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No. 69636-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

ZINAIDA and VICTOR BOSSERDT,

Appellants,

vs.

B. DAVID THOMAS,

Respondent.

2013 JUN -6 AM 9:56
COURT OF APPEALS DIV I
STATE OF WASHINGTON

BRIEF OF RESPONDENT

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I. INTRODUCTION

Respondent B. David Thomas (“Thomas”) is an attorney. In September 2006, his client Nonna Verd (“Verd”) sold her interest in King Pastry & Deli, Inc. (“King Pastry”), to Zinaida Bosserdt. Acting as Verd’s attorney, Thomas drafted the Stock Purchase and Sale Agreement (“the Agreement”) that memorialized the transaction.

After the deal closed, Verd sued Zinaida Bosserdt and her husband, Victor Bosserdt (“the Bosserdts”), in connection with the operation of King Pastry. The Bosserdts, in turn, filed a third-party complaint against Thomas. The Bosserdts alleged that Thomas was liable to them because the Agreement he drafted did not refer to two of King Pastry’s debts. The Bosserdts claimed that they would not have entered into the Agreement had they known of the debts. The Bosserdts conceded that Thomas was not their attorney in the transaction and that he was not aware of the debts when he drafted the Agreement.

Each of the Bosserdts’ claims against Thomas had a statute of limitation of three years or less. The Bosserdts were aware that Thomas drafted the Agreement at the time of the transaction in September 2006 and they learned of the two King Pastry debts by July 16, 2007, but they waited until July 30, 2010, to commence their action against Thomas. The Bosserdts learned no new facts about Thomas’s role in the transaction

after July 16, 2007. The trial court properly dismissed the case on statute of limitations grounds. Thomas requests that this Court affirm the trial court's ruling.

II. ISSUES

1. Did the trial court properly dismiss the Bosserdts' claims against Thomas because they were all time-barred?
2. Did the trial court err by failing to include written findings of fact and conclusions of law in its order dismissing the Bosserdts' claims on summary judgment?

III. STATEMENT OF THE CASE

A. The Stock Purchase and Sale Agreement

Thomas is an attorney. CP 17. In 2004, he represented Verd in connection with the formation of King Pastry. CP 17. In September 2006, Verd sold her interest in the business to Zinaida Bosserdt through a Stock Purchase and Sale Agreement ("the Agreement").¹ CP 18. Thomas drafted the Agreement in his capacity as Verd's attorney. CP 18.

B. Verd's Claims Against the Bosserdts

On September 6, 2007, Verd filed this lawsuit against the Bosserdts and King Pastry. She requested dissolution of King Pastry and damages stemming from the Bosserdts' alleged breach of fiduciary duties.

¹ The Appendix to this brief contains a timeline of significant events.

C. The Bosserdts' Counterclaims Against Verd

On November 16, 2007, the Bosserdts filed a counterclaim against Verd. The Bosserdts alleged that they would not have agreed to partner with Verd in any business or invest any money with her if she had disclosed that she and her businesses were heavily in debt. The Bosserdts and King Pastry asserted the following causes of action against Verd: (1) breach of contract; (2) fraud/intentional misrepresentation; (3) Consumer Protection Act violations; (4) breach of fiduciary duty; and (5) violation of federal securities laws.

D. The Bosserdts' Bankruptcy Cases

On October 1, 2008, the Bosserdts filed a Chapter 7 Voluntary Petition for Bankruptcy in the U.S. Bankruptcy Court for the Western District of Washington. CP 55-57. On January 8, 2009, the Bankruptcy Court granted the Bosserdts a discharge under 11 U.S.C. § 727. CP 55-57. The Bankruptcy Court closed the Bosserdts' case on January 27, 2010. CP 55-57.

On March 21, 2009, the Bosserdts filed a Chapter 13 Voluntary Petition for Bankruptcy in the U.S. Bankruptcy Court for the Western District of Washington. CP 59-61. The case was dismissed at their request on February 23, 2010. CP 63.

