

FILED

JAN - 6 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 317404-III

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION III

SHARON SHEPARD,

Plaintiff/Appellant

v.

DAVID HOLMES and LORAINÉ HOLMES,
ERA SUN RIVER REALTY, and
CHICAGO TITLE INSURANCE COMPANY,

Defendants/Respondents,

RESPONDENT CHICAGO TITLE INSURANCE COMPANY'S BRIEF

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ORIGINAL

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I. INTRODUCTION

Chicago Title respectfully requests that this court affirm the trial court's June 10, 2013 Order Granting Chicago Title's Motion for Summary Judgment and June 10, 2013 Judgment Dismissing Plaintiff's Complaint against Chicago Title.

Shepard did not make any arguments or present any assignments of error on her claims of bad faith, breach of contract, and consumer protection act violations against Chicago Title. Shepard has thus abandoned her appeal on those issues. Chicago Title is, therefore, entitled to a summary Order affirming the trial court's judgment dismissing all claims other than the one raised in her appeal. Fosbre v. State, 70 Wash. 2d 578, 583, 424 P.2d 901, 904 (1967).

Shepard's Opening Brief is primarily directed against Respondents Holmes and ERA. The only argument Shepard makes in her Brief as to Chicago Title is that the trial court erred in applying the statute of limitations to Shepard's misrepresentation claim. *Appellant's Opening Brief at 18-22*. Therefore, Chicago Title will address primarily that issue in its brief. Chicago Title will also address Shepard's failure to present any evidence to support her claim of misrepresentation.

II. FACTS

Chicago Title generally accepts Shepard's Background Facts in *Appellant's Opening Brief at 5-6*. For purposes of its Summary Judgment Motion, Chicago Title also accepted all of the allegations in Shepard's Complaint as true and did not dispute any facts. *CP at 122-123*.

In summary, Shepard alleged that she purchased real property parcels 1, 2, 3 and 4 on July 27, 2007 believing that they were four separate lots that could be re-sold individually. Shepard contends that prior to her purchase of the property, Chicago Title represented that the four lots could be sold individually. Shepard also contends that she relied on Chicago Title's representation in deciding to purchase the property on July 27, 2007.

In July 2011, Shepard decided to sell two of the lots. She contacted the county about doing so and learned that on December 8, 1998, the seller of the property had recorded a deed of consolidation that consolidated the four separate lots into one single parcel. The consolidation deed required Shepard to record a rescission of the consolidation deed before being able to sell the lots separately. *CP at 1-3*. Shepard also learned that the county's density requirements had changed and now prohibited the single parcel from being de-consolidated into separate lots. Shepard could have de-consolidated the lots in 2007 at the time she purchased the property. *CP at 26-27*.

Shepard filed her Complaint on December 20, 2012 alleging that Chicago Title's representations were false and induced her to purchase the property. She also alleged that Chicago Title had denied her title insurance claim in bad faith. *CP at 5*. Chicago Title filed a Motion for Summary Judgment on all claims, (*CP at 121-162*) and the trial court entered a judgment dismissing all of Shepard's claims against Chicago Title. *CP at 374-376*.

III. STATEMENT OF THE ISSUES

1. Is Chicago Title entitled to prevail on the claims abandoned by Shepard in the trial court and on appeal?
2. Is Chicago Title entitled to prevail because Shepard filed her suit after the statute of limitations had run?
3. Is Chicago Title entitled to prevail because any representation it made to Shepard was true?

IV. ARGUMENTS

A. Chicago Is Entitled to Prevail on the Matters Abandoned by Shepard

Chicago Title filed a Motion for Summary Judgment seeking dismissal of Shepard's misrepresentation and bad faith claims. *CP at 121-132*. For purposes of its summary judgment motion, Chicago Title did not dispute Shepard's factual allegations. *CP at 122-123*.

Shepard did not respond to Chicago Title's summary judgment motion regarding the breach of contract, consumer protection act and bad faith claims, other than to comment on "a sad excuse for a law in the state of Washington." *CP at 165-170, 280-285*. The trial court granted Chicago Title's summary judgment motion because Shepard had not presented any facts or law to support her claims. The trial court also found that the statute of limitations had run on the misrepresentation claim and dismissed it. *CP at 374-375*.

