Tooke v. Soo Line R.R. Co.

Appellate Court of Illinois, First District, Third Division

September 28, 2016, Decided

No. 1-15-3514

Reporter
2016 IL App (1st) 153514-U *; 2016 Ill. App. Unpub. LEXIS 2055 **

TROY TOOKE, Plaintiff, v. SOO LINE RAILROAD COMPANY d/b/a CANADIAN PACIFIC RAILWAY, A CORP., Defendant/Third-Party Plaintiff-Appellant, v. KNOEDLER MANUFACTURING, INC., Third-Party Defendant-Appellee.

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).

Prior History: **[**1]** Appeal from the Circuit court of Cook County, Illinois, County Department, Law Division. No. 2012 L 004582. The Honorable John H. Ehrlich, Judge Presiding.

Tooke v. Soo Line R.R. Co., 2016 Ill. Cir. LEXIS 480 (Ill. Cir. Ct., Feb. 11, 2016)

Disposition: Affirmed.

Core Terms

railroad company, third-party, seats, railroad, recite, attach, trial court, locomotive, statute of limitations, terms and conditions, indemnity, parties, terms, warranties, relevant portion, written document, two year, manufacture, discovery, documents, installed, omission, premised, tolled, card, sufficient information, breach of contract, cause of action, contract claim, discovery rule

Judges: PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices Lavin and Pucinski concurred in the judgment.

Opinion by: FITZGERALD SMITH

Opinion

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Lavin and Pucinski concurred in the judgment.

ORDER

[*P1] *Held:* The circuit court did not err in dismissing the third-party plaintiff's complaint. The third-party plaintiff failed to attach or recite to the contract upon which the majority of its claims were premised, or provide an affidavit sufficiently explaining the contract's inaccessibility, as required under section 2-606 of the Illinois Code of Civil Procedure (735 ILCS 5/2-606 (West 2012)). In addition, the trial court properly concluded that the third-party contribution claim was time-barred under section 13-204(b) of the Code (735 ILCS 5/13-204(b) (West 2012)), since the third party plaintiff should reasonably have known of any acts or omissions of the third-party defendant, as a result of an identical lawsuit, involving identical parties, that the third-party plaintiff had filed near the same time, in another jurisdiction.

[*P2] This cause arises from an accident **[**2]** suffered by the plaintiff, Troy Tooke (hereinafter Tooke), a locomotive engineer for the defendant, Soo

Line Railroad Company d/b/a Canadian Pacific Railway, a Corp. (hereinafter the railroad company), when the locomotive seat he was in broke, causing him to fall and sustain injuries. Three years after Tooke filed his complaint against the railroad company, the railroad company filed a third-party complaint against the seat manufacturer, Knoedler Manufacturing, Inc. (hereinafter Knoedler), alleging, contribution, breach of contract and breach of express and implied warranties and implied indemnification. The trial court granted Knoedler's motion to dismiss the third-party complaint, holding that the breach of contract, express and implied warranty and indemnification actions were all premised on the existence of a contract between Knoedler and the railroad company's locomotive supplier, General Electric (hereinafter GE) of which the railroad company was the intended beneficiary, but that the railroad company had failed to attach this contract to its pleading, as required by section 2-606 of the Illinois Code of Civil Procedure (735 ILCS 5/2-606 (West 2012)). With respect to the contribution action, the trial court held that the claim was barred by the **[**3]** applicable two year statute of limitations for such actions set forth in section 13-204(b) of the Code (see 735 ILCS 5/13-204(b) (West 2012)). On appeal, the railroad company argues that the trial court erred in dismissing its complaint: (1) by misinterpreting section 2-606 of the Illinois Code of Civil Procedure (735 ILCS 5/2-606 (West 2012)), and refusing to permit it to proceed with discovery so as to subpoena the necessary written instrument upon which a majority of its counts were premised; and (2) by finding that the contribution claim was time-barred under section 13-204(b) of the Code (735 ILCS 5/13-204(b) (West 2012)). For the reasons that follow, we affirm.

