

NO. 338070
COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FILED
MAR 11, 2016
Court of Appeals
Division III
State of Washington

JAMES DARLING, an individual,
Appellant,

LAWRENCE BROWN a married individual
and, BRIAN MAIN a married individual and
as members of RED TOWER, LLC, a limited
liability company
Plaintiffs

V.

GREGORY D. JEFFEREYS, and KIMBERLEY
JEFFEREYS, a married couple, POACHER'S ROCK,
LLC, a limited liability company,
Defendants

AUBLE & ASSOCIATES, INC., a domestic corporation,
SCOT D. AUBLE, and JANE DOE ABULE, a married couple,
Respondents

GRANT PERSON and JANE DOE PERSON, a married couple,
SCOTT PERSON, an individual, SONRISE LAND LLC,
a limited liability company, and NAI BLACK REALTY
COMPANY, a domestic corporation, and ERIC SATCHJEN, an
individual and WORKLAND WITHERSPOON a domestic
corporation.
Defendants

BRIEF OF APPELLANT

Drew D. Dalton, WSBA No. 39306
Of Attorneys for Appellant James Darling
FORD LAW OFFICES, P.S.
320 S. Sullivan Rd.
Spokane Valley, WA 99037
Tel. 509-9242400

TABLE OF CONTENTS

| | |
|---|----|
| TABLE OF CONTENTS | 2 |
| ASSIGNMENTS OF ERROR | 4 |
| Assignment of Error No. 1 | 4 |
| A. The superior court erred as a matter of law when it found there was no issue of material fact with regards to the Statute of Limitations in this case..... | 4 |
| INTRODUCTION..... | 5 |
| PROCEDURAL STATEMENT OF THE CASE..... | 8 |
| STATEMENT OF THE CASE..... | 8 |
| Discovery Rule..... | 10 |
| Judge's Comments Conflict and Great Issue of Fact | 13 |
| CONCLUSION | 14 |

TABLE OF AUTHORITIES

CASES

| | |
|--|----------|
| <i>1000 Virginia Limited Partner v. Vertecs Corporation</i> , 158 Wn. 2d 566,567 (2006) | 7, 8, 10 |
| <i>Fell v. Spokane Transit Auth.</i> , 128 Wash. 2d 618 (1996). | 5 |
| <i>Gazija</i> , 86 Wash.2d at 220 | 7 |
| <i>Green v. A.P.C.</i> , 136 Wash.2d 87, 95,(1998). | 7 |
| <i>Grimwood v. Univ. of Puget Sound, Inc.</i> , 110 Wash. 2d 355, 359 (1988). | 7 |
| <i>Hollis v. Garwall, Inc.</i> , 137 Wash. 2d 683, 690 (1999) | 5 |
| <i>Preston v. Duncan</i> , 55 Wash. 2d 678, 681 (1960). | 5, 7 |
| <i>Ruffer v. St. Frances Cabrini Hosp.</i> , 56 Wash. App. 625, 628, <i>rev. den.</i> , 114 Wash. 2d 1023 (1990) | 6 |

OTHER AUTHORITIES

| | |
|---------------------|---------|
| Clerks Papers(CP) 1 | 5, 8 |
| CP 50 | 8, 9 |
| CP 60 p. 21-25 | 5, 8, 9 |
| CP 69 | 8 |
| CP. 69 | 5 |
| Verbatim Report | 12, 13 |

RULES

| | |
|-----------|------|
| CR 56(c) | 7 |
| CR 56(c); | 5, 6 |
| CR 56(e) | 7 |
| CR 56(e); | 6 |

ASSIGNMENTS OF ERROR

Assignment of Error No. 1

A. The superior court erred as a matter of law when it found there was no issue of material fact with regards to the Statute of Limitations in this case.

Issues pertaining to Assignment of Error No.1

1. Discovery Rule
2. Judge's Comments Conflict and Great Issue of Fact

INTRODUCTION

James Darling and Red Tower LLC are the remaining plaintiffs in this matter. This suit stems from two transactions that took place in 2008. The suit was filed on April 2, 2014. Clerks Papers(CP) 1. Mr. Darling did not have knowledge of the defendant Auble and Auble & Associates potential liability until April 2012. CP 60 p. 21-25. Judge Harold Clarke, III granted summary judgment against Mr. Darling stating the statute of limitations had run. CP. 69 Mr. Darling's lawsuit is timely and there is an issue of fact with regards to his theories against Auble and Auble & Associates (henceforth Auble).

I. Standard of Review

The purpose of summary judgment is to avoid a useless trial. *Preston v. Duncan*, 55 Wash. 2d 678, 681 (1960). A motion for summary judgment must be granted if, after considering the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and reasonable persons can reach but one conclusion. *Hollis v. Garwall, Inc.*, 137 Wash. 2d 683, 690 (1999). A material fact is one on which the outcome of litigation depends. CR 56(c); *Fell v. Spokane Transit Auth.*, 128 Wash. 2d 618 (1996).