E. Status of Lawsuit During Pendency of the Bosserdt's Bankruptcy Cases

On November 24, 2008, the Bosserdt's filed a document entitled "Notice of Bankruptcy Filing" in their case against Verd. CP 65. The document stated in part: "All proceedings herein are stayed pursuant to the provisions of 11 U.S.C. § 362." CP 65. The Bosserdt's did not file a motion seeking a stay of the proceedings, Verd did not file a response to the Notice of Bankruptcy Filing, and the trial court did not enter an order staying the proceedings.

F. Procedural History of Lawsuit After the Bosserdt's Bankruptcy Cases

Despite the fact that the trial court had not issued an order staying the case, the Bosserdt's filed a motion to remove stay on May 14, 2010. CP 67-69. The motion was combined with a request to add Thomas as a third-party defendant. CP 67-69. Verd did not file a response to the motion. On May 25, 2010, the trial court entered an Order Denying Motion to Amend and Granting Removal of Stay. CP 71-72.

The trial court granted the Bosserdt's second motion for leave to add Thomas as a third-party defendant on June 24, 2010. CP 74-75. The Bosserdt's filed and served their third-party complaint on July 30, 2010. CP 77-87. They asserted the following causes of action against Thomas: (1) fraud; (2) negligent misrepresentation; (3) violation of the Washington

Securities Act, Ch. 21.20 RCW (“WSSA”); and (4) Violation of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b).² CP 77-86.

G. The Bosserdts’ Knowledge of Facts Supporting Their Claims

Each of the Bosserdts’ four claims against Thomas was based on the fact that the Agreement did not identify two of King Pastry’s debts: (1) a loan to Yevgenia Vaysberg, and (2) a UCC lien held by Kautsman Construction. CP 92-93.³ The parties agree that Thomas had no knowledge of the loan or the lien when he drafted the Agreement. CP 107-108; 113-114.⁴

When Zinaida Bosserdt signed the Agreement in September 2006, she was aware that Thomas was representing Verd only. CP 19-43.⁵

The Bosserdts became aware of the Vaysberg loan in late 2006, as evidenced by paragraph 3.13 of the Amended Third Party Complaint: “On or about October 2006, [the Bosserdts] learned King Pastry & Deli, Inc., was heavily in debt and actually owed over \$200,000 to a previous investor, Yevgenia Vaysberg. [Verd], nor Mr. Thomas her attorney [sic], ever told [the Bosserdts] about the debts . . .” CP 80. Thomas did not represent Verd in connection with the Vaysberg loan.

² The Bosserdts also alleged a Washington Consumer Protection Act claim. The summary judgment dismissal of this claim is not part of this appeal.

³ Bosserdts’ answer to Thomas’s Interrogatory No. 1.

⁴ Zinaida Bosserdt deposition transcript, 48:11-49:1 (Vaysberg); and 54:22-55:6 (Kautsman Construction).

⁵ CP 24, ¶ 21 of Agreement.

The Bosserdts alleged in their third-party complaint that Verd “had a long history of borrowing money from people without any intention or ability to pay the money back.” CP 81. They identified 14 individuals from whom Verd allegedly borrowed money that she had no intention or ability to repay. CP 81. The Bosserdts were aware of these other alleged loans by May 2007. CP 115.⁶ Thomas did not represent Verd in connection with any of the other alleged loans.

Zinaida Bosserdt testified at her deposition that she learned of the Kautsman Construction lien by July 16, 2007. CP 113. Thomas did not represent Verd in connection with the lien.

On July 17, 2007, the Bosserdts’ attorney, Dan Harris, wrote a letter to the Bellevue Police Department that stated in part:

This is to alert you about the crimes that have been perpetrated by sisters Nonna and Inna Verd on Russian immigrants here in Bellevue, WA for years.

The sisters borrow money for businesses that do not exist, without any intention or ability to repay. The total amount of money the Verd sisters have obtained by fraud and/or extortion from their victims exceeds \$700,000....