Shepard's opening appeal brief does not assign any errors or present any arguments that the trial court erred in dismissing Shepard's breach of contract, consumer protection act and bad faith claims. Therefore, Shepard has waived and abandoned the right to appeal those issues. Fosbre v. State, 70 Wash. 2d 578, 583, 424 P.2d 901, 904 (1967). Thus, the only matter for review is the dismissal of Shepard's misrepresentation claim because of the statute of limitations.

B. The Trial Court Did Not Err in Finding that the Statute of Limitations Had Run

1. The Statute of Limitations Began Running When any Alleged Misrepresentations Were Made

For purposes of its Motion for Summary Judgment, Chicago Title did not dispute Shepard's allegation that Chicago Title represented that the four lots could be sold individually and that Shepard relied on those representations in deciding to purchase the property. *CP at 2-3, 26-28.*¹ Chicago Title argued, and the trial court agreed, that if Shepard relied on the representations in deciding to purchase the property, it is axiomatic that the representations would have had to been made no later than, July 27, 2007 -- the date Shepard purchased the property. Thus, the time for filing a claim on misrepresentations would have to be calculated no later than the date of purchase of the property.

¹ For purposes of its summary judgment motion, Chicago Title did not dispute Plaintiff's allegations. Nonetheless, Chicago Title denies that it made any misrepresentations as to the state of the title.

The statute of limitations on a misrepresentation claim is three years, and runs from the time that a party has right to seek relief in the courts. Colwell v. Eising, 118 Wash 2d 861, 868. Here, Shepard's cause of action for misrepresentation would have accrued on July 27, 2007 – the day she purchased the property -- because she is charged with constructive knowledge of matters in the public record. Any false statements could have been discovered by a review of the public records on that date.

2. The Discovery Rule Does Not Apply

Shepard argues that the discovery rule applies, and that the statute of limitation did not commence until she discovered that the representations were false – at the time she finally decided to sell the property. The discovery rule may apply in two circumstances: 1) when the plaintiff affirmatively pleads and proves the nine elements of fraud, or 2) when the defendant breached a duty to disclose a material fact. Crisman v. Crisman, 85 Wash. App. 15, 21, 931 P.2d 163, 166 (1997).

Shepard did not plead, nor did she present any evidence or arguments of fraud, so she fails on the first option. As to the second option, Chicago Title had no duty to disclose any information on the property to Shepard as part of its title insuring process. RCW 48.29.010(3)(c); Barstad v. Stewart Title Guar. Co. Inc., 145 Wash.2d 528, 536, 39 P.3d 984 (2002); Dave Robbins Const., LLC v. First

Am. Title Co., 158 Wash. App. 895, 249 P.3d 625 (Wash. Ct. App. 2010). Therefore, the second option does not apply because Chicago Title had no duty to disclose any issues regarding the title. Chicago Title's title exam was to protect itself from potential claims. It simply issued a policy insuring against specific defects in title to the property as of the date the policy was issued. The title insurance policy did not guarantee that Shepard would ever have a particular future use of her property.

Even assuming that Chicago Title had a duty to disclose the existence of the consolidation deed, Shepard still cannot prevail. The recorded consolidation deed, which was a matter of public record, gave Shepard constructive notice of the facts contained in that document because "when the facts upon which the fraud is predicated are contained in a written instrument which is placed on the public record, there is constructive notice of its contents...." Strong v. Clark, 56 Wash. 2d 230, 232, 352 P.2d 183, 184 (1960). Since the recorded consolidation deed gave constructive notice that the four separate lots had been re-consolidated into one lot, any statements that were contrary to the recorded consolidation deed would axiomatically be false at the time the statements were made. The recorded deed would thus have been the primary evidence to contradict Chicago Title's statements. Therefore, Shepard had constructive notice of the facts in

the public record at the time the false statements were made – putting the statute of limitations running from at least July 27, 2007.

Finally, Shepard submitted no evidence to the trial court as to why she was unable to discover the consolidation deed. Shepard argues that she relied on a “certified plat map” provided by Chicago Title. *Appellant’s Opening Brief at 20-21*. However, the evidence presented to the trial court shows that Chicago Title did not present her with any certified plat maps. Chicago Title provided a copy of a location map which clearly states: “this plat is for your aid in locating your land with reference to streets and other parcels. While this plat is believed to be correct, the company assumes no liability for any loss occurring by reason of reliance thereon.” *CP at 145, 180*.

