

No. 80623-3

SUPREME COURT
OF
THE STATE OF WASHINGTON

MICHAEL MILLER; VICKI RINGER; and JOANNE FAYE
TORGERSON, as trustee for the TORGERSON FAMILY TRUST;

Appellants,

v.

ONE LINCOLN TOWER LLC, a Delaware Limited Liability
Company; BELLEVUE MASTER LLC, a Delaware Limited Liability
Company; LS HOLDINGS, LLC, a Washington Limited Liability
Company

Respondents.

STATEMENT OF ADDITIONAL
AUTHORITIES

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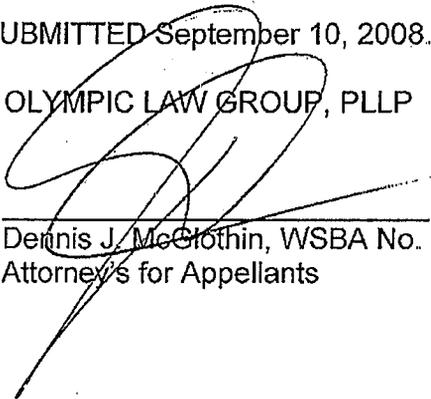
Petitioner's hereby file this statement identifying additional authorities supportive of its arguments asserted in its previously filed Supplemental Brief:

1. *Seabrook v. Commuter Housing, Inc.*, 72 Misc.2d 6 (N.Y. City Civ. Ct 1972), applying Uniform Commercial Code §§ 2-104 and 2-302 to a lease dispute and holding a lease which contained 54 clauses/10,000 words on 4-pages was unconscionable.

2. *Zimmerman v. First American Title Insurance Company*, 790 S.W.2d (Tex. App. – Tyler 1990), holding a real estate agent was a “consumer” for purposes of the Deceptive Trade Practices Act when the agent was to receive one lot free and clear of liens as commission for sale of other lots.

RESPECTFULLY SUBMITTED September 10, 2008.

OLYMPIC LAW GROUP, PLLP


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FILED AS
ATTACHMENT TO EMAIL

HSeabrook v. Commuter Housing Co., Inc.,
N.Y. City Civ. Ct. 1972.

Civil Court, City of New York,
Queens County, Trial Term, Part XVI
Tawn SEABROOK, Plaintiff,

v.

COMMUTER HOUSING CO., INC., Defendant.
Nov. 13, 1972.

Action against apartment house owner for return of one month's rent and security deposit given by plaintiff upon entry into written lease. The Civil Court of the City of New York, Edwin Kassoff, J., held that provisions in ten thousand-word apartment lease to effect that, if apartment building were completed after date set for commencement of lease, lease should continue, but term should not commence until notice was given that apartment was ready for occupancy and that failure to give possession on date of commencement of term should not affect obligations of tenant or extend term were unconscionable and unenforceable; thus where apartment was not ready for occupancy until four months after lease was to commence, tenant who had been forced to vacate her premises and obtain shelter elsewhere was entitled to cancellation of lease and to return of one month's rent and security deposit.

Judgment for plaintiff.

West Headnotes

[1] Landlord and Tenant 233 ↪1

233 Landlord and Tenant

233I Creation and Existence of the Relation

233k1 k Nature of the Relation. Most Cited

Cases

With respect to leasing of an apartment, the landlord is a "merchant," that is, a person who by his occupation holds himself out as having knowledge or skill peculiar to practices involved in the transaction; thus landlord is held to completely different set of rules which are generally more strict than rules that apply to nonmerchants, so that one who contracts with landlord will generally find himself in a more

favorable position with court and protected to greater extent than if he had contracted with a nonmerchant and landlord is held to higher standard of conduct by the court Uniform Commercial Code, §§ 2-104, 2-302.

[2] Statutes 361 ↪184

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k180 Intention of Legislature

361k184 k. Policy and Purpose of Act

Most Cited Cases

When applying a statute, court should consider its objects and purposes and evils sought to be remedied and should construe it so as to effectuate its general purposes and suppress the mischief.

[3] Statutes 361 ↪184

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k180 Intention of Legislature

361k184 k. Policy and Purpose of Act

Most Cited Cases

Statute may be extended by analogy beyond its apparent boundaries to include situations which would reasonably have been contemplated by legislature in light of purposes giving impetus to the legislation.

[4] Landlord and Tenant 233 ↪21

233 Landlord and Tenant

233II Leases and Agreements in General

233II(A) Requisites and Validity

233k21 k. Existence and Condition of

Property Most Cited Cases

Landlord and Tenant 233 ↪184(2)

233 Landlord and Tenant

233VIII Rent and Advances

233VIII(A) Rights and Liabilities

233k184 Deposits and Other Security by

Tenant

233k184(2) k. Deposits Most Cited

Cases

Landlord and Tenant 233k213(5)

233 Landlord and Tenant

233VIII Rent and Advances

233VIII(A) Rights and Liabilities

233k212 Payment

233k213 In General

233k213(5) k. Recovery of

Payments. Most Cited Cases

Provisions in apartment lease, containing ten thousand words, to effect that if apartment building were completed after date set for commencement of lease, lease should continue, but term should not commence until notice was given that apartment was ready for occupancy and that failure to give possession on date of commencement of term should not affect obligations of tenant or extend term were unconscionable and unenforceable; thus where apartment was not ready for occupancy until four months after lease was to commence, tenant who had been forced to vacate her premises and obtain shelter elsewhere was entitled to cancellation of lease and to return of one month's rent and security deposit. Uniform Commercial Code, §§ 2-104, 2-302.

**68 *7 Tawn Seabrook, plaintiff in person
Samuel Steinberg, Brooklyn, for defendant.

EDWIN KASSOFF, Judge.

This action was brought by plaintiff for the return of one month's rent and a security deposit totalling \$464. Plaintiff entered into a written lease agreement with the defendant on or about November 30, 1971 for an apartment in defendant's building. The lease and occupancy were to commence on March 1, 1972. The building in which the apartment was located was under construction when the parties executed the lease. Defendant's printed form lease contained a clause which provided that if the building was not completed on the date occupancy was to commence, occupancy would begin on the day the building was completed and the three year period of the lease would commence with occupancy. On or about June 29, 1972 defendant notified plaintiff that the apartment would be ready for occupancy on **69 July 1, 1972, four months after the lease was to commence. On May 12, 1972, plaintiff notified

defendant that because of the landlord's delay in construction she was forced to vacate her premises and seek shelter elsewhere. Plaintiff requested that the lease be cancelled. Defendant refused to cancel the lease and refused to return the rent and security deposit. At the trial, plaintiff testified that neither the landlord or his renting agent explained the construction clause to her before she executed the lease. She also testified that she was not represented by an attorney.