...

The pattern of the crime committed by them is as follows. First, the Verd sisters become good or close friends with a potential victim. After establishing this relationship, they discuss their business affairs and then ask the victim to loan them money for their business (some of these businesses do

⁶ Page 62 of Zinaida Bosserdt deposition, lines 2-10

not even exist), promising a very favorable repayment rate or a share in the business.

The Verd sisters never disclose the real situation which is that they systematically borrow money from their victims, their business and they themselves are heavily in debt, with countless liens and judgments against them.... CP 118-120.

Mr. Harris' letter goes on to identify ten individuals, including Zinaida Bosserdt, who purportedly loaned money to Verd and had not been paid back; five individuals who purportedly loaned money to Verd and had been paid back after multiple demands and warnings; and 12 individuals whom Verd purportedly solicited for additional loans. Id.

H. Trial Court Determined Bosserdt's Claims Time-Barred

On November 22, 2011, the trial court dismissed the Bosserdt's claims against Thomas because they were time-barred. CP 222-224. The trial court denied the Bosserdt's motion for reconsideration on December 19, 2011. CP 314-315.

IV. ARGUMENT

A. Standard of Review

The standard of review for an order granting summary judgment is de novo, and the appellate court performs the same inquiry as the trial court. *Shiekh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). "A motion for summary judgment is properly granted where 'there is no genuine issue as to any material fact and ... the moving party is entitled to

a judgment as a matter of law.” *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003) (alteration in original) (quoting CR 56(c)). The reviewing court should view “the facts and reasonable inferences from those facts in the light most favorable to the nonmoving party.” *Id.*, at 794.

B. The Bosserdts’ Claims Were Time-Barred

1. Three-Year Statutes of Limitation Applied

Each of the Bosserdts’ claims had a statute of limitation of three years or less, as follows:

Fraud: RCW 4.16.080(4) provides that a fraud claim has a three-year statute of limitation, which is deemed to accrue when the aggrieved party discovers the facts constituting the fraud. The nine essential elements of a fraud claim are: (1) representation of an existing fact; (2) materiality of the representation, (3) falsity of the representation, (4) the speaker’s knowledge of its falsity, (5) the speaker’s intent that it be acted upon by the plaintiff, (6) plaintiff’s ignorance of the falsity, (7) plaintiff’s reliance on the truth of the representation, (8) plaintiff’s right to rely upon it, and (9) resulting damages. *Stiley v. Block*, 130 Wn.2d 486, 925 P.2d 194 (1996).

Negligent Misrepresentation: This cause of action has a three-year statute of limitation and is subject to the discovery rule (RCW

4.16.080(2)); *Sabey v. Howard Johnson & Co.*, 101 Wn. App. 575, 592-593, 5 P.3d 570 (2000)). Where the discovery rule applies to the accrual of a cause of action, the statute of limitations begins to run from when the plaintiff knows (or reasonably should know) the *factual* basis for the cause of action; it is not necessary that the plaintiff be aware of the *legal* basis for the claim. *Fradkin v. Northshore Utility District*, 96 Wn. App. 118, 122, 977 P.2d 1265 (1999).

The elements of a negligent misrepresentation cause of action come from Restatement (Second) of Torts § 522(1) (1977), which states:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Sabey, 101 Wn. App. at 585.

WSSA: The Bosserdt's alleged that Thomas violated RCW 21.20.010 by making a material misrepresentation or omission in connection with the sale of a security. The limitation period provided by the WSSA for such a claim is as follows: "No person may sue under this section ... more than three years after a violation of the provisions of RCW 21.20.010, either was discovered by such person or would have been

discovered by him or her in the exercise of reasonable care....” RCW 21.20.430(4)(b).

Federal Securities Cause of Action: 28 U.S.C. § 1658 provides that the statute of limitations for a 10b-5 action is the earlier of two years after the discovery of facts constituting the violation, or five years after such violation. The basic elements of a Rule 10b-5 claim are: (1) a material misrepresentation or omission of fact, (2) scienter, (3) a connection with the purchase or sale of a security, (4) transaction and loss causation, and (5) economic loss. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005).