[*P3] I. BACKGROUND

[*P4] The record below reveals the following pertinent facts and procedural history. On April 30, 2012, Tooke filed his complaint against his employer, the railroad company, pursuant to the Federal Employer's Liability Act (FELA), alleging violations of the Locomotive Inspection Act (LIA) (49 U.S.C. § 20701, *et seq.*). Tooke's causes of action were premised upon the June 20, 2011, incident, wherein he was injured when the locomotive seat which he was sitting in, suddenly and without warning, broke, causing him to fall into the engine cab and resulting in various back and neck injuries. After the railroad filed its appearance on May 12, 2012, the parties conducted discovery for **[**4]** a period of three years.

[*P5] On September 13, 2013, the railroad company amended its answer and admitted liability under the relevant portion of the LIA. As a result the parties proceeded with discovery as to damages alone. Subsequently, the trial court entered a trial date of June 23, 2015.

[*P6] Only a few months prior to trial, on March 13, 2015, the railroad company filed a third-party complaint against Knoedler, which was amended on May 14, 2015. As a result, the trial date in Tooke's LIA action was vacated upon the railroad company's motion.

[*P7] In this amended third-party complaint against Knoedler, the railroad company sought to lessen its damages by alleging: (1) contribution (count I); (2) breach of contract (count II); (3) breach of express warranties (count III); (4) breach of implied warranties (count IV); and (5) breach of implied indemnification (count V).

[*P8] According to the railroad company's third-party complaint, sometime in the 1990s, prior to the incident involving Tooke, the railroad company had entered into a contract with GE under which GE agreed to manufacture railroad locomotives for it, including seats allegedly made and installed by Knoedler. The railroad company alleged **[**5]** that prior to entering into this contract with GE for new locomotives it analyzed a number of potential locomotive seats, including seats manufactured by Knoedler. At this time, Knoedler provided the railroad company with a variety of verbal and written information, and a quote for the purchase of the seats. Accordingly, as part of its subsequently

executed contract with GE, the railroad company directed GE to install the Knoedler seats in its new locomotives.

[*P9] The railroad company further alleged that "upon information and belief" there was a contract between GE and Knoedler for the purchase of those seats (including specifically the seat which malfunctioned injuring Tooke) under which the railroad company was an intended beneficiary. With respect to this contract, the railroad company alleged that "upon information and belief" it "included GE's Terms and Conditions," obligating Knoedler to, *inter alia*: (1) warrant that the seats would be of merchantable quality, free from all defects in design and fit for the particular purpose for which they were intended; (2) warrant that Knoedler would comply with all laws applicable to the seats, including the LIA; (3) warrant that Knoedler would **[**6]** comply with good industry practices, including the exercise of that degree of skill, diligence, prudence and foresight which could be reasonably expected form a competent seller engaged in the same type of manufacture (and which would include compliance with the LIA); and (4) agree that Knoedler would be liable, as a result of any breach of contract, warranty or tort, for any special, consequential, incidental, indirect or exemplary damages relating to the goods, which would include any breach of duty under the LIA.

[*P10] The railroad company then alleged that Knoedler designed, built and installed the specific seat that injured Tooke, in violation of the LIA, the express purchase contract terms it entered into with GE to build and provide the seats, and the implied warranties and indemnification created by its action of supplying those seats to GE.

[*P11] In support of this contention, the railroad company did not attach a copy of the agreement between Knoedler and GE. Instead, it attached a generic GE Terms and Conditions form for third-party vendors that its attorney found on the internet and that it termed an "exemplar contract." In addition, the railroad company attached an affidavit signed **[**7]** by its attorney, stating that "as a third-party beneficiary to the contract" the railroad company did "not have access" to the GE purchase orders or the contract between GE and Knoedler that would have referenced the specific GE Terms and Conditions with Knoedler. However, according to the attorney's affidavit, "upon information and belief" the Terms and Conditions of the attached generic GE third-party vendor contract were "substantially similar to, or identical" to the ones contained in the actual contract between GE and Knoedler.

[*P12] On June 17, 2015, Tooke filed a motion to stay the railroad company's third-party cause of action against Knoedler, or in the alternative, sever it, so as to permit him to proceed with his trial against the railroad company on the issue of damages. In that motion, Tooke alleged that the filing of the third-party complaint on the eve of his trial was intended to cause unnecessary delay, and potentially postpone the trial for years.