A party moving for summary judgment has the initial burden of proving, by uncontroverted evidence, that there is no genuine issue of material fact. CR 56(c); *Maloney v. Tribune Publishing Co.*, 26 Wash. App. 357, 359 (1980) This can be done by either (1) pointing out the absence of competent evidence to support the claimant's case or (2) establishing through affidavits that no genuine issue of material fact exists. *Fisher v. Aldi Tire, Inc.*, 78 Wash. App. 902, 906 (1995), *rev. den.*, 128 Wash. 2d 1025 (1996).

Once a party has made a showing that there is no genuine issue of material fact, the burden shifts to the non-moving party, who must then set forth specific facts showing that there is a genuine issue of material fact for trial. *Nat'l Union Ins. Co. v. Puget Power*, 94 Wash. App. 163, 178-79 (1999).

In response to a summary judgment motion, the non-moving party may not merely rely upon mere allegations or denials, but must instead affirmatively set forth specific facts showing the existence of a genuine issue for trial. CR 56(e); *Ruffer v. St. Frances Cabrini Hosp.*, 56 Wash. App. 625, 628, *rev. den.*, 114 Wash. 2d 1023 (1990). The non-moving party must testify to facts based on personal knowledge. CR 56(e); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wash. 2d 355, 359

(1988). A "fact" is a reality rather than supposition or opinion.

Grimwood, 110 Wash. 2d at 359.

If the non-moving party cannot provide specific facts to show there is a genuine issue for trial, the moving party is entitled to summary judgment as a matter of law.

CR 56(c); CR 56(e); *Preston v. Duncan*, 55 Wash. 2d 678 (1960).

Discovery Rule

"In many instances an action accrues immediately when the wrongful act occurs, but in some circumstances where the plaintiff is unaware of harm sustained a "literal application of the statute of limitations" could "result in grave injustice."*1000 Virginia Limited Partner v. Vertecs Corporation*, 158 Wn. 2d 566,567 (2006);citing *Gazija*, 86 Wash.2d at 220. To avoid this injustice, courts have applied a discovery rule of accrual, under which the cause of action accrues when the plaintiff discovers, or in the reasonable exercise of diligence should discover, the elements of the cause of action. see *Green v. A.P.C.*, 136 Wash.2d 87, 95,(1998). This does not mean that the action accrues when the plaintiff learns that he or she has a legal cause of action; rather, the action accrues when the plaintiff discovers the salient facts

underlying the elements of the cause of action." *1000 Virginia*, at 568.

PROCEDURAL STATEMENT OF THE CASE

Mr. Darling filed a claim against Auble on April 2, 2014. CP 1. The Superior Court dismissed the claim on summary judgment stating the claim brought by Mr. Darling was not timely on August 28, 2014. CP 69. That is the only issue being appealed by Mr. Darling on appeal before the Court of Appeals, Division III.

STATEMENT OF THE CASE

Mr. Darling entered into the purchase of two properties involving Greg Jeffery's and Grant Persons. CP 60. These properties have been identified as Y tower Unit 3 and Units 1&2 of the Ridpath. Mr. Darling relied on the appraisals to make his purchase decisions. CP 50, Darling Discovery Deposition exhibits p. 221 and 240. The appraisals were done by Scot Auble of Auble & Associates, Inc. (Auble). If the properties had appraised significantly lower he would not have bought the units. CP 60. The purchase price for Units 1&2 included build out money and so the

actual purchase price was closer to half the value of the property with money for improvement. CP 50. The purchase price was \$475,000 between the contract and the assignment fee. CP 60 (closing agreement). Just over \$148,000 was held for build out. CP 60 . The appraisals did not include proper definitions or descriptions of specific conditions that could have substantially affected the appraised value, HVAC, interior condition, condominium documents. CP 60, Shorett Declaration. The Auble appraisal failed to properly analyze the valued of the land. Auble's land sales approach is not consistent with the appraisers' USPAP (Uniform Standards of Professional Practice) or the best practices in the profession. CP 60

ARGUMENT

Is there an issue of fact regarding whether the statute of limitations has run against Mr. Darling. Our position is nothing in the judges decisions or in the argument brought by the other side shows that Mr. Darling knew or should have known there was an issue with the appraisals prior to his filing of this lawsuit. While more than three years had

expired from the date of the appraisal, not more than three years expired from when Mr. Darling became aware there were issues with the transaction. We ask the court to reverse the dismissal.

Discovery Rule

The Discovery rule means “the action accrues when the plaintiff discovers the salient facts underlying the elements of the cause of action.” *1000 Virginia*, at 158 Wn. 2d 568. Thus, the question before the court is whether Mr. Darling should have known prior to April or May 2011 that he had a cause of action against Auble.

Mr. Darling entered into purchases of the two properties in 2008 because he believed they were viable investments at the time. The appraisals did nothing to persuade him otherwise, especially with regards to Units 1&2. He was working with whom he believed to be reputable businessmen.

