actions brought against an attorney for legal malpractice. Evanston asserts that the language set forth in section 13-214.3(b) describing an action brought against an attorney for "an act or omission in the performance of professional services", contemplates an

attorney-client relationship.

¶ 22 Evanston cites several cases in support of its proposition that the statute of repose applies to causes of action in which it is alleged that the defendant attorney performed services for his or her client. In *Bova v. U.S. Bank, N.A.*, 446 F. Supp. 2d 926 (2006), plaintiff brought an action against the defendant bank and the bank's attorneys, alleging that they violated the Illinois Consumer Fraud and Deceptive Businesses Practices Act in connection with mortgage foreclosure proceedings. The defendant attorneys claimed that plaintiff's actions were time barred by the statute of repose pursuant to section 13-214.3 of the Code. *Bova,* 446 F. Supp. 2d 926, 932-33 (2006). The court held that the statute of repose governs actions for legal malpractice in which the defendant attorney renders legal services to the plaintiff. *Bova,* 446 F. Supp. 2d 926, 934 (2006). Specifically, the language of 735 ILCS 5/13-214.3(b) is "unambiguous with respect to its exclusive application to attorney malpractice claims." *Bova,* 446 F. Supp. 2d 926, 934 (2006), quoting *Cotton v. Private Bank & Trust*, No. 01 C 1099, 2004 WL 526739 (N.D. Ill. Mar. 12, 2004).

¶ 23 Evanston also relied upon *Ganci v. Blauvelt*, 294 Ill. App. 3d 508, 653 (1998), where the husband's children brought a complaint against the wife's son, alleging that he deprived them of a portion of the wife's estate to which they were entitled. The defendant son then filed a third-party complaint against his deceased mother's attorney seeking contribution for the injuries incurred by the plaintiffs. *Ganci*, 294 Ill. App. 3d at 515. The court in *Ganci* held that "the third-party complaint does not set forth a failure of [the attorney's] professional duty to [the third-party plaintiff] but rather conduct on [the attorney's] part whereby he shared culpability for

the injuries to plaintiff." The court concluded that section 13-214.3 of the Code does not apply in the absence of a claim for legal malpractice. *Ganci,* 294 Ill. App. 3d at 515.

¶ 24 Finally, Evanston cites to *Wilbourn v. Advantage Financial Partners, LLC*, No. 09-CV-2068, 2010 WL 1194950 (N.D. Ill. Mar. 22, 2010), where the plaintiff brought a multiple count complaint stemming from an alleged equity-stripping scheme whereby plaintiff alleged that the loan company's attorney committed fraud. The court in *Wilbourn* held that section 13-214.3 is not applicable because the defendant never served as plaintiff's attorney. *Wilbourn*, 2010 WL 1194950, *10.

¶ 25 In their brief, defendants contend that the cases cited by Evanston are factually distinguishable from the case at bar. Defendants assert that the case at bar is one of legal malpractice unlike the causes of actions set forth in *Ganci*, *Bova*, *Cotton*, and *Wilbourn* which address intentional misconduct, conspiracy, fraud, and aiding and abetting tortious conduct on the part of the defendant attorney. We disagree.

¶ 26 Here, Evanston's complaint does not set forth a claim for legal malpractice. Here, Evanston relied upon an agency theory setting forth a claim for breach of implied warranty of authority, fraudulent misrepresentation, and negligent misrepresentation. In so doing, Evanston alleged that defendants falsely or negligently asserted that they had authority to bind Kieferbaum to the FFA.

¶ 27 Defendants further contend that Evanston's interpretation of the statute adds a limiting instruction to the express language of section 13-214.3 of the Code. Defendants assert that when interpreting the meaning of "performance of professional services", the focus should be on the

specific tasks performed by the attorney regardless of whether a client or non-client brings the suit.

¶ 28 In the case at bar, following *Bova* and *Ganci*, we find that section 13-214.3(b) contemplates an attorney-client relationship. Defendants, as legal counsel for Kieferbaum, did not provide legal representation to Evanston. In the absence of an attorney-client relationship, there is no duty owed to plaintiff by the defendant attorneys. *Kopka v. Komensky & Rubenstein*, 354 Ill. App. 3d 930, 934-35 (2004). As such, a plaintiff cannot bring suit against an attorney in the "performance of their professional services" unless there was a attorney-client relationship in which the defendants owed a duty to the complaining party. We hold that section 13-214.3(b) is unambiguous. We conclude that "professional services" contemplates an action where a client brings suit against his or her attorney arising out of an attorney-client relationship.

Based on our findings, we need not address Evanston's remaining issues.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court is reversed and remanded.

Reversed and remanded.