The discovery rule simply does not apply in this case, and the trial court correctly ruled that the statute of limitations had run on Shepard’s claims.

3. Application of the Statute of Limitations was Proper

Shepard’s last argument is that application of the statute of limitations in this case creates a statute of repose. Shepard argues that “the statute of limitations should not have been deemed to commence upon the recording of the deed of consolidation.” *Appellant’s Opening Brief at 18-19*. Shepard misunderstands Chicago Title’s argument. Chicago Title did not argue that the statute of limitations began running from the recording of the consolidation deed. Chicago

Title argued that the statute of limitations began running from the date of any misrepresentation – which would have to be no later than July 27, 2007 -- because all of the facts regarding the property were readily ascertainable on that date and Shepard had constructive notice of matters in the public records. *CP at 124, 282.*

The policy of charging a plaintiff with constructive knowledge of matters in the public record brings finality to potential claims by giving a solid starting point for the statute of limitations. If plaintiffs aren't charged with constructive knowledge of items in the public record at the time of purchase, then a potential misrepresentation claim would never arise until the plaintiff decided to do something with the property. That could conceivably be 10, 20, or even 50 years after purchase of the property. The purpose of the statute of limitations is to prevent that type of perpetual uncertainty.

C. Chicago Title Made No Misrepresentations

As a final problem for Shepard, even if the discovery rule applies and the statute of limitations did not start until she decided to sell the property, Shepard's own testimony shows that there were no misrepresentations because all of the statements regarding the property were true. Shepard alleged in her Complaint that she was "told by others including Chicago Title that the above property was subject to Short Plat No. 865 and had individual lots 1, 2, 3, and 4 which could be independently sold." CP at 2, ll. 24-28. Shepard also submitted a declaration to the trial court wherein

she states “Mr. Shuttleworth advised me that if we had found out about the Deed of Consolidation when we purchased the property, in July of 2007, we could have simply had the short plat reinstated by rescinding the Deed of Consolidation.” CP at 27, ll. 9-11. In other words, even if Chicago Title represented that Shepard could sell each lot individually, the representation was true at the time Shepard purchased the lots: she could have rescinded the consolidation and sold the lots separately. It was because of Shepard’s delay and the change in the county’s density requirements that Shepard lost her ability to de-consolidate, not because of any statement made by Chicago Title. CP at 27, ll. 12-3.

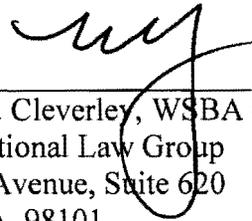
V. Chicago Title is Entitled to Attorney Fees Under RAP 18.1

Chicago Title did not seek an award of attorney fees in the trial court. On appeal, however, attorney fees may be awarded if the appeal is frivolous or without merit. An appeal is frivolous if there are no debatable issues on which reasonable minds can differ and is so totally devoid of merit that there was no reasonable possibility of reversal. Wright v. Dave Johnson Ins. Inc., 167 Wash. App. 758, 787, 275 P.3d 339, 356 review denied, 175 Wash. 2d 1008, 285 P.3d 885 (2012). In this case, Shepard has abandoned and waived issues for which a notice of appeal was filed, and Shepard submits no facts or legal arguments under which she can prevail. Chicago Title should therefore be awarded its attorney fees and costs for the appeal.

V. CONCLUSION

Chicago Title requests that: 1) this Court refuse to review any claims abandoned by Shepard in the trial court or in her appellate brief; 2) the trial court's judgment dismissing Shepard's claims be affirmed; and 3) that Chicago Title be awarded its attorney fees and costs.

January 3, 2014



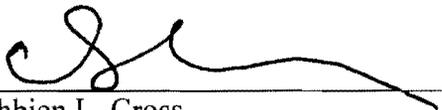
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CERTIFICATE OF SERVICE

I hereby certify that on the date given below I caused to be served the foregoing document entitled RESPONDENTS' MOTION ON THE MERITS TO AFFIRM on the following individuals in the manner indicated:

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January 3, 2014



Shbien L. Cross