[1] The lessees in situations such as this one are usually occasional customers, not acquainted with the carefully drafted legal terms set forth in such printed form leases. The landlord and his agents, assisted by expert legal counsel, carefully draft the lease in language designed solely for the landlord's protection. When the landlord presents the lease to the lessee for acceptance and execution he is usually fully cognizant of the fact that the other party has not read or bargained for many of the incidental terms of the contract. The terms of the printed contract are usually non-negotiable. In most cases the tenant is not represented by counsel. The landlord's position is superior. He not only possesses superior knowledge, but offers a scarce commodity. The lessee is often under an existing lease which usually expires at or about the time the new lease is to become effective.*8 The landlord is a merchant in a seller's market place. The word 'merchant' as used by this Court has the same definition as used in Section 2-104 of the Uniform Commercial Code. The Code defines merchant as 'a person who deals in goods of the kind or otherwise. By his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.' If one is a merchant, he has a special skill or a particular knowledge; and for this reason he is held by the Court to a completely different set of rules which are generally more strict than the rules that apply to non-merchants. As a result, one who contracts with a merchant will generally find himself in a more favorable position with the Court and protected to a greater extent than if he had contracted with a non-merchant. A merchant is to be held to a higher standard of conduct by the Court.

The lessee that has no choice but to sign an unconscionable lease agreement or not take the premises must be protected against the bad bargain he enters into. The lease in such cases is the equivalent of a consumer contract. The concept of laissez-faire, that is if the purchaser does not agree to lease of the seller he can go elsewhere, has no place in our enlightened society where lessor and lessee do not deal on **70 equal terms and where lessee for all practical purposes does not have the option of shopping around for available renting accommodations of his choice.

The Uniform Commercial Code by its definition applies only to the sale of goods. However, Section 2-302 of the Code which provides '(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result,' does not mention the sale of goods. The official comment to Section 2-302 of the Code states that the purpose of the section is to prevent suppression and unfair surprise by avoiding enforcement of unconscionable contracts made by parties who lacked equal bargaining power. It is this Court's view that the Code's prohibition represents a crystallization of the law's view toward all such contracts, whether for the sale of goods or otherwise. Although the lease agreement in this case does not come *9 within the scope of section 2-302 of the Code, it presents a business pattern closely akin to what the drafters of section 2-302 sought to prohibit, and may be related to the Code by analogy.

[2][3][4] The notion that an unconscionable bargain should not be given full enforcement is by no means novel. In Scott v. United States, 79 U.S. (12 Wall) 443, 445, 20 L.Ed. 438 (1870), the Supreme Court stated: '... If a contract be unreasonable ... but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to.' When applying a statute, the courts should consider its objects and purposes and the evils sought to be remedied, and should construe it so as to effectuate the general purposes, and suppress the mischief (Casey Development Corp. v. Montgomery

County, 212 Md. 138, 129 A.2d 63 (1957)). A statute may be extended by analogy, beyond its apparent boundaries, to include situations which would reasonably have been contemplated by the Legislature in light of the purposes giving impetus to the legislation. (3 Southerland Statutory Construction, 3rd Ed. (Horack) Sec. 6005 (1943)) Thus, principles of the Uniform Negotiable Instruments Act have been extended beyond the letter of the statute to non-negotiable instruments (Sheldon v. Blackman, 188 Wis. 4, 205 N.W. 486 (1924)). The Court reasoned that the Negotiable Instruments Law represented codification of the law on all instruments of debt. Similarly, an Illinois statute authorizing county election contests was held applicable to municipal elections (Harding v. Albert, 373 Ill. 94, 25 N.E.2d 32 (1939)). A bankruptcy statute, giving a debt 'due to the United States' priority, was held to apply to a debt due on governmental corporations (In **71 re: Wilson, 23 F.Supp. 236 (N.D.Tex.1938)). A Louisiana statute, imposing on public utilities 'corporations' the burden of paying expenses incurred in their investigation by the State's public service commission, was extended by analogy to natural persons operating a public utility (Gremillion v. La. Public Service Commission, 186 La. 295, 172 So. 163 (1937)). Before the Code was enacted, the court in the case of Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948) refused to grant specific performance due to the unconscionability of a provision in the contract. Extending the rules embodied in the Code, the court in Vitex Mfg. Corp. v. Caribtex Corp., 377 F.2d 795, 799 (3d Cir. 1967) which was an action for damages resulting from a breach of contract to supply wool for processing said: 'While this contract is not controlled by the Code, the Code is persuasive here because it embodies the foremost modern legal thought concerning commercial transactions.' In Hertz Commercial Leasing Corp. v. Transportation Credit Clearing House, 59 Misc.2d 226, 229, 298 N.Y.S.2d 392, 395, *10 rev'd on other grounds, 64 Misc.2d 910, 316 N.Y.S.2d 585, where section 2-302 was applied to an equipment lease it was said by the court that 'In view of the great volume of commercial transactions which are entered into by the device of a lease, rather than a sale, it would be anomalous if this large body of commercial transactions were subject to different rules of law than other commercial transactions which tend to the identical economic result.' That provisions of uniform acts have been extended to transactions which are within their intent, although

perhaps not within their words, is clear (Agar v. Orda, 264 N.Y. 248, 190 N.E. 479).

A consideration of applicable case law and of economic reason leads this court to conclude that the principles set forth in section 2-302 of the Uniform Commercial Code, should be extended to govern the lease before the court.

The doctrine of unconscionability is used by the courts to protect those who are unable to protect themselves and to prevent injustice, both in consumer and non-consumer areas.

The plaintiff was presented with a long complex lease, printed in small, practically illegible print. The court finds the lease to contain fifty-four clauses. The lease is four pages long and contains approximately ten thousand words. If typed on 11 8 1/2 paper, the lease would contain approximately fifty pages of highly technical legal terms, terms not commonly used or understood by the occasional lessee. How can a consumer be expected to fully comprehend or intelligently execute a lease of this length?

Clause number 33 entitled 'New Building' states: 'The building being erected on the premises by the Landlord is presently in the course of construction and, notwithstanding anything herein contained to the contrary as to either the commencement and termination of this lease or the provisions of paragraph No 19 hereof, or any other **72 provisions of this lease, it is agreed that if the building should be completed on a date other than the date set for the commencement of the term hereunder, this lease shall continue in full force and effect, except that the term shall not commence until notice is given by the landlord to the tenant that the apartment is ready for occupancy by the tenant and the termination date of this lease shall be the last calendar day of the thirty-sixth month from the commencement date set by the landlord in said notice.'