[*P13] On June 19, 2015, Knoedler filed a section 2-619 motion to dismiss the railroad company's third-party complaint. See 735 ILCS 5/2-619 (West 2012)). In that motion Knoedler argued, *inter alia*, that the complaint should be dismissed because: (1) the contribution **[**8]** claim was filed outside of the two year statute of limitations for such claims (735 ILCS 5/13-204 (West 2012)); (2) counts II through V were all premised on an illusory written contract, which the railroad company had failed to attach to its pleading as required under section 2-606 of the Code (735 ILCS 5/2-606 (West 2012)); (3) counts II through V were barred by the four-year statute of limitations for breach of contract/warranty actions (including those for the sale of goods) (see 735 ILCS 5/13-207 (West 2012)); 810 ILCS 5/2-725 (2012)); (3) the railroad company had failed to adequately plead its third party beneficiary rights under the alleged contract; and (4) the railroad company's claims were preempted by the LIA.

[*P14] On August 24, 2015, the trial court granted Knoedler's motion with prejudice. Specifically, the trial court dismissed counts II through V because the railroad company failed to attach to its complaint the

contract upon which these counts were premised. The court explained that pursuant to section 2-606 of the Code (735 ILCS 5/2-606 (West 2012)) all pleadings based upon a written document must include an attached copy of that written document. The court found that the railroad company had failed to attach such a document, and instead provided the court with a GE contract, **[**9]** obtained from the internet, setting forth terms and conditions, which the railroad company's attorney attested in an affidavit were "substantially similar or identical to the ones agreed to by GE and Knoedler." The court held that the attached contract was irrelevant, lacked foundation and constituted hearsay.

[*P15] In that respect, the court further held that the affidavit by the railroad company's attorney did not excuse the failure to attach the contract, because the attorney lacked personal knowledge pertaining to the authenticity and relevance of the internet document, as well as the contract allegedly executed by GE and Knoedler. As the court explained, the attorney "had nothing to do with the drafting of [that] contract." The trial court also rejected the railroad company's argument that the contract was inaccessible to it without the benefit of written discovery. As the court explained, "It was [the railroad company's] own inaction for years in failing to bring the third-party complaint that resulted in the lack of a contract." The court noted that the railroad company had the ability to obtain the document during the pendency of discovery in defending its action against Tooke, but **[**10]** had failed to do so. The court further noted that the railroad company should have been placed on notice of the existence of any alleged contract between GE and Knoedler, so as to be able to obtain it by the nearly identical action it had filed against Knoedler in the Western District of Pennsylvania as early as December 2011, and which had recently been decided by the Third Circuit in *Delaware & Hudson Railway Co. v. Knoedler Manufacturers, Inc.*, 781 F.3d 656 (3rd Cir. 2015) *cert. denied* 136 S. Ct. 54, 193 L. Ed. 2d 30 (2015)). Finally, the court rejected the railroad company's argument of third party beneficiary status as speculative and unsupported by the record.

[*P16] With respect to the railroad company's contribution claim, the court held that the claim was barred by the two-year statute of limitations in section 13-204(b) of the Code (735 ILCS 5/13-204(b) (West 2012)).

[*P17] In dismissing the railroad company's third-party complaint with prejudice, the court noted that Tooke's motion to sever, or alternatively stay the third-party complaint was pending before another judge in the circuit court. The judge therefore stated that he would not decide "whether to add 304(a) language" to the dismissal order, until the other judge made his ruling in the matter. As the court stated, "Today's motion should read the motion is granted with prejudice for the reasons **[**11]** stated on the record. *** The only thing I am not deciding at this point is whether to do 304(a) language."

[*P18] On August 25, 2015, the judge deciding the motion to sever or stay the third-party complaint, entered an order staying the third-party cause of action.

[*P19] On September 4, 2015, the railroad company filed a motion to reconsider. On November 12, 2015, the trial court found that the order staying the third-party cause of action was void, for lack of jurisdiction, and denied the motion to reconsider, making a specific finding pursuant to Illinois Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Jan. 1, 2015)), that there was no just cause to delay enforcement or appeal of the dismissal. The railroad company now appeals.

