IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Nationwide Mutual Fire Insurance Company a/s/o Ligaya and Marcelino Cueto,	)	
Plaintiff,	)	
v.	)	No. 19 L 10084
Capitol Cement Co., Inc., and City of Chicago, a municipal corporation,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

The Local Governmental and Governmental Employees Tort Immunity Act provides a one-year statute of limitations. The common law discovery rule may toll the running of that statute under certain circumstances. In this case, the plaintiff's subrogors knew of their property damage and its wrongful cause more than one year before the subrogee filed its complaint. For that reason, the motion to dismiss must be granted with prejudice.

Facts

Ligaya and Marcelino Cueto owned property located at 3845 West Grand Avenue in Chicago. Nationwide Mutual Fire Insurance Company issued a policy to the Cuetos for their property, and that policy was in effect in February 2018. On February 20 and 23, 2018, water and sewage backed up into the Cuetos' property. The Cuetos' property continued to have water and sewer backups for the remainder of 2018. The liquidated sum paid by Nationwide to the Cuetos for their property damage amounted to $80,283.87, plus the Cuetos' $1,000 deductible.

On September 13, 2019, Nationwide filed a complaint against Capitol Cement Company and the City of Chicago. Count two of the complaint alleges the City had been servicing, repairing, and restoring sewer lines in the vicinity of the Cuetos' property before February 2018. Nationwide alleges the City owed a duty of due care in conducting its sewer work. Nationwide claims the City breached its duty by failing to service, repair, and reconnect the sewer line properly so as not to cause a backup, and by failing to comply with servicing and safety precautions. Nationwide also alleges the City's conduct rendered Nationwide unable to identify the cause of the damage to the Cuetos' property until January 2019.

On December 19, 2019, the City filed a motion to dismiss count two of the complaint. The City's central argument is that Nationwide's claim is barred by the one-year statute of limitations for claims against local public entities provided by the Local Governmental and Governmental Employees Tort Immunity Act (TIA). *See* 745 ILCS 10/8-101. The parties proceeded with written and oral discovery before Nationwide responded to the City's motion.

Discovery revealed the City's Department of Transportation had hired Capitol Cement to install a sewer catch basin in the street near the Cuetos' property. In August 2018, the Department of Water Management indicated it could not work on the Cuetos' sewer problem because their building was zoned commercial and, therefore, exempt from the City's private drain program available for residential property. Ultimately, the City rezoned the building as residential, allowing the City to address the continuing problems.

On October 1, 2018, plumbers the Cuetos had hired informed them the sewer appeared to be blocked in an area under the street. The record does not disclose who then contacted the City, but a Department of Water Management employee, Oscar Worrill, instructed the Cuetos not to dig any further as the problem appeared to be one for the City to resolve. In late November 2018,

another Water Management employee, Muhammad Abdul-Karim, became involved in the sewer issues at the Cuetos' property. At or around that time, the City hired J.C. Restoration, Inc. to investigate and make sewer repairs.

A December 17, 2018 e-mail chain between representatives of J.C. Restoration and Nationwide indicate by that date J.C. Restoration had excavated the site. J.C. Restoration reported a utility cover had been placed over the sewer. J.C. Restoration also indicated that the Cuetos' sewer line remained intact from their building to the sidewalk, but that the line had been completely removed from the sidewalk out to the street. Abdul-Karim indicated the cut sewer line could have been the cause of the backups. He testified there had not been problems with the sewer prior to the installation of the catch basin, and that its installation impeded the private sewer line from reaching the main. J.C. Restoration repaired the sewer by installing a new pipe from the sidewalk curb to the sewer main.

With that evidence, Nationwide, on August 31, 2020, filed its response brief. Nationwide argues in essence that the discovery rule tolled the running of TIA's one-year statute of limitations. According to Nationwide, if the City's expert employees could not determine the cause of the backups before February 2019, no reasonable person could have made the same discovery earlier. Thus, if the statute did not begin to run until February 2019, Nationwide timely filed its complaint on September 13, 2019.

On September 15, 2020, the City filed its reply brief. The City argues that Nationwide misapplies two legal theories. First, according to the City, the limitation period does not run from when Nationwide learned of the precise City action causing the harm. Second, a single tortious act cannot be recast as a continuing tort by alleging continuing damages flowing from a single tortious act.

This court has reviewed the parties' submissions including all exhibits.

Analysis

The City brings its motion to dismiss pursuant to Code of Civil Procedure section 2-619. 735 ILCS 5/2-619. A section 2-619 motion authorizes the involuntary dismissal of a claim based on defects or defenses outside the pleadings. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 485 (1994). A court considering a section 2-619 motion must construe the pleadings and supporting documents in a light most favorable to the nonmoving party. *See Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). All well-pleaded facts contained in the complaint and all inferences reasonably drawn from them are to be considered true. *See Calloway v. Kinkelaar*, 168 Ill. 2d 312, 324 (1995). A court is not to accept as true those conclusions unsupported by facts. *See Patrick Eng., Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. As has been stated: "The purpose of a section 2-619 motion is to dispose of issues of law and easily proved issues of fact early in the litigation." *Czarobski*, 227 Ill. 2d at 369.