Paragraph number 19 entitled 'Failure to Give Possession' reads in part: 'If landlord shall be unable to give possession of the demised premises on the date of the commencement of the term hereof by reason of the fact that the premises are located in a building being constructed and which has not been

*11 sufficiently completed to make the premises ready for occupancy or by reason of the fact that a certificate of occupancy has not been procured or for any other reason, landlord shall not be subject to any liability for the failure to give possession, on said date. Under such circumstances the rent reserved or covenanted to be paid herein shall not commence until the possession of demised premises is given or the premises are available for occupancy by tenant, and no such failure to give possession on the date of commencement of the term shall in any wise affect the validity of this lease or the obligations of tenant hereunder, nor shall same be construed in any wise to extend the term of this lease. The issuance to landlord of a temporary certificate of occupancy shall be deemed conclusive evidence, as against tenant, that the premises are available for occupancy by the tenant.'

These two clauses alone contain three hundred and forty words and are separated by some thirteen complex legal clauses containing approximately two thousand words. In Williams v. Walker-Thomas Furniture Co., 121 U.S.App.D.C. 315, 350 F.2d 445 (1965) the court found that unequal bargaining powers and the absence of a meaningful choice on the part of one of the parties, together with contract terms which unreasonably favor the other party, may spell out unconscionability. Both clauses are constructed by the landlord for the purpose of guaranteeing full occupancy. Once the consumer enters the merchant's trap and executes the lease, he is caught in a web from which there is no escape. The two clauses fail to set forth a reasonable period for extension of the time of commencement of the lease and fail to give the tenant the option of cancelling the lease agreement if the premises are not ready for occupancy within a reasonable time after the lease was to commence. The court realizes that by not setting forth a time for extending the commencement of lease implies that a reasonable time will apply. However, it is the court's opinion that the landlord was under an affirmative duty and obligation to set forth a reasonable time limit and thereby relieve lessee of the burden **73 and risk of determining what period of time is reasonable. The landlord merchant was also under an affirmative duty to bring clauses 19 and 33 to the attention of the lessee and to explain their meaning before asking the lessee to execute the lease. Hiding these clauses in a maze of legal terms will not shield the landlord from his obligations to the lessee.

The court finds these two clauses to be unconscionable and will not enforce them. In doing this, the court in no way seeks to abridge the parties' right to contract, but merely holds that *12 an expert cannot hide behind legal clauses of this kind when dealing with an occasional lessee that has neither a knowledge of real estate law nor the advice of legal counsel.

Accordingly, the court orders that one month's rent and one month's security, totalling \$464, be returned to the plaintiff, with interest from May 12, 1972.

N Y City Civ.Ct 1972.
Seabrook v Commuter Housing Co., Inc.
72 Misc 2d 6, 338 N.Y S 2d 67

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▶ Zimmerman v. First American Title Ins Co.
Tex.App.-Tyler, 1990.

Court of Appeals of Texas, Tyler
Mel ZIMMERMAN, Sharon Zimmerman, Jeffrey
Glover and Johanna Glover, Appellants,

v
FIRST AMERICAN TITLE INSURANCE
COMPANY, Appellee
No. 12-88-00331-CV.

Feb. 28, 1990.
Rehearing Denied June 21, 1990.

Real estate agent brought action against title company for breach of Deceptive Trade Practices Act and negligence in closing real estate sale. Title company's motion for directed verdict was granted by the 7th District Court, Smith County, W.E. Coats, J, and agent appealed. The Court of Appeals, Bill Bass, J, held that: (1) title company owed duty to the agent where he was a signatory to contract in that he was to receive title to one lot free and clear of liens in lieu of commission for brokering sale of other lots, and title company undertook to handle the closing in addition to providing title insurance; (2) when title company later undertook to cure its first failure to accomplish transfer of lot to agent "free and clear," it owed duty of performing that cure with care; (3) agent was a consumer for purposes of the Act; (4) agent had not elected remedies by accepting deed or by seeking relief from other parties; and (5) there was evidence from which it could be found that running of statute of limitations was suspended or that title company was estopped from asserting it.

Reversed and remanded

West Headnotes

[1] Appeal and Error 30 ↪901

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k901 k Burden of Showing Error Most Cited Cases

Where trial court granted motion for directed verdict without specifying which of several grounds alleged in the motion constituted the basis of its judgment, it was opponents' burden to show on appeal that directed verdict could not be supported on any of the grounds set forth in the motion.

[2] Appeal and Error 30 ↪927(7)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k927 Dismissal, Nonsuit, Demurrer to Evidence, or Direction of Verdict
30k927(7) k Effect of Evidence and Inferences Therefrom on Direction of Verdict. Most Cited Cases

Appeal and Error 30 ↪989

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)1 In General
30k988 Extent of Review
30k989 k In General Most Cited Cases

Appeal and Error 30 ↪997(3)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)1 In General
30k997 Taking Case from Jury
30k997(3) k Direction of Verdict.
Most Cited Cases

On appeal from directed verdict, evidence is to be viewed in the light most favorable to appellants' position, disregarding all contrary evidence and inferences therefrom, and if there is any evidence on a controlling fact about which reasonable minds could differ, judgment must be reversed

[3] Antitrust and Trade Regulation 29I ↪251

29I Antitrust and Trade Regulation
29III Statutory Unfair Trade Practices and
Consumer Protection
29TIII(D) Particular Relationships
29Tk251 k Principal and Agent Most
Cited Cases
(Formerly 92Hk8 Consumer Protection, 272k2)

Deposits and Escrows 122A ↪13

122A Deposits and Escrows
122AII Conditional Deposits or Escrows
122Ak13 k. Depositories Most Cited Cases
(Formerly 272k2)

Title company owed a duty to real estate agent, and thus could be liable to him for its negligence in closing transaction or for nondisclosures and misrepresentations in violation of the Deceptive Trade Practices Act, where agent was signatory of the contract and possessor of enforceable legal rights under it, in that he was to receive one of the lots conveyed "free and clear" in lieu of commission, and in that agent brought contract to insurer, not merely to procure title insurance for the purchaser, but also that it might handle the closing in conformance with instructions in the contract, which the title company undertook to do, and was paid a closing fee. V.T.C.A., Bus. & C. § 17.41 et seq.

[4] Abstracts of Title 6 ↪3

6 Abstracts of Title
6k3 k Rights, Duties, and Liabilities of
Examiners of Title. Most Cited Cases
(Formerly 272k14)
Title company may be liable for negligence in closing a real estate transaction

[5] Deposits and Escrows 122A ↪13

122A Deposits and Escrows
122AII Conditional Deposits or Escrows
122Ak13 k Depositories. Most Cited Cases
Escrow agent is in a fiduciary relationship with the contracting parties, and among the obligations of the fiduciary are the duty of loyalty, the duty to make full disclosure, and the duty to exercise a high degree of care to conserve the money and pay it only to those persons entitled to receive it.

[6] Deposits and Escrows 122A ↪13

122A Deposits and Escrows
122AII Conditional Deposits or Escrows
122Ak13 k. Depositories Most Cited Cases
(Formerly 272k2)
Title company, having undertaken to cure its earlier error as closer in failing to accomplish transfer of title to lot to real estate agent "free and clear," as provided by contract in lieu of commission, owed agent duty of performing the correction with care, in securing release of recorded liens.