[*P20] II. ANALYSIS

[*P21] At the outset, we note that a motion to dismiss pursuant to section 2-619 (735 ILCS 5/2-619 (West 2012)) admits the legal sufficiency of the complaint (*i.e.*, all facts well pleaded), 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. *Relf v. Shatayeva*, 2013 IL 114925, ¶ 20, 998 N.E.2d 18, 375 Ill. Dec. 726; *DeLuna v. Burciaga*, 223

Ill. 2d 49, 59, 857 N.E.2d 229, 306 Ill. Dec. 136 (2006); see also *Krilich v. American National Bank & Trust Co. of Chicago*, 334 Ill. App. 3d 563, 569-70, 778 N.E.2d 1153, 268 Ill. Dec. 531 (2002). 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 **[**12]** only where no material facts are in dispute and the defendant is entitled to dismissal as a matter of law. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55, 962 N.E.2d 418, 356 Ill. Dec. 733. The relevant inquiry on appeal is "'whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.'" *Sandholm*, 2012 IL 111443, ¶ 55 (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17, 619 N.E.2d 732, 189 Ill. Dec. 31 (1993)). Our review the circuit court's grant of a motion to dismiss pursuant to section 2-619 is *de novo*. *Relf*, 2013 IL 114925, ¶ 21.

[*P22] On appeal, the railroad company first argues that the trial court erred when it dismissed its breach of contract claims by over-broadly interpreting section 2-606 of the Code (735 ILCS 5/2-606 (West 2012)). The railroad company admits that it did not attach an actual contract between GE and Knoedler to its third-party complaint. Nonetheless, it asserts that pursuant to section 2-606 (735 ILCS 5/2-606 (West 2012)), it was sufficient for it to "recite" portions of that contract in its complaint, so as to avoid dismissal. In addition, the railroad company maintains that the affidavit of its attorney attesting that the railroad company was unable to obtain the actual contract also should have been sufficient to avoid dismissal. For the reasons that follow, we disagree.

[*P23] Initially, we take issue with the railroad company's assertion **[**13]** that it "recited" portions of the "indemnity provision of the GE-Knoedler Terms and Conditions agreement" in its third party complaint. What the railroad company "recited" were portions of a document it characterized as "similar" and which it had obtained from the internet. This is apparent from the fact that the railroad company itself admitted through the affidavit of its attorney that it did not have access to the actual agreement, but found an "exemplar" Terms and Conditions portion of a general GE contract online (a contract which is not unique to railroad issues, seats, or anything pertaining to this case). In its complaint, the railroad company then alleged that "upon information and belief" an agreement between GE and Knoedler existed and contained the thereafter "recited" indemnity language. The indemnity language in the complaint, however, merely mirrored the language of the Terms and Conditions provisions of the "exemplar" contract that the railroad company found online. Although the railroad company's attorney stated that "upon information and belief" this "exemplar" contract was "similar or identical to" the provisions of the actual GE and Knoedler agreement, he provided **[**14]** absolutely no basis for his information and belief. In fact, nothing in the attorney's affidavit indicated that the attorney had ever seen that contract, so as to be able to opine on the similarities or differences between the exemplar and the alleged original. See *Bogenberger v. Pi Kappa Alpha Corp., Inc.*, 2016 IL App (1st) 150128, ¶ 34, 56 N.E.3d 1, 404 Ill. Dec. 438 (Acknowledging that an allegation made "on information and belief" is not equivalent to an allegation of relevant fact, but noting that because a plaintiff "will have knowledge of how he learned of the facts alleged upon information and belief," the complaint must "allege how those facts were discovered") ; see also *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 40, 976 N.E.2d 318, 364 Ill. Dec. 40 (same). Accordingly, the railroad company's own pleading discloses that it failed to recite to the actual alleged contract between Knoedler and GE, and that instead it merely recited to portions of a document it professed to be "similar."

[*P24] Recitation of such a "similar" document is in contravention of the express terms of section 2-606 of the Code (735 ILCS 5/2-606 (West 2012)). Section 2-606 provides in relevant part:

> "If a claim or defense is founded upon a written instrument, a copy thereof, or of so much of the

> same as is relevant, must be attached to the pleading as an exhibit or recited therein, unless the pleader attaches to his or her pleading **[**15]** an affidavit stating facts showing that the instrument is not accessible to him or her. *** [T]he exhibit constitutes a part of the pleading for all purposes." 735 ILCS 5/2-606 (West 2012).

"The exhibits to which section 2-606 applies generally consist of instruments being sued upon, such as contracts." *Velocity Investments, L.L.C. v. Alston*, 397 Ill. App. 3d 296, 922 N.E.2d 538, 337 Ill. Dec. 415 (2010).