2. The Bosserdts Commenced Action Against Thomas on July 30, 2010

A civil action is commenced by the serving of a summons and complaint, or by filing a complaint. CR 3(a). The Bosserdts commenced their action against Mr. Thomas by filing and serving the First Amended Third Party Complaint on July 30, 2010.

3. The Bosserdts’ Claims Against Thomas Accrued More Than Three Years Before July 30, 2010

In *Clare v. Saberhagen Holdings, Inc.*, 129 Wn. App. 599, 603, 123 P.3d 465 (2005), the Court of Appeals stated:

The plaintiff bears the burden of proving that the facts constituting the claim were not and could not have been discovered by due diligence within the applicable limitations period. Whether a party exercised due diligence

is normally a factual issue, which usually precludes granting summary judgment. However, when reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law. (Citations omitted).

In this case, reasonable minds could reach but one conclusion: the Bosserdts learned of the facts supporting their claims against Thomas by July 17, 2007, at the very latest. The Bosserdts commenced the third party action against Thomas more than three years later, on July 30, 2010. The claims were time-barred and the trial court properly dismissed them.

The Bosserdts' claims against Thomas arise out of the fact that the Agreement he drafted did not identify the Vaysberg loan or the Kautzman Construction lien. As described above, the Bosserdts knew of Thomas's role in drafting the Agreement. They learned of the Vaysberg loan by October 2006 and the Kautzman Construction lien by July 16, 2007.

Furthermore, the Bosserdts' attorney wrote a letter to the Bellevue Police Department on July 17, 2007, identifying ten individuals, including Zinaida Bosserdt, who purportedly loaned money to Verd and had not been paid back; five individuals who purportedly loaned money to Verd and had been paid back after multiple demands and warnings; and 12 individuals whom Verd purportedly solicited for additional loans. The Bosserdts' attorney described Verd's conduct as fraudulent. He also stated Verd failed to disclose to her "victims", including Zinaida Bosserdt,

that Verd and her businesses were heavily in debt, with countless liens and judgments against them.

There is no question that the Bosserdts knew of the facts supporting each of their causes of action against Thomas by July 17, 2007, at the latest, and there is no question that the Bosserdts failed to commence their action against Thomas within three years of acquiring such knowledge.

4. The Bosserdts Learned No New Facts from DFI Statement of Charges Directed at Verd

The Bosserdts argue that they did not discover the facts supporting their claims until the Washington Department of Financial Institutions (“DFI”) issued a Statement of Charges and Notice of Intent to Enter an Order to Cease and Desist (“Statement of Charges”) to Verd and King Pastry in 2008. Amended Brief of Appellant, at 6. For some reason, the Bosserdts failed to include the Statement of Charges in their Clerk’s Papers. They did include in their Clerk’s Papers Ms. Bosserdt’s declaration claiming that she learned of the Statement of Charges on August 22, 2008. CP 229, 292-294. Attached to her declaration is a Better Business Bureau (“BBB”) report regarding the Statement of Charges. CP 292-294. The BBB report describes DFI’s investigation of King Pastry and Verd. It makes no mention of Thomas.

The Bosserdts cannot credibly argue that they learned any new facts supporting their claims against Thomas after July 17, 2007, because the Statement of Charges and the BBB report make absolutely no mention of Thomas, directly or indirectly.

The real thrust of the Bosserdts' argument appears to be that they did not recognize that they could pursue certain claims against Thomas until DFI issued the Statement of Charges. The argument does not withstand scrutiny. The Bosserdts describe the "discovery rule" at page 9 of their Amended Brief of Appellant as follows: "The key consideration under the discovery rule is the factual, not the legal, basis of the cause of action.... The cause of action accrues when the claimant knows, or should have known the relevant facts, whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action."⁷ Here, there is no question that the Bosserdts knew all of the facts that they allege support their claims against Thomas by July 17, 2007. The fact that it was not until later that they understood that that these facts were allegedly enough to establish their claims does not change the fact that statute of limitations clock started ticking for each of their causes of action on or before July 17, 2007. They simply waited too long to commence their action against Thomas. The trial court's dismissal of the action was proper.