[7] Antitrust and Trade Regulation 29I ↪141

29I Antitrust and Trade Regulation
29III Statutory Unfair Trade Practices and
Consumer Protection
29TIII(A) In General
29Tk139 Persons and Transactions
Covered Under General Statutes
29Tk141 k. Consumers, Purchasers,
and Buyers; Consumer Transactions. Most Cited
Cases
(Formerly 92Hk5 Consumer Protection)

Antitrust and Trade Regulation 29I ↪147

29I Antitrust and Trade Regulation
29III Statutory Unfair Trade Practices and
Consumer Protection
29TIII(A) In General
29Tk139 Persons and Transactions
Covered Under General Statutes
29Tk147 k. Contractual Relationships
and Breach of Contract in General. Most Cited Cases
(Formerly 92Hk5 Consumer Protection)

Antitrust and Trade Regulation 29I ↪150

29I Antitrust and Trade Regulation
29III Statutory Unfair Trade Practices and
Consumer Protection
29TIII(A) In General
29Tk150 k. Completion of Transaction
Most Cited Cases
(Formerly 92Hk5 Consumer Protection)
To be a "consumer" entitled to maintain an action under the Deceptive Trade Practices Act, one must

have sought or acquired goods or services by purchase or lease, and the goods or services purchased or leased must form the basis of the complaint; consumer status turns on relationship to transaction and not contractual relationship with the defendant, and there is no requirement that defendant's deceptive or misleading conduct occur simultaneously with the sale or lease of the goods or services that form the basis of the consumer's complaint V.I.C.A., Bus. & C. § 17.45(4)

[8] Antitrust and Trade Regulation 29T ↪148

29I Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(A) In General

29Tk139 Persons and Transactions Covered Under General Statutes

29Tk148 k Tortious Conduct and Negligence in General Most Cited Cases
(Formerly 92Hk34 Consumer Protection)

Antitrust and Trade Regulation 29T ↪292

29I Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(E) Enforcement and Remedies

29TIII(E)1 In General

29Tk292 k Privity Most Cited Cases

(Formerly 92Hk34 Consumer Protection)

Claims under the Deceptive Trade Practices Act are not based in negligence, nor is there any requirement of privity between consumer and defendant. V.I.C.A., Bus. & C. § 17.46.

[9] Antitrust and Trade Regulation 29T ↪141

29I Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(A) In General

29Tk139 Persons and Transactions Covered Under General Statutes

29Tk141 k. Consumers, Purchasers, and Buyers; Consumer Transactions. Most Cited Cases

(Formerly 92Hk8 Consumer Protection)

Real estate agent was a "consumer" in connection

with real estate transaction in which agent was to acquire one lot free and clear of liens as commission for brokering the sale of other lots, such that agent could recover from title company under the Deceptive Trade Practices Act upon showing deceptive and misleading practices in connection with closing. V.I.C.A., Bus. & C. § 17.46.

[10] Estoppel 156 ↪52.10(2)

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k52.10 Waiver Distinguished

156k52.10(2) k Nature and Elements

of Waiver. Most Cited Cases

"Waiver" is voluntary and intelligent relinquishment of a known right or intentional conduct inconsistent with assertion of a known right

[11] Election of Remedies 143 ↪7(1)

143 Election of Remedies

143k7 Acts Constituting Election

143k7(1) k. In General. Most Cited Cases

Party does not lose a remedy by electing to pursue another unless it appears that he acted voluntarily, intentionally, and with knowledge essential to the exercise of an intelligent choice.

[12] Election of Remedies 143 ↪7(1)

143 Election of Remedies

143k7 Acts Constituting Election

143k7(1) k. In General. Most Cited Cases

Real estate agent who was to receive one lot free and clear of liens as commission for brokering the sale of other lots did not elect remedies so as to preclude suit against title company for alleged negligence and misrepresentations in handling the closing, by accepting deed to one lot and by three years later accepting a quit-claim deed in supposed correction of error when it was discovered that the lot had not been free of liens, where agent had no choice because, both after the initial closing and after the title company's subsequent pretended correction of the problem, agent was ignorant of prior liens until he lost title to the property through foreclosure of those liens.

[13] Election of Remedies 143  7(1)

143 Election of Remedies

143k7 Acts Constituting Election

143k7(1) k. In General. Most Cited Cases

Party who was to receive title to lot free and clear of liens did not elect remedies, precluding recovery of damages from title company which handled closing, by seeking from other parties, including lienholders, various forms of relief, including reformation and removal of cloud from title

[14] Election of Remedies 143  7(1)

143 Election of Remedies

143k7 Acts Constituting Election

143k7(1) k. In General. Most Cited Cases

Pleading 302  53(1)

302 Pleading

302II Declaration, Complaint, Petition, or Statement

302k53 Separate Counts on Same Cause of Action

302k53(1) k. In General. Most Cited Cases

Pleading 302  93(1)

302 Pleading

302III Responses or Responsive Pleadings in General

302III(A) Defenses in General

302k89 Pleading Different Pleas or Defenses Together

302k93 Inconsistent Defenses

302k93(1) k. In General. Most Cited

Cases

Party may plead and prove totally inconsistent claims and defenses, and mere bringing of action that is dismissed before entry of judgment is not an election of remedies barring prosecution of another remedy.

[15] Election of Remedies 143  7(1)

143 Election of Remedies

143k7 Acts Constituting Election

143k7(1) k. In General. Most Cited Cases

Pursuit of a fancied or unfounded remedy which never existed, because either the facts or the

applicable law proved to be different from what plaintiff presumed, does not prevent plaintiff from invoking the proper remedy

[16] Vendor and Purchaser 400  229(1)

400 Vendor and Purchaser

400V Rights and Liabilities of Parties

400V(C) Bona Fide Purchasers

400k225 Notice

400k229 Constructive Notice, and Facts

Putting on Inquiry

400k229(1) k. In General. Most

Cited Cases

Purchaser of real estate has constructive notice of all information in his grantor's chain of title, and he is bound by every recital, reference and reservation contained in or fairly disclosed by any instrument which forms an essential link in that chain.

[17] Limitation of Actions 241  100(13)

241 Limitation of Actions

241II Computation of Period of Limitation

241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action

241k98 Fraud as Ground for Relief

241k100 Discovery of Fraud

241k100(13) k. Constructive Notice of Fraud. Most Cited Cases

If evidence of fraud is a matter of public record, it is ordinarily sufficient to charge a party with knowledge of the fraud and to start running of statute of limitations, but existence of fiduciary or special relationship of trust and confidence between the parties may excuse the injured party from making prompt and thorough investigation of the records until receipt of other knowledge that would reasonably arouse suspicion.