[*P25] Our courts have repeatedly interpreted section 2-606 as requiring the plaintiff to attach the *actual* written document to his complaint or to recite to the relevant portions of the *actual* written document in the body of the pleadings. See *e.g., CNA International, Inc. v. Baer*, 2012 IL App (1st) 112174, ¶ 47, 981 N.E.2d 441, 367 Ill. Dec. 116 ("A plaintiff who alleges breach of contract is statutorily required to attach the contract at issue to its complaint."); see also *Barber v. American Airlines, Inc.*, 398 Ill. App. 3d 868, 885, 925 N.E.2d 1240, 339 Ill. Dec. 119 (2010), *rev'd on other grounds*, 241 Ill. 2d 450, 948 N.E.2d 1042, 350 Ill. Dec. 535 (2011) (same); see also *Patel v. Home Depot USA, Inc.*, 2012 IL App (1st) 103217, ¶ 11, 964 N.E.2d 1288, 358 Ill. Dec. 266 ("[I]f a claim is based on a written document, the document itself must be attached to the pleading as an exhibit."); see also *Plocar v. Dunkin' Donuts of America, Inc.*, 103 Ill. App. 3d 740, 749, 431 N.E.2d 1175, 59 Ill. Dec. 418 (1981) (holding that dismissal of a breach of contract claim was proper in light of the plaintiffs' failure to recite or attach a copy of the contract).

[*P26] The rationale is clear. A party pursuing a claim based on a written contract must present evidence of intent to be bound under such a contract and of conformity of both parties to the contract's terms. Permitting a party to attach or recite to documents **[**16]** "similar" to the written contract, as the railroad company would have us do, would give parties permission to attach any documents they might suspect are similar to the contract for which they seek relief, even when those documents had nothing to do with the intent of the actual parties in the litigation. See *e.g., Velocity*, 397 Ill. App. 3d at 298-99 (holding that the failure of an assignee of credit card debt to attach to its complaint the original credit card agreement between the debtor and the credit card issuer, or recite its terms within the complaint, was grounds for dismissal of action to collect outstanding balance on the credit card, even though assignee attached, *inter alia*, a statement of accounts, an affidavit of the service manager, and the issuer's card member agreement, because the card member agreement "offer[ed] no evidence that the [debtor] agreed to be bound by [the] terms [in that agreement] or that th[ose] terms even applied to this particular account.").

[*P27] Accordingly, pursuant to section 2-606 (735 ILCS 5/2-606 (West 2012)), failure to attach or recite to the relevant portions of the actual documents sued upon is grounds for dismissal. *Plocar*, 103 Ill. App. 3d at 749 (1981); see also *Popp v. Cash Station, Inc.*, 244 Ill. App. 3d 87, 100, 613 N.E.2d 1150, 184 Ill. Dec. 558 (1992); see also *Christoffel v. County Mutual Insurance Co.*, 183 Ill. App. 3d 32, 35, 538 N.E.2d 1171, 131 Ill. Dec. 615 (1989) ("Failure to comply with the requirement of section 2-606 is **[**17]** grounds for dismissal of a complaint.")

[*P28] The present case is similar to the decision in *Cahill v. Eastern Bemefot Systems Inc.*, 236 Ill. App. 3d 517, 603 N.E.2d 788, 177 Ill. Dec. 718 (1992), instructive. In that case, the plaintiff filed a complaint against his employer, the medical insurance company and the insurance administrator used by the employer, when they failed to provide insurance coverage for the hospitalization of his son. *Cahill*, 236 Ill. App. 3d at 518. The plaintiff alleged that he was entitled to such coverage pursuant to a contract between the employer and the insurance company under which he alleged he was a direct beneficiary. *Cahill*, 236 Ill. App. 3d at 518. The plaintiff, however, failed to attach the applicable contract to his complaint, and instead attached a document titled "Special Benefit Addendum." *Cahill*, 236 Ill. App. 3d at 519. In affirming the dismissal of the plaintiff's

complaint, we held that the plaintiff's failure to attach the contract between his employer and the insurance company was fatal to his contract claim. *Cahill*, 236 Ill. App. 3d at 520-21. In doing so, we found that the attached "Special Benefit Addendum" was insufficient to establish the intent of the parties with respect to the plaintiff. *Cahill*, 236 Ill. App. 3d at 521.