⁷ Internal quotations and citations omitted.

5. The Applicable Statutes of Limitation Were Never Tolloed

a. The Bosserdt's Bankruptcy Actions Did Not Toll the Applicable Statutes of Limitation

When a debtor files for bankruptcy protection, legal actions against the debtor are automatically stayed and the statutes of limitation pertaining to those actions are tolled. 11 U.S.C. § 362. However, the inverse does not hold true. A bankrupt debtor may still proceed with legal actions against others and, in such cases, the statute of limitations on the debtor's claims are not tolled. A petition in bankruptcy does not stay claims, including counterclaims, brought by the debtor. *See Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1203-05 (3d Cir. 1991) (automatic stay applicable to debtor's father's conversion claim against debtor, but not to debtor's counterclaims against father). *See also Brown v. Armstrong*, 949 F.2d 1007, 1009-10 (8th Cir. 1991); *Martin-Trigona v. Champion Fed. Savings and Loan Assoc.*, 892 F.2d 575, 577 (7th Cir. 1989); *Carley Capital Group v. Fireman's Fund Ins. Co.*, 889 F.2d 1126, 1127 (D.C. Cir. 1989); *Freeman v. Commissioner of Internal Revenue*, 799 F.2d 1091, 1093 (5th Cir. 1986).

11 U.S.C. § 108 does toll statutes of limitation for claims brought by a bankruptcy trustee on behalf of a bankrupt estate. The statute provides in relevant part as follows:

(a) If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence the action, and such period has not expired before the date of the filing of the petition, **the trustee may commence such action only before the later of –**

- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
- (2) two years after the order for relief. (Emphasis added).

Courts that have examined the question have held that the purpose of the two year extension granted by 11 U.S.C. § 108 is to preserve the interests of the debtor's estate. *See, e.g., In re Lawler*, 53 B.R. 166, 171 (Bankr. N.D. Tex. 1985); *In re G.N. Partners*, 48 B.R. 462, 467 (Bankr. D.Minn. 1985). Thus, these courts have held that debtors acting in their own interests, such as the Bosserdt in this case, cannot invoke 11 U.S.C. § 108, or its predecessor, Section 29(e). *See, e.g., In re Lawler*, 53 B.R. at 172; *Burroughs v. Local Acceptance (Matter of Dickson Co.)*, 432 F. Supp. 752, 756 (W.D.N.C. 1977); *Costello Pan American World Airways, Inc.*, 295 F. Supp. 1384, 1390 (S.D.N.Y. 1969); *In re Craig*, 7 B.R. 864, 866 (Bankr. E.D.Tenn. 1980); *Engine Rebuilders, Inc. v. Seven Seas Import-Export & Merc., Inc.*, 189 Mont. 236, 242, 615 P.2d 871 (1980) (“there is no tolling of a statute of limitation for anyone but a trustee in bankruptcy”).

The Bosserdts' two bankruptcy cases have no impact on the evaluation of statute of limitations issues in this case. While the Bosserdts' bankruptcy cases automatically stayed actions against the Bosserdts, they did not stay claims the Bosserdts may have had against other parties, including Thomas.

b. The Trial Court Did Not Toll the Statute of Limitations

On November 24, 2008, before Thomas was a party, the Bosserdts filed a document entitled "Notice of Bankruptcy Filing". The document stated in part: "All proceedings herein are stayed pursuant to the provisions of 11 U.S.C. § 362." The Bosserdts did not file a motion seeking a stay of the proceedings, Verd did not file a response to the Notice of Bankruptcy Filing, and this trial court did not enter an order staying the proceedings.