[18] Limitation of Actions 241  13

241 Limitation of Actions

241I Statutes of Limitation

241I(A) Nature, Validity, and Construction in General

241k13 k. Estoppel to Rely on Limitation.

Most Cited Cases

Party may be estopped to assert the defense of limitations if his statements or conduct kept the other

party in ignorance of his rights or induced him to refrain from bringing action within the applicable time.

1191 Deposits and Escrows 122A ↪13

122A Deposits and Escrows

122AII Conditional Deposits or Escrows

122Ak13 k Depositories. Most Cited Cases

Title company acting as escrow agent is in a fiduciary relationship with the parties to the closing of a real estate transaction.

1201 Limitation of Actions 241 ↪197(2)

241 Limitation of Actions

241V Pleading, Evidence, Trial, and Review

241k194 Evidence

241k197 Weight and Sufficiency

241k197(2) k Ignorance, Trust, Fraud, and Concealment of Cause of Action. Most Cited Cases

There was evidence from which jury might reasonably conclude that title company was in a fiduciary relationship with agent who was to receive a lot in lieu of commission in connection with closing of sale on others lots, such that agent was justified in not searching deed records for liens on his lot until his suspicion was reasonably aroused by failure to receive tax statement, and so that the running of the statute of limitations on agent's claim against title company was suspended in the interim.

1211 Limitation of Actions 241 ↪197(2)

241 Limitation of Actions

241V Pleading, Evidence, Trial, and Review

241k194 Evidence

241k197 Weight and Sufficiency

241k197(2) k Ignorance, Trust, Fraud, and Concealment of Cause of Action. Most Cited Cases

There was evidence from which jury could find that title company's misrepresentations regarding supposed correction of title problem were fraudulent and reasonably calculated to induce party to refrain from commencing suit within period allowed by statute of limitations, so that title company should be estopped from asserting limitations defense.

*693 James S. Robertson, Jr., Wilson, Miller, Spivey, Sheehy & Knowles, Tyler, for appellants.
Steven M. Dowd, Lufkin, for appellee.

BILL BASS, Justice.

This is an action brought by a real estate agent against a title insurance company for the title company's breach of the Deceptive Trade Practices Act "breach of contractual and fiduciary duty," and negligence in the closing of a real estate sale. At the close of the evidence, the trial court withdrew the case from the jury and rendered judgment that appellants take nothing against First American Title Company, appellee. We reverse the trial court's judgment and remand the cause for a new trial.

Appellant Zimmerman was the real estate agent who arranged a sale of forty-eight lots on Lake Palestine from the First City Bank of Dallas, seller, to Ken Torres, buyer. The parties agreed that, in lieu of a cash commission, Zimmerman would receive one of the lots, the June 19, 1981, purchase contract reciting "[b]uyer to deed lot # 80 of Unit 1 Hide A Way Bay over to Mel & Sharon Zimmerman free and clear on date of closing."

Zimmerman referred the contract to Tyler Land and Title Company, appellee's predecessor. The land purchase contract specified a purchase price of \$30,000, \$500 cash as earnest money and the \$29,500 balance payable in cash at closing. The Lindale State Bank loaned Torres the money, and informed the title company that the payment of Torres' note to them should be secured by a deed of trust covering the forty-eight lots, and the reservation in the deed from First City to Torres of a vendor's lien and superior title in the Lindale Bank. The title company closed the transaction and issued title policies insuring Torres' title and the interest of the mortgagee, Lindale State Bank. All forty-eight lots were conveyed by deed dated February 10, 1982, and recorded March 8, 1982, from the First City Bank of Dallas, seller, to Ken Torres, buyer. This conveyance reserved a vendor's lien and superior title to secure the payment of Torres' note to the Lindale State Bank. The note was also secured by a deed of trust covering all forty-eight lots. As part of the closing, which the appellee title company handled, Ken Torres conveyed lot 80 to Mel and Sharon Zimmerman by warranty deed dated February 16, 1982, and also recorded March 8, 1982. Therefore, the Zimmermans failed to receive lot 80.

"free and clear" as required by the contract, but instead received lot 80 subject to the Lindale Bank's lien and deed of trust only just created in favor of the Lindale Bank. Torres defaulted in the payment of the note to the Lindale Bank and the bank foreclosed its lien on February 7, 1984, by a sale of all the lots, including lot 80 under the deed of trust to Larry S. Watkins, the buyer at the deed of trust sale. Watkins then executed a deed of trust to secure a loan from the American National Bank.

The Zimmermans had in the meantime contracted to sell lot 80 to the Glovers by contract for deed dated April 16, 1985. Mr. Glover is Mrs. Zimmerman's son. The Glovers built a house on the lot.

Zimmerman testified that they did not discover that there was a question about their title to lot 80 until sometime in 1985 when they failed to receive a tax statement. Zimmerman then approached the title company about the problem and was assured that the matter would be corrected. The local manager submitted the Zimmermans' claim to their claim department who apparently authorized the payment of \$1,395.83 to Larry Watkins, trustee, in consideration of his execution of a quitclaim deed to the Zimmermans. Shortly thereafter the Zimmermans received the quitclaim deed and assumed that they at last had an unencumbered fee simple title to lot 80. However, the title company had failed to secure a release of American National Bank's lien given by Watkins a month after Lindale Bank's foreclosure of its lien.

Watkins in turn defaulted in the payment of his note, and American National Bank also foreclosed its lien by deed of trust sale July 14, 1986.

*694 The Zimmermans filed their original petition against the title company on October 30, 1986, for damages resulting from the title company's negligence in failing to close the sale from First City Bank of Dallas to Ken Torres so that the Zimmermans received lot 80 "free and clear" as required by the purchase contract and for their negligent failure to secure a release from American National Bank when it assured the Zimmermans that their initial title problem would be corrected. The Zimmermans also alleged that the title company's acts constituted a breach of the Texas Deceptive Trade Practices Act.

At the close of the evidence the title company moved for directed verdict on three grounds. First, the title company argued that it owed no duty to the Zimmermans. Second, the title company contended that the evidence conclusively demonstrated that the Zimmermans had elected to accept their deed to lot 80 encumbered by the lien to the Lindale Bank and had proceeded against their grantor, Torres, and others seeking title, removal of cloud from title and reformation of the deed from First City Bank to Torres so as to vest title in themselves. In the title company's view, the Zimmermans had thus waived their right to recover from the title company. Third, the title company urged the appellants' causes of action were barred by the applicable statutes of limitation.

[1] The trial court granted the title company's motion for directed verdict without specifying which of the grounds alleged in the defendant's motion constituted the basis of its judgment. It is therefore the appellants' burden to show that the court's directed verdict cannot be supported on any of the grounds set forth in the title company's motion for instructed verdict. McKelvy v. Barber, 381 S.W.2d 59, 62 (Tex. 1964).