Auble’s argument is simply that because the appraisal’s where in 2008 the statute had run by the time this case was filed in 2014. If that were the end of the analysis

we would agree but it is not. Auble provided no proof that Mr. Darling should have known there was an issue with the transaction before his meeting with Mr. Casey.

Mr. Darling provided a declaration that he did not believe anything was wrong in 2008. That is consistent with the discovery rule. A declaration was provided by Mr. Marshall Casey that he meet with James Darling in April or May 2011 and told him there where issues with the transactions. This is the first time Mr. Darling knew there could be a problem with the entire transaction. This is when he had salient information that could lead him to “discover” there was an issue with the transaction. As a result he sought legal help and eventually filed this case. The fact that Mr. Casey does no mention the appraisals in his declaration does not negate its importance. The declarations states he believed there were issues with the transactions that should be looked at. This is the point in time when Mr. Darling discovered there were potential issues.

Nothing provided by the appellant at the summary judgment hearing proved that Mr. Darling should have

known prior to late April early May 2011 that there was an issue with the transactions.

Frankly, if we go strictly by expert testimony it could be said Mr. Darling did not “know” there was an issue until he got the declaration back from Peter Shorett dated August 17, 2015. But that is not standard the court uses.

The standard is applied by finding out “when did the plaintiff know or should he have known” there was an issue. Mr. Darling’s evidence shows he had no idea there was an issue until after he meet with Mr. Casey. Then at that meeting he was advised (given enough salient facts) to suspect he may need to file a case.

Auble on the other hand has provided no evidence that he knew there was an issue earlier in time. They are saying because Mr. Darling is not mentioned specifically in that declaration there is no issue of fact and the original statute of limitations applies. See Hg Tr. p. 40 In 16 – p 41 In. 12.

Judge Clarke stated regarding Mr. Darling he had “just some general sense there may be something wrong, doesn’t mean he knew anything.” Hg. Tr. pg 45, In 1-2. This

goes to support the position that he did not know there was an issue prior to April 2011. Judge Clarke essentially went on to state summary judgment should be granted because Mr. Darling didn't "know" there was an issue. Id. This conflicts with the record and Judge Clarke's comments about the appraisal.

Judge's Comments Conflict and Great Issue of Fact

Judge Clarke stated he was not ready to dismiss as to the issues with the appraisal as there very well may be a reliance issue. Hg. Tr. Pg. 47 He also stated the declaration by Mr. Shorett created an issue of fact as to whether the appraisal was done correctly. Hr. Tr. Pg. 45.

In other words, Judge Clarkes statements find a problem with the appraisal based on the expert testimony. This appears contrary to the ruling regarding the statute of limitations, as Auble's argument was essentially Mr. Darling did not show he ever knew there was an issue.

If there is an issue of fact regarding the appraisal then there has to be a determination as to when Mr. Darling knew or should have known there was an issue with the appraisal.

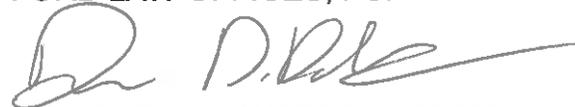
The facts provide an issue of fact as to when that occurred. In this case, the soonest Mr. Darling knew or could have known was the conversation with Marshall Casey. Defendant has not provided any information to show that Mr. Darling knew before that date.

CONCLUSION

The court found there was an issue of fact regarding reliance on Auble's appraisal. Mr. Darling did not know there was any issue with the transaction or appraisals until he meet with Marshall Casey in April or May 2011. He filed his case on April 2, 2014. Auble provided no evidence that he knew there was an issue before that date. Thus, we ask the court to reverse the trial court's decision and remand for trial and attorney's fees as allowable under the law.

DATED: March 11, 2016

FORD LAW OFFICES, PS.



Drew D. Dalton, WSBA No.: 39306
Attorney for Claimant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that I mailed this day an original and true copies of the document referenced below to the following; postage prepaid, first class mail in Spokane Valley, WA to:

Docket No. : 320111
Claimant : James Darling
Document : **BRIEF OF APPELLANT**

TO:

Attorney for Defendants Scot D. Auble and Jane Doe Auble, and Auble & Associates:
Mike Wolf
Randall & Danskin, P.S.
1500 Bank of America Financial Center
601 W. Riverside Ave
Spokane, WA 99201-0653

Spokane County Court Clerk
1116 W Broadway Ave
Spokane, WA 99260-0350

Court of Appeals
Court Commissioner
500 N Cedar St.
Spokane, WA 99201
Fax (509) 456-4288
Bridget.lochelt@courts.wa.gov

DATED: 11th March 2016


Drew D. Dalton

BRIEF OF APPELLANT - 15

FORD LAW OFFICES, P.S.
320 S. Sullivan Road
Spokane Valley, Washington 99037
(509) 924-2400 / FAX: (509) 927-1311