One of the enumerated grounds for a section 2-619 motion to dismiss is that, "the action was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5). The statute of limitations for causes of action against local governmental entities is one year. As provided by the TIA in relevant part: "No civil action . . . may be commenced in any court against a local entity or any of its employees for any injury unless it is commenced within one year from the date that the injury was received or the cause of action accrued." 745 ILCS 10/8-101(a).

The bar imposed by statutes of limitations is balanced by the common-law discovery rule that tolls the start of a limitations period. *See Golla v. General Motors Corp.*, 167 Ill. 2d 353, 360 (1995); *Witherell v. Weimer*, 85 Ill. 2d 146, 156 (1981); *Dancor Int'l, Ltd. v. Friedman, Goldberg & Mintz*, 288 Ill. App. 3d 666, 672 (1st Dist. 1997). The discovery rule rests on two facts: (1) a plaintiff's actual knowledge of an injury; and (2) whether a person in the plaintiff's position should have reasonably known the injury was wrongfully caused. *See SK Partners I, LP v. Metro*

Consultants, Inc., 408 Ill. App. 3d 127, 130 (1st Dist. 2011). When a plaintiff learns both facts may, itself, be a disputed question of fact. *Witherell,* 85 Ill. 2d at 156. If, however, "it is apparent from the undisputed facts . . . that only one conclusion can be drawn, the question becomes one for the court" and may be resolved as a matter of law. *Id.*; *see Steinmetz v. Wolgamot,* 2013 IL App (1st) 121375, ¶ 39.

Illinois law is plain that if the facts indicate a reasonable person should have known a defendant wrongfully caused an injury, the plaintiff had an obligation to inquire further. *See Dancor*, 288 Ill. App. 3d at 673. Put another way, a plaintiff is said to know or reasonably should know of a wrongfully caused injury when they receive sufficient information to put a reasonable person on notice to determine whether actionable conduct has occurred. *See Hoffman v. Orthopedic Systems, Inc.*, 327 Ill. App. 3d 1004, 1011 (1st Dist. 2002). The discovery rule is not concerned with a plaintiff's knowledge "of a *specific* defendant's negligent conduct or knowledge of the existence of a cause of action." *Young v. McKiegue,* 303 Ill. App. 3d 380, 388 (1st Dist. 1999) (emphasis added) (citing cases). Rather, "the limitations period begins to run when the plaintiff becomes aware that the cause of his problem stems from another's negligence and not from natural causes." *Castello v. Kalis*, 352 Ill. App. 3d 736, 744-45 (1st Dist. 2004) (quoting *Saunders v. Klungboonkrong,* 150 Ill. App. 3d 56, 60 (1986)). Thus, "wrongfully caused" does not mean a plaintiff must know of the defendant's negligent conduct before the statute is triggered. *See Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 416-17 (1981).

The Supreme Court has repeatedly held that, "where the plaintiff's injury is caused by a 'sudden traumatic event,' such as the automobile accident that occurred in this case, the cause of action accrues, and the statute of limitation begins to run, on the date the injury occurs." *Golla v. General Motors Corp.*, 167 Ill. 2d 353, 362 (1995). This rule has been applied to cases involving property damage, one of which, *M&S Industrial Company, Inc. v. Allahverdi*, 2018 IL App (1st) 172028, is particularly useful here.

In *M&S*, Allahverdi's employees left a loading dock open during a period of severely high winds on October 27, 2010. *Id.* at ¶ 3. The winds tore off part of the roof of Allahverdi's building and sent it into electrical power lines servicing M&S's building. *Id.* A resulting power surge damaged M&S's computer numerical control machines used to manufacture sophisticated metal components for the defense industry. *Id.*

M&S filed its initial complaint in August 2015. *Id.* Allahverdi filed a section 2-619 motion to dismiss based on the lack of causation, *id.* at ¶ 7, and the circuit court granted the motion. *Id.* On M&S's motion to reconsider, the court granted Allahverdi leave to amend and add an argument based on section 2-619(a)(5) that M&S's complaint was time barred and the discovery rule did not apply. *Id.* at ¶¶ 9 & 11. The circuit court ultimately held the four-year construction negligence statute of limitations contained in 735 ILCS 5/13-214(a) applied because the roof had been improperly constructed. The court also found the property damage resulted from a sudden traumatic event; consequently, the discovery rule did not save the complaint. *Id.* at ¶ 12.