[2] The standard of review applicable to an appeal from a directed verdict requires that the evidence be viewed in the light most favorable to the appellants' position, disregarding all contrary evidence and inferences therefrom. If there is any evidence on a controlling fact about which reasonable minds could differ, the trial court's judgment must be reversed and the cause remanded for a new trial. Henderson v. Travelers Ins. Co., 544 S.W.2d 649, 650 (Tex. 1976).

In their first point of error the appellants urge the trial court erred in directing a verdict for the title company because the evidence shows that the title company was negligent as a matter of law, or, in the alternative, that the evidence raised an issue of fact regarding the negligence and gross negligence of the title company. The appellants contend in their second point that the facts of the case establish, or at least raise the issue of, the title company's breach of a contractual or fiduciary duty it owed the Zimmermans.

[3] The title company maintains that its duty was

only to carry out the terms of the contract for the buyer and seller; that Zimmerman was not a party to the agreement, but merely a real estate agent to whom it owed no duty.

We believe the title company's contention that it owed no duty to the Zimmermans is insupportable. Zimmerman was a signatory of the contract and the possessor of enforceable legal rights under it. Zimmerman had customarily done business with the title company. He brought the contract to the title company, not merely to procure title insurance for the buyer, but also that it might handle the closing in conformity with the instructions in the contract. The title company accepted the contract and assumed the responsibility to close the transaction in accordance with those instructions. The title company ordered the preparation of the necessary documents for closing and paid them from the closing proceeds. It circulated the documents with instructions for their execution, and had them recorded. It prepared the closing statements and made disbursements, including the recording and delivery of the deed to the Zimmermans for lot 80. The title company was paid a closing fee.

[4][5] A title company may be liable for its negligence in closing a real estate transaction. *695 Dixon v. Shirley, 558 S.W.2d 112 (Tex.Civ.App.-Corpus Christi 1977, writ ref'd n.r.e.); Chilton v. Pioneer National Title Insurance Co., 554 S.W.2d 246 (Tex.Civ.App.-Waco 1977, writ ref'd n.r.e.) The title insurance agent may not intentionally or recklessly deceive the parties to a real estate transaction. Stone v. Lawyers Title Insurance Corp., 537 S.W.2d 55 (Tex.Civ.App.-Corpus Christi 1976), *aff'd in part and rev'd in part*, 554 S.W.2d 183 (Tex.1977). An escrow agent is in a fiduciary relationship with the contracting parties. Chilton, 554 S.W.2d at 249. Among the obligations of the fiduciary are (1) the duty of the loyalty, (2) the duty to make a full disclosure, and (3) the duty to exercise a high degree of care to conserve the money and pay it only to those persons entitled to receive it.

In the instant case, the title company twice undertook the obligation of transferring to the Zimmermans the title to lot 80 free and clear of liens, first during the original closing, and subsequently when the error was discovered. In each instance, the title company having accepted that undertaking owed the

Zimmermans the duty to use care and skill to see that it was done correctly. *Id.*: Montgomery Ward & Co. v. Scharrenbeck, 204 S.W.2d 508 (Tex.1947).

[6] The buyer, seller and Zimmerman agreed that instead of a cash commission from the seller's proceeds, Zimmerman would take as his commission one of the lots received by the buyer "free and clear of liens." The title company disregarded these instructions of the contracting parties and without disclosure to anyone created a lien on lot 80 in favor of the Lindale Bank. That was a significant alteration of an important provision of the agreement, and a breach, not only of the title company's duty to Zimmerman, but also of its duty to the buyer and seller "to exercise due care to carry out the terms of the agreement." The title company repeatedly asserts in its brief that it carried out the terms of the agreement, but the record contains ample evidence to the contrary. Some three years after closing the title company undertook to cure its first failure to accomplish the transfer of lot 80 to the Zimmermans "free and clear." Having undertaken the task, the title company plainly owed the Zimmermans the duty of performing it with care. Yet once again they failed to secure a release of a recorded lien. The trial court's directed verdict cannot be sustained on the theory of no duty.

In their third point, the appellants contend that the trial court erred in directing a verdict for the title company because the evidence demonstrated material issues of fact as to the title company's alleged violations of the Deceptive Trade Practices Act.

The appellants maintain that the title company advised Mr. Zimmerman that since title to all the lots would be checked in connection with the sale to Torres, it was not necessary for him to order a separate policy for lot 80. The appellants urge that the evidence establishes or at the very least raises the issue that the title company's negligent handling of the closing and its failure to reveal the existence of the Lindale Bank's lien encouraged in the Zimmermans the false belief that the title to lot 80 was free and clear of liens. The title company's subsequent attempts to cure its error were, in appellants' view, reasonably calculated to falsely reassure them that their title had been cleared when the title company knew or should have known that the deed it obtained from Larry Watkins to the

Zimmermans effected no such remedy. Therefore, the appellants argue, the evidence shows intentional or negligent misrepresentations by the title company and its failure to disclose material facts, conduct constituting a "false, misleading act or practice" and a breach of the DIPA. The appellants urge the evidence of the title company's conduct raises the issue of its breach of the DTPA in (1) representing that an agreement confers or involves rights and remedies that it does not have or involve, (2) representing that goods or services have sponsorship, approval, characteristics, uses, and benefits which they do not have, or (3) the failure to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a *696 transaction into which the consumer would not have entered had the information been disclosed. Tex.Bus. & Com.Code Ann. § 17.46 (Vernon 1968).

The title company's position is that "[t]he alleged violation of the ... DTPA is founded in contract ... and tort law and in both such instances it must be shown by Zimmerman that [the title company] owed a duty to him. ..." The title company argues the facts in evidence do not show the existence of such a duty. It reiterates its argument that the Zimmermans were not "parties" to the real estate sale agreement and did not purchase a separate title policy on lot 80.

The title company's argument once again ignores the fact that Mr. Zimmerman was a signatory of the contract and agreed by its terms with the other parties to acquire lot 80 "free and clear of liens" in lieu of the ordinary agent's commission. The record at least raises the issue that the title company failed to close the transaction in conformity with the agreement, misrepresenting the effect of the deed from Torres to Zimmerman and failing to disclose the existence of an outstanding lien. The evidence in the case suggests that the title company's subsequent attempt to cure its mistake involved an astonishing repetition of the same character of errors, nondisclosures and misrepresentations.

[7] A person must be a consumer as that term is defined in the Act in order to maintain an action under the DIPA. Melody Home Manufacturing Co. v. Barnes, 741 S.W.2d 349, 351 (Tex.1987). Tex.Bus. & Com.Code § 17.45(4) (Vernon 1987).

defines consumer as "an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services." Two requirements have been recognized as essential to establish consumer status. First, one must have sought or acquired goods or services by purchase or lease. Second, the goods or services purchased or leased must form the basis of the complaint. Id.; Riverside National Bank v. Lewis, 603 S.W.2d 169, 173-75 (Tex.1980).