The Notice of Bankruptcy Filing had no effect on the statutes of limitation for the Bosserdts' claims against Thomas. First, Thomas was not yet a party to the action at the time and there was no "proceeding" against him that could be stayed by the Court. Second, the Notice of Bankruptcy Filing misstated the law—the Bosserdts' counterclaims against Ms. Verd and their claims against Thomas were not stayed under 11 U.S.C. § 362. Finally, the trial court never entered an order staying the

case. Consequently, the only stay that existed as of November 24, 2008, was the automatic bankruptcy stay under 11 U.S.C. § 362, which only applied to claims against the Bosserdts, not affirmative claims they had against others, including Thomas.

C. CR 52 Does Not Require Findings of Fact and Conclusions of Law

The Bosserdts argue that the trial court erred by not setting forth findings of fact and conclusions of law in its order dismissing their claims against Thomas. There is no basis for this assignment of error. Findings of fact and conclusions of law are not necessary on summary judgment under CR 52(a)(5)(B) and, if made, are superfluous and will not be considered by the appellate court. *Donald v. Vancouver*, 43 Wn. App. 880, 719 P.2d 966 (1986).

V. CONCLUSION

Each of the Bosserdts causes of action against Thomas had a statute of limitations of three years or less. The Bosserdts learned the facts supporting their claims against Thomas by July 16, 2007, but did not commence suit against Thomas until over three years later, on July 30, 2010. The trial court properly dismissed the Bosserdts' claims because they were time-barred. Thomas requests that this Court affirm the trial court's order dismissing the claims.

RESPECTFULLY SUBMITTED this 5TH day of June, 2013.

FORSBERG & UMLAUF, P.S.

By: 
Terrence J. Cullen, WSBA #12554
Jeffrey T. Kestle, WSBA #29648
Attorneys for Respondent B. David Thomas

APPENDIX - CHRONOLOGY

September 2006	Thomas drafts Agreement on behalf of client Verd. Zinaida Bosserdt knows Thomas represents Verd only.
October 2006	Bosserdts learn of Vaysberg loan.
May 2007	Bosserdts know Verd “had a long history of borrowing money from people without any intention or ability to pay the money back.”
July 16, 2007	Bosserdts know of Kautsman Construction lien.
July 17, 2007	Bosserdts’ attorney’s letter to police accuses Verd of fraud.
September 6, 2007	Verd sues the Bosserdts for dissolution of King Pastry.
November 16, 2007	Bosserdts sue Verd - claims include fraud, CPA violation, and violation of securities laws.
July 23, 2008	DFI issues Statement of Charges to Verd and King Pastry. No mention or reference to Thomas.
October 1, 2008	Bosserdts file Chapter 7 Bankruptcy Action.
November 24, 2008	Bosserdts file document entitled “Notice of Bankruptcy Filing” in King County case against Verd. Trial Court does not enter order staying proceedings.
January 8, 2009	Bosserdts obtain Chapter 7 Bankruptcy Discharge.
March 21, 2009	Bosserdts file Chapter 13 Bankruptcy Action.

February 23, 2010	Bosserdts' Chapter 13 Bankruptcy Action dismissed at their request.
May 14, 2010	Bosserdts file motion to remove nonexistent stay and add Thomas as a defendant in King County Superior Court action against Verd.
May 25, 2010	King County Superior Court denies Bosserdts' motion to add Thomas but grants order lifting nonexistent stay.
June 24, 2010	Order allowing Third Party Complaint against Thomas.
July 30, 2010	Bosserdts commence suit against Thomas.

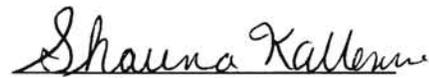
CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing **BRIEF OF RESPONDENT** on the following individual in the manner indicated:

Mr. Harold H. Franklin, Jr.
459 Seneca Avenue NW
Renton, WA 98057
Telephone: 206-617-7031
 U.S. Mail

SIGNED this 5th day of June, 2013, at Seattle, Washington.


Shauna Kallerman