On appeal, M&S argued that the discovery rule applied because it could not have known the damage was wrongfully caused until after M&S hired an engineer in March 2016 to inspect the roof. *Id.* at ¶ 35. Allahverdi argued in response that M&S knew on October 27, 2010 its property damage may have been wrongfully caused and further inquiry was necessary. *Id.* The court agreed with Allahverdi.

The court determined it need not address the sudden-traumatic-event rule because the facts were undisputed. *Id.* at ¶ 50. M&S's president went to the site soon after the event where she took photographs and Allahverdi told her the roof blew off when an employee opened the dock door. *Id.* at ¶ 39. Armed with that information, "M&S reasonably should have suspected possible wrongful causation and, at a minimum, should have been compelled to inquire further when its neighbor's roof uplifted in

the wind and hit the power lines, causing damage to its property." *Id.* at ¶ 42.

The court found persuasive two other cases based on similar factual scenarios and the plaintiffs' delays in investigating obvious property damage. *Id.* at ¶¶ 43-45 (citing *AXIA, Inc. v. I.C. Harbour Constr. Co.*, 150 Ill. App. 3d 645 (2d Dist. 1986) and *Swann & Weiskopf, Ltd. v. Meed Assocs.*, 304 Ill. App. 3d 970 (1st Dist. 1999)). In contrast, the court distinguished several other cases on which M&S relied. In those cases, the property damage occurred incrementally over time and initial repairs appeared to have remedied the problems. *Id.* at ¶¶ 46-49 (citing *Henderson Square Condo. Ass'n. v. LAB Townhouses, LLC*, 2015 IL 118139, *County of Du Page v. Graham, Anderson, Probst & White, Inc.*, 109 Ill. 2d 143 (1985), *Society of Mount Carmel v. Fox*, 31 Ill. App. 3d 1060 (2d Dist. 1975)).

The court's decision in *M&S* is persuasive here. Following *M&S*, this court need not address the sudden-traumatic-event rule because the facts are undisputed. Prior to February 20, 2018, the Cuetos' property never experienced sewer backups. If the Cuetos thought the first sewer backup was a one off, they must have reasonably recognized something had happened to their sewer when their property suffered a second sewer backup only three days later on February 23, 2018. Given those two incidents and others occurring throughout 2018, the Cuetos had a duty to inquire further into the cause of their property's sewer backups. Since the Cuetos knew their property had been damaged and they should have reasonably known the damage was wrongfully caused, the statute of limitations would have started to run no later than February 23, 2018, making the December 19, 2019 filing of the complaint barred by the TIA's one-year statute of limitations.

If the one-year statute did not begin to run on February 23, 2018, it started to run on October 1, 2018. Nationwide admits on that date plumbers hired by the Cuetos told them the plumbers had discovered a sewer blockage in an area under the street.

Resp. Br. 1-2. That singular fact defeats Nationwide's argument that: "[i]f the expert on the City's sewer system could not determine the cause of the backups before January of 2019, no reasonable person could have." *Id.* at 5. Nationwide's internal contradiction indicates the Cuetos' privately hired plumbers did precisely what Nationwide says could not be done – identify the cause of the backups. And as the law makes plain, identifying the possible defendant is the key, as opposed to identifying the means by which the possible defendant caused the damage. *See Knox College*, 88 Ill. 2d at 416-17. Once again, Nationwide's December 19, 2019 filing of the complaint is barred by the TIA's one-year statute of limitations.

Nationwide's argument is not saved by the continuing tort doctrine. Illinois law plainly distinguishes between a continuing tort caused by continuing unlawful acts as opposed to continuing injury from a single tortious act. *See Pavlik v. Kornhaber*, 326 Ill. App. 3d 731, 745, (1st Dist. 2001) (citing *Hyon Waste Mgmt. Servs., Inc. v. City of Chicago*, 214 Ill. App. 3d 757, 762 (1991)). As to the former, the statute of limitations does not begin to run until the date of the last injury or the date the tortious acts cease. *See Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 345 (2002). As to the latter, pursuant to the discovery rule, a cause of action accrues and the limitations period begins when the injured party knows or reasonably should know of an injury that was wrongfully caused. *See Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 285 (2003).

Neither Nationwide's complaint nor its response brief alleges any continuing tortious conduct by the City in 2018 or 2019. Rather, the complaint and response brief make plain that the Cuetos' private plumbers and the City's Departments of Transportation and Water Management actively sought to identify the location and cause of the sewer backups. It is obvious that conduct furthering the goal of remediation is not tortious unless it causes additional injury. In sum, to find for Nationwide would incentivize property owners not to investigate the source of their

injuries and, thereby, escalate damage claims. That result does not benefit insurers, insureds, or potential tortfeasors.

Conclusion

For the reasons presented above, it is ordered that:

1. The City's motion to dismiss count two is granted with prejudice;
2. Pursuant to Illinois Supreme Court Rule 304(a) there is no just reason to delay either enforcement or appeal or both of this order; and
3. The case continues as to the remaining defendant.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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