[8] The title company's argument suggests a misplaced reliance on defenses rooted in common-law tort and contract doctrines. The Deceptive Trade Practices Act is not a codification of the common law. Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex.1980). Claims under the DTPA are not based in negligence. D. Bragg, P. Maxwell, J. Longley, Texas Consumer Litigation, § 2.02 n 90 at 34 (2d Ed.1983). Nor is there any requirement of privity between the consumer and the defendant. "The coverage of the Deceptive Trade Practice Act is not restricted to deceptive practices committed by parties furnishing goods or services, but rather extends to any deceptive practice made in connection with the purchase or lease of such goods or services." Gibbs v. Main Bank of Houston, 666 S.W.2d 554, 559 (Tex.App.-Houston [1st Dist.] 1984, no writ) (citing Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535 (Tex.1981)). In Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705 (Tex.1983), the Supreme Court reiterated the rule that the determination of a plaintiff's consumer status turns on the plaintiff's relationship to a transaction, not the plaintiff's contractual relationship with the defendant. The Supreme Court said in Flenniken:

A plaintiff establishes his standing as a consumer in terms of his relationship to a transaction, not by a contractual relationship with the defendant. The only requirement is that the goods or services sought or acquired by the consumer form the basis of his complaint.

Flenniken, 661 S.W.2d at 707. Therefore, the court concluded "[i]f, in the context of a transaction in goods or services, any person engages in an unconscionable course of action which adversely affects a consumer, that person is subject to liability under the DIPA." Id. Moreover, there is no requirement that the defendant's deceptive or

misleading conduct occurs simultaneously with the sale or lease of goods or services that form the basis of the consumer's complaint. Cf. Leal v. Furniture Barn, Inc., 571 S.W.2d 864, 865 (Tex.1978); Melody Home Manufacturing Co., 741 S.W.2d 349.

*697 [9] The appellants established their standing as consumers by the original real estate transaction in which they sought to acquire lot 80 free and clear of liens as Mr. Zimmerman's commission for brokering the sale of the other lots. There is evidence that it was in the context of that transaction that the title company engaged in the alleged deceptive and misleading practices. The trial court's directed verdict cannot be sustained upon the title company's assertion that the Zimmermans had shown no duty owing them by the title company.

In their fifth point of error, the appellants contend that the trial court erred in directing a verdict for the title company, because the doctrine of election of remedies is inapplicable to this case.

The title company maintains that the Zimmermans accepted the deed to lot 80, although the lot was subject to an outstanding lien (not shown on the deed) contrary to the instructions in the real estate purchase contract. Instead, as the title company phrases it, the Zimmermans "elected to retain title to lot 80." The title company apparently argues that the Zimmermans' initial acceptance of the deed to lot 80 and their acquiescence in the title company's efforts to cure the problem are facts which constitute a ratification of the title company's error and a waiver of the Zimmermans' right of recovery against it.

However, three years had transpired between the title company's preparation, recordation and delivery of the deed to Zimmerman, and his discovery of the title company's error. The deed did not contain any reference to the recently created lien in favor of the Lindale Bank. The Zimmermans had already lost title to the lot through the foreclosure of the Lindale Bank's lien. Mrs. Zimmerman's son was in the process of placing a home on the lot. It is difficult to see what real choice the Zimmermans possessed at that time but to accept the title company's assurance that they would correct its error by securing a conveyance, free and clear of liens, from the buyer at the deed of trust sale, Larry Watkins.

[10][11][12] Waiver is the voluntary and intelligent relinquishment of a known right or intentional conduct inconsistent with the assertion of a known right. Ford v. State Farm Mutual Automobile Insurance Co., 550 S.W.2d 663, 666 (Tex.1977); Bocanegra v. Aetna Life Ins. Co., 605 S.W.2d 848, 851 (Tex.1980). Similarly, a party does not lose a remedy by electing to pursue another unless it appears that he acted voluntarily, intentionally and with the knowledge essential to the exercise of an intelligent choice. Bocanegra, 605 S.W.2d at 852. When the Zimmermans received the deed from Torres after the closing they were totally ignorant of the central fact which was the genesis of all their difficulties. When they discovered their predicament and complained to the title company, the title company sent them a deed from Larry Watkins, trustee, with the assurance that their problem was solved. Once again they were left ignorant of the existence of a prior lien whose foreclosure would shortly oust them from their title. Their complaint to the title company and their acceptance of the Larry Watkins deed from the title company in supposed correction of its error cannot seriously be considered as a ratification of the original error. Repudiation at that point would have been an empty gesture. The time for repudiation of the original flawed conveyance had passed with the foreclosure of the Lindale Bank's lien while the Zimmermans were entirely unaware of its existence. The application of the doctrine of election obviously presupposes the existence of at least two inconsistent rights or remedies. In fact, the Zimmermans had no such alternatives. The title company asserts that the Zimmermans "elected to retain title to lot 80." However, the record shows that both after the initial closing and the title company's subsequent pretended correction of the problem, the Zimmermans were ignorant of the prior liens until they had lost title to their property through the foreclosure of those liens. An election simply cannot arise from these facts.

The appellants also joined in their suit against the title company, actions against American National Bank, First City National Bank of Dallas, Ken Torres and the *698 Lindale State Bank, pleading for various forms of relief including reformation, removal of cloud from title and for title and possession. Their suits against the American National Bank, Ken Torres and the First City National Bank of Dallas were dismissed by agreement prior to judgment. Their action against the Lindale State

Bank was withdrawn from the jury at the close of the plaintiffs evidence and verdict directed for the bank

[13][14][15] The title company argues that by bringing the other causes seeking other inconsistent forms of relief, the appellants made an election of remedies which bars their recovery of damages from the title company

There is no merit in the title company's contention. A party may plead and prove totally inconsistent claims and defenses in Texas Deal v. Madison, 576 S.W.2d 409 (Tex.Civ.App.-Dallas 1978, writ ref'd n.r.e.), overruled on other grounds, Cypress Creek Utility Service Co., Inc. v. Muller, 640 S.W.2d 860, 866; Tex.R.Civ.P. 48. The mere bringing of an action that has been dismissed before the entry of judgment is not an election of remedies barring the prosecution of another remedy Bocanegra, 605 S.W.2d at 852; Poe v. Continental Oil & Cotton Co., 231 S.W. 717, 719 (Tex.Comm'n App.1921, holding approved); Bandy v. Cates, 44 Tex.Civ.App. 38, 97 S.W. 710, 711 (1906, writ ref'd). Moreover, the pursuit of a fancied or unfounded remedy which never existed, because either the facts or the applicable law prove to be different from what the plaintiff presumed, does not prevent the plaintiff from invoking the proper remedy id. In the instant case, all of the actions against the other defendants were dismissed by agreement before judgment with the exception of the suit against the Lindale State Bank in which a verdict was directed against the appellants at the conclusion of their evidence