[*P29] Just as in *Cahill*, in the present case, the attached generalized internet document, and the recited portions of that document in the railroad company's complaint, with no **[**18]** direct connection to Knoedler, to the railroad company, to railroads or locomotive seats in general, are insufficient to establish Knoedler and GE's intent with respect to the plaintiff. Accordingly, the requirements of section 2-606 (735 ILCS 5/2-606 (West 2012) have not been met. See *Cahill*, 236 Ill. App. 3d at 521; see also *Velocity*, 397 Ill. App. 3d at 298-99.

[*P30] In coming to this decision, we have reviewed *Darst v. Lang*, 367 Ill. 119, 10 N.E.2d 659 (1937) and *Christoffel v. Country Mutual Insurance Co.*, 183 Ill. App. 3d 32, 538 N.E.2d 1171, 131 Ill. Dec. 615 (1989) cited to by the railroad company and find them inapposite.

[*P31] In *Darst*, the plaintiffs described the relevant portions of the deed they had entered into with their daughter, asking the court to insert into that deed language reserving a life estate in their favor on the basis of a mutual mistake. *Darst*, 367 Ill. at 120. The appellate court affirmed the trial court's denial of the daughter's motion to make the plaintiffs' complaint more specific by setting out a copy of the deed. *Darst*, 367 Ill. at 124. The court noted that although it was true that the plaintiffs had not attached the deed to their complaint, they had recited the relevant portions of the deed. *Darst*, 367 Ill. at 124. The court found that it was not necessary to recite the instrument in *haec verba* or to attach a copy of it as an exhibit. *Darst*, 367 Ill. at 124-25.

[*P32] Similarly, in *Christoffel*, an insured motorist filed a claim against her automobile insurer for denial of her claim under the uninsured **[**19]** motorist provisions of her policy. *Christoffel*, 183 Ill. App. 3d at 34. The court reversed the dismissal of the insured's complaint, finding that she had substantially complied with section 2-606 of the Code by reciting the relevant portions of her insurance policy in the "body of her complaint." *Christoffel*, 183 Ill. App. 3d at 35.

[*P33] Unlike in the present case, in both *Darst* and *Christoffel*, the plaintiffs recited relevant provision of the actual written documents upon which they were pursuing their claims in the body of their complaints. Accordingly, unlike here, there were no questions as to the foundation or relevancy of the documents recited. What is more, in both of those decisions, the plaintiffs, who were no longer in possession of the relevant contracts, had executed those contracts, so as to have known their actual terms. Here, the railroad company, as alleged third party beneficiary, never executed the agreement, and therefore, as it admits itself, could not have known the actual terms of the agreement between GE and Knoedler, and particularly not the intent of those parties as to the benefits that the railroad company was supposed to have received under any such agreement.

[*P34] We similarly reject the railroad company's assertion that the affidavit of its attorney **[**20]** attesting that the railroad company did not have access to the actual contract was sufficient to satisfy the requisites of section 2-606 of the Code (735 ILCS 5/2-606 (West 2012)).

[*P35] It is undisputed that if the instrument upon which the claim is based is not attached to the pleading, then an affidavit "stating, under oath facts showing that the instrument is not accessible to him" must be attached. *Amschl v. Linenthal*, 104 Ill. App. 2d 40, 46, 243 N.E.2d 547 (1968); see also 735 ILCS 5/2-606 (West 2012). Such an affidavit "is intended to excuse the requirement to present the written contract, where the affidavit explains why the contract is unavailable." *Velocity*, 397 Ill. App. 3d at 299.

[*P36] In the present case, the railroad company attached an affidavit of its attorney merely stating

that "as the third party beneficiary" the railroad company did not have access to the contract between Knoedler and GE. In light of the fact that prior to filing its third-party complaint, for three full years the railroad company was involved in litigation (with full subpoena power) with Tooke, stemming from the malfunction of the exact locomotive seat it now alleges was built and installed by Knoedler, we agree with the trial court that the attorney's affidavit did not provide a sufficient **[**21]** explanation as to why the contract was inaccessible to the railroad company prior to this date. This is even more apparent from the fact that the railroad company was involved in a nearly identical law suit against Knoedler in December 2011 in the Western District of Pennsylvania (see *Delaware & Hudson*, 781 F.3d 656), wherein it sought contribution from Knoedler on the basis of seats it had manufactured and installed in GE locomotives that were subsequently used by the railroad company. Under these circumstances, the trial court properly concluded that the railroad company sought to excuse "delay with sympathy," without actually providing a reason for its inability to obtain the alleged contract.

[*P37] Accordingly, for the aforementioned reasons, we find that the railroad company has failed to comply with the requisites of section 2-606 of the Code (735 ILCS 5/2-606 (West 2012)), so as to require dismissal of its breach of contract claims.[1]

[*P38] On appeal, the railroad company next asserts that the trial court erred when it dismissed its contribution claim on the basis that it was barred by the two year statute of limitations in section 13-204(b) of the Code (735 ILCS 5/13-204 (West 2012). That section provides in pertinent part:

> "In instances where an underlying action has been filed by a claimant, no action for contribution or indemnity may be commenced more than 2 years after the party seeking contribution or indemnity has been served with process in the underlying action or more than 2 years from the time the party, or his or her privy, knew or should reasonably have known of an act or omission giving rise to the action for contribution or indemnity, whichever period expires later." 735 ILCS 5/13-204(b) (West 2012).

[*P39] The railroad company does not dispute that contribution claims are governed by the two year statute of limitations in section 13-204(b), nor that it failed to comply with that statute by filing its contribution claim against Knoedler two years **[**23]** after having been served in the underlying action. 735 ILCS 5/13-204(b) (West 2012). Nonetheless, the railroad company argues that the trial court failed to apply the "discovery rule" to permit it additional time from the moment it actually discovered it had such a contribution claim in which to file it. Specifically, it asserts that because prior to 2015, when the Third Circuit decided *Delaware & Hudson*, 781 F.3d 656,[2] a contribution claim of this type had never been recognized by any Illinois or federal court, under the "discovery rule" the statute of limitations should have been tolled to the date of that decision. We disagree.

[*P40] Section 13-204(b) contains the "discovery rule," which tolls the statute of limitations to two years from the date the plaintiff knows or reasonably should know of "an act or omission giving rise **[**24]** to the action for contribution or indemnity, whichever period expires later." 735 ILCS 5/13-204(b) (West 2012); see also *Swann & Weiskopf,*

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[1] With respect to this issue, we note that in its brief the railroad company asserts that it is appealing only the dismissal of count II (breach of contract) of its complaint. However, we agree with Knoedler that since counts III through V were also premised on the existence of, or performance upon this contract, **[**22]** the failure to attach or recite to it, or provide an affidavit sufficiently explaining its inaccessibility applies across the board to all four counts (II through V). Accordingly, dismissal as to all four counts on this basis was proper.

[2] In *Delaware & Hudson* the Third Circuit overturned the lower court and ruled that third-party state law claims for breach of contract, contribution and indemnification brought by a the railroad company against Knoedler for a broken seat injury were not preempted by the LIA. *Delaware & Hudson*, 781 F.3d at 662, 667, 669. In doing so, the Third Circuit carved out an exception to the LIA's preemption of state common law claims, when those claims are based on federal standards. *Delaware & Hudson*, 781 F.3d at 662, 667, 669.

Ltd. v. Meed Associates, Inc., 304 Ill. App. 3d 970, 975, 711 N.E.2d 395, 238 Ill. Dec. 292 (1999) (The "discovery rule" contained in section 13-204 "tolls the statute of limitation until the plaintiff knows or reasonably should know it has been injured and that this injury is wrongfully caused. [Citation.] At that point, the plaintiff has an obligation to conduct further inquiries to determine whether it has an actionable claim.").