The most authoritative as well as the most recent statement of Texas law pertaining to the doctrine of election is Judge Pope's opinion in Bocanegra wherein he distinguishes the doctrine of election from the kindred theories of judicial and equitable estoppel, waiver and ratification. The facts in Bocanegra illustrate the narrow application of the doctrine of election in this state. Janie Bocanegra sued Aetna to recover under a group health policy which provided coverage for medical expenses incurred in treatment of a non-occupational injury or disease. Mrs. Bocanegra had previously filed a claim with the Industrial Accident Board related to the same conditions, and had settled her claim. The court of civil appeals held the settlement was an election which barred her later suit. The supreme court discussed the difficulty doctors, lawyers and laymen

have in understanding and applying the statutory distinction between "occupational disease" and "ordinary disease of life." The supreme court reversed the court of civil appeals and held that her claim and settlement of her claim for benefits for on-the-job injury was not an election barring her subsequent suit for reimbursement of non-occupational injury expenses, because it was not the product of an informed election in that she did not possess a full and clear understanding of the facts and appropriate remedies essential to the exercise of an intelligent choice.

The title company strenuously argues that this case is governed by the decision of the San Antonio Court of Civil Appeals in Texas Reserve Life Insurance Co. v. Security Title Co., 352 S.W.2d 347 (Tex.Civ.App.-San Antonio 1961, writ ref'd n.r.e.). Both Texas Reserve and the case at bar involve a title company's negligent closing of a real estate transaction in which the title company failed to secure the release of a prior lien burdening one of the parcels in the transfer. But the analogy goes no further. In Texas Reserve, the plaintiff learned of the unreleased lien within days of closing. A repudiation of the instrument delivered in violation of the escrow agreement would still have been effectual to restore the status quo. Instead, four months later and with full knowledge of the facts, Texas Reserve elected to pay the indebtedness secured by the lien. It then brought a negligence action against the title company seeking damages for the *699 amount it was required to pay to secure title to the property free and clear of liens. The Zimmermans, on the other hand, were entirely unaware of the facts that gave them the right to repudiate until three years later after their title was extinguished by foreclosure. The restoration of the status quo was by then impossible. They were led to believe by the receipt of the second deed that the title company had rectified its error and secured their ownership of lot 80 free and clear of liens. Texas Reserve is not apposite. The appellants cannot be charged with having made an election of remedies under the facts of this case and the trial court's directed verdict cannot be sustained on that basis.

In their sixth and last point of error, the appellants maintain that the trial court erred in directing a verdict, because they are not barred by limitations from asserting their causes of action

The title company contends that the Zimmermans had constructive notice of the prior lien on lot 80 from March 8, 1982, the date of filing of the Torres deed and the deed of trust in favor of the Lindale State Bank. The Zimmermans did not file their suit until October 30, 1986, more than four years after they were chargeable with notice of those instruments. Therefore, it argues, their suit against the title company was barred by the appropriate statutes of limitation, two years as to the DTPA claim (Tex. Bus. & Com. Code § 17.565 (Vernon 1987)) and four years for the appellants' other actions (Tex. Civ. Prac. & Rem. Code § 16.004 and § 16.051 (Vernon 1986))

[16][17][18][19] A purchaser of real estate has constructive notice of all information in his grantor's chain of title, and he is bound by every recital, reference and reservation contained in or fairly disclosed by any instrument which forms an essential link in that chain. Westland Oil Development Corp. v. Gulf Oil, 637 S.W.2d 903, 908 (Tex.1982). If evidence of a fraud is a matter of public record, it is ordinarily sufficient to charge a party with knowledge of the fraud, and to start the running of the statute of limitations. Sherman v. Sipper, 137 Tex. 85, 152 S.W.2d 319 (1941). However, the existence of a fiduciary or special relationship of trust and confidence between the parties may excuse the injured party from making a prompt and thorough investigation of the records until the receipt of other knowledge that would reasonably arouse suspicion. Courseview, Inc. v. Phillips Petroleum Co., 158 Tex. 397, 312 S.W.2d 197 (1957). Moreover, a party may be estopped to assert the defense of limitations if his statements or conduct kept the other in ignorance of his rights or induced him to refrain from bringing his action within the applicable time. Gibbs, 666 S.W.2d 554; Mandola v. Mariotti, 557 S.W.2d 350 (Tex.Civ.App.-Houston [1st Dist.] 1977, writ ref'd n.r.e.); Ladd v. Knowles, 505 S.W.2d 662 (Tex.Civ.App.-Amarillo 1974, writ ref'd n.r.e.); Lanpar Company v. Stanfield, 474 S.W.2d 753 (Tex.Civ.App.-Waco 1971, writ ref'd n.r.e.); Annotation, Fraud, Misrepresentation, or Deception as Estopping Reliance on Statute of Limitations, 43 A.L.R.3d 419 (1972). A title company acting as escrow agent is in a fiduciary relationship with the parties to the closing of a real estate transaction. Chilton, 554 S.W.2d 246; City of Fort Worth v. Phippen, 439 S.W.2d 660 (Tex.1969)

There is evidence that Zimmerman had customarily done business with the title company. He brought the real estate purchase contract to the title company for closing. He was a signatory to the contract and was by its terms to receive the grant of lot 80 "free and clear of liens." The title company conducted the closing seeing to the preparation of the instruments, their circulation with instructions for their execution, and their recording. Instead of seeing that the Zimmermans received lot 80 free and clear of liens, the title company was instrumental in the creation of a lien on lot 80 which did not exist when it received the contract and which was not mentioned in the contract. Zimmerman's suspicions were not aroused until he failed to receive a tax statement in 1985. He complained to the title company. He was told that the problem would be corrected and he was mailed a deed, accompanied by the assurance that everything *700 was all right. However, the title company was or should have been aware of the lien affecting the lot. The Zimmermans subsequently learned that this lien was also foreclosed by deed of trust sale on July 14, 1986. The Zimmermans filed suit October 30, 1986.

[20][21] Viewing the evidence on the controlling facts most favorably to appellants' position, we conclude that there is evidence from which a jury might reasonably conclude that the title company was in a fiduciary relationship with Zimmerman; that he was therefore justified in not searching the deed records until his suspicion was reasonably aroused by his failure to receive the tax statements in 1985, and that the running of the statute was suspended in the interim. Further there is evidence from which it reasonably might be inferred that the title company's misrepresentations regarding their supposed correction of the Zimmermans' title problem were fraudulent and reasonably calculated to induce the Zimmermans to refrain from commencing their suit within the period allowed by the statute of limitations, and that consequently, the title company should be estopped to assert their limitation defense. We therefore conclude that the trial court's directed verdict cannot be sustained on the theory that their causes of action were barred by the appropriate statutes of limitation.

All of the appellant's points of error are sustained. The judgment of the trial court is reversed and the case remanded to the trial court.

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