[*P41] Although ordinarily, the date at which a plaintiff has or should have the requisite knowledge to trigger the tolling of a limitations period will be a question of fact, "[w]here it is apparent from the undisputed facts *** that only one conclusion can be drawn, the question becomes one for the court" (*Witherell v. Weimer*, 85 Ill. 2d 146, 156, 421 N.E.2d 869, 52 Ill. Dec. 6 (1981)), and can be resolved as a matter of law, making a section 2-619 involuntary dismissal on statute of limitations grounds appropriate. *Nair v. Bloom*, 383 Ill. App. 3d 867, 870, 890 N.E.2d 1113, 322 Ill. Dec. 194 (2008); see also *Castello v. Kalis*, 352 Ill. App. 3d 736, 744, 816 N.E.2d 782, 287 Ill. Dec. 815 (2004); see also *Saunders v. Klungboonkrong*, 150 Ill. App. 3d 56, 61, 501 N.E.2d 882, 103 Ill. Dec. 565 (1986) ("If only one conclusion can be drawn from the undisputed facts, the question of the timeliness of the plaintiff's complaint is for the court to decide."); see also *Henderson v. Jones Brothers Construction Corp.*, 234 Ill. App. 3d 871, 873, 602 N.E.2d 16, 176 Ill. Dec. 709 (1992) ("Determining at what point a party becomes possessed of sufficient information to be under **[**P25]** an obligation to inquire further may be a question of law.").

[*P42] In the present case, the undisputed facts establish that the railroad company had information about its potential third party claim against Knoedler, from the day that Tooke's complaint was filed against it on April 30, 2012, and served on May 1, 2012. The extensive discovery that occurred for three years in that underlying action certainly provided the railroad company with "enough information" to be obligated to "inquire further." What is more, the decision in *Delaware & Hudson*, affirmatively establishes that the railroad company should reasonably have been aware of potential acts or omissions by Knoedler so as to be placed on notice of any potential contribution claims. In *Delaware & Hudson* the railroad company initiated an identical contribution law suit against Knoedler in the Western District of Pennsylvania, as early as December 2011, as a result of injuries sustained by four of its employees when the locomotive seats they were sitting in broke. *Delaware & Hudson*, 781 F.3d at 659. That action was entirely based on the premise that the railroad company had directed GE to install seats purchased from Knoedler, and that Knoedler had "agreed to provide **[**P26]** seats of suitable quality to prevent seat failures for use in the railroad company's locomotives." *Delaware & Hudson*, 781 F.3d at 659. The action in *Delaware & Hudson* was filed five months before Tooke filed the cause of action in this case (on April 30, 2012), and five months after Tooke was injured as a result of the seat failure. As such, there is absolutely no basis for the railroad company to contend that it did not have sufficient information of potential acts or omissions by Knoedler, at the very least by May 1, 2012, to file a third-party contribution claim against Knoedler in the cause at bar.

[*P43] Any argument by the railroad company that it could not have predicted the outcome of *Delaware & Hudson*, does not excuse its failure to file the contribution claim within two-years of knowing the potentiality of such a claim, so as to, in the very least, preserve that action for itself. See 735 ILCS 5/13-204(b) (West 2012) (the statute of limitation is tolled until the plaintiff knows or reasonably should know of "an act or omission giving rise to the action for contribution or indemnity, whichever period expires later"); see also *Hanks v. Cotler*, 2011 IL App (1st) 101088, ¶ 19, 959 N.E.2d 728, 355 Ill. Dec. 314 ("the commencement of the limitations period" is tolled "until the potential plaintiff possesses sufficient **[**P27]** information concerning his or her injury and its cause to put a reasonable person on notice to make further inquiries"); see also *Mitsias v. I-Flow Corp.*, 2011 IL App (1st) 101126, ¶ 23, 959 N.E.2d 94, 355 Ill. Dec. 66 ("as soon as [the plaintiff] has sufficient information about her injury and its

cause to spark inquiry in a reasonable person as to whether the conduct of the party who caused her injury might be legally actionable," the plaintiff has the burden to "investigate whether she has a viable cause of action."); *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 171, 421 N.E.2d 864, 52 Ill. Dec. 1 (1981) ("once it reasonably appears" that the party should have sufficient information of the injury, "the party may not slumber on his rights.").

[*P44] Accordingly the trial court's dismissal of the contribution claim was proper. See *Swann & Weiskopf*, 304 Ill. App. 3d at 975 (holding that a design firm, which had contracted to provide services for an extended care facility knew of potentially actionable conduct on part of the subcontractor hired to design the storm water removal system, so that limitations period on its contribution and breach of contract claims against subcontractor began to run under the discovery rule, at the very latest during the arbitration hearing on the facility owner's claim against the firm arising from the flooding problems, during which the design of the system was identified **[**28]** as an issue.)

[*P45] III. CONCLUSION

[*P46] For the aforementioned reasons, we affirm the judgment of the circuit court.

[*P47] Affirmed.

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