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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ALLEN B. SHAY, et al., Plaintiffs and Appellants, v. DAVID M. BERGER, et al., Defendants and Respondents.	B234498 (Los Angeles County Super. Ct. No. GC032876)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph F. DeVanon Jr., Judge. Affirmed.

Allen B. Shay, in pro. per., for Plaintiff and Appellant.

Jamie Williams, in pro. per., for Plaintiff and Appellant.

Melonee Williams, in pro. per., for Plaintiff and Appellant.

Betty S. Chain for Defendants and Respondents David M. Berger and Seth Caplan.

Fidelity National Law Group and Jacky P. Wang for Defendants and Respondents Chicago Title Insurance Company and Diana Duval.

INTRODUCTION

The plaintiff homeowners filed a complaint alleging the defendant mortgage broker, investor, escrow officer and escrow company conspired to defraud them by recording unnecessary liens against their property as part of a scheme to steal the equity in the property. Following a bench trial, the trial court entered judgment in favor of the defendants, finding the plaintiffs had failed to carry their burden of proof and the statute of limitations barred their claims. The homeowners appeal. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

On October 24, 2003, successive property owners Melonee Williams, Jamie Williams and Allen Shay filed a complaint against Seth Caplan, David Berger, Diana Duval and Chicago Title Insurance Company (among others not party to this appeal), alleging the defendants had engaged in a conspiracy to defraud them of the equity in their property.[1] In a prior appeal (*Shay v. Berger* (Jul. 24, 2007, B186013) [nonpub. opn.]), we reversed the trial court's dismissal of the action after sustaining without leave to amend the defendants' demurrers to the operative fourth amended verified complaint on statute of limitations and other grounds, including Shay's lack of standing.

According to the complaint, Melonee met with Caplan of SunCoast Home Loans to refinance her existing home loan with a new first mortgage. Escrow was opened for Melonee to sell the property to Jamie for $275,000, with a first mortgage in the amount of $192,500 and "cash through escrow" in the amount of $82,500. Even though escrow was opened with Jamie as the buyer, escrow officer Duval and Chicago Title requested the recording of an $82,000 note in Melonee's name (payable to SunCoast) against the property, but there is no evidence Melonee received the funds and none of her creditors were paid. According to amended escrow instructions, the sale to Jamie would consist of a $192,500 first mortgage with Long Beach Mortgage Company (subsequently purchased by Washington Mutual Bank) with no mention or authorization of any second deed of

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[1] Because two parties share the same last name, we refer to Melonee Williams and Jamie Williams by their first names, as the parties have done.

trust. However, without obtaining Jamie's signature or permission and without ever transferring any money to her escrow or giving her the proceeds, SunCoast (through Chicago Title) recorded a fraudulent $40,000 trust deed Jamie did not execute, and SunCoast later assigned its interest to Berger. Jamie did not sign or authorize the $40,000 trust deed, the defendants concealed it from her, and she did not discover it until Berger appeared at a creditor's meeting in the midst of Jamie's bankruptcy proceedings in March 2002. Jamie sold the property to Shay subject to all liens, claims and defenses, and Shay was ultimately forced to pay Berger $79,000 on the fraudulent second trust deed and was deprived of the opportunity to rehabilitate the property, sell it and share the proceeds with Jamie.

The defendants subsequently answered, and the parties conducted discovery before proceeding to a bench trial on causes of action for (1) fraud and conspiracy to commit fraud (against all defendants), (2) constructive fraud (against all defendants), (3) breach of the implied covenant of good faith and fair dealing (against Chicago Title and Duval), (4) negligent training or supervision (against Chicago Title) and (5) breach of fiduciary duty (against Chicago Title, Duval and Caplan).[2] The parties presented the following testimony and documentary evidence.

For nearly 20 years, Melonee owned real property located at 242 to 248 Wapello in Pasadena. By late 1999, because of health and financial problems in her family, she was delinquent on a first mortgage with Wendover, a second with the Small Business Administration and a third with Aames. Foreclosure proceedings were underway. At the time, she believed she owed Wendover about $127,000, the SBA about $22,000 and Aames about $42,000 (a total of $191,000). She had received notice of default indicating her home would be sold on November 18, 1999, and the amount needed to cure the default was $270,077.73. In an effort to prevent foreclosure and save her home, Melonee had filed a number of bankruptcy petitions, and on her attorney's advice, quitclaimed a

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[2] The second cause of action for "false certificate of acknowledgement of execution of trust deed pursuant to scheme to defraud" was abandoned.

50 percent interest in the property to one of her daughters (Lorna Riley) on November 17, the day before the scheduled foreclosure sale. Title was later restored to Melonee's name alone.

Melonee's bankruptcy attorney referred her to Seth Caplan, a mortgage broker with SunCoast, and said he could get her a new loan. Melonee had previously met with another mortgage broker (Bright Financial) but rejected that loan offer because the lender required an "exorbitant" origination fee.

Initially, the plan was to "do a refinance" for Melonee. Caplan noted some equity in the property, but there were a number of obstacles to obtaining financing, including multiple defaults on multiple encumbrances, multiple bankruptcy filings and delinquent taxes. Melonee's credit was very poor. Caplan proposed a short-term loan through SunCoast in the amount of $82,000 ($83,250 with loan costs). Melonee recalled Caplan telling her she would need a "bridge loan" in order to take care of the pending defaults given the foreclosure threat. She acknowledged a handwritten note she had directed to Diane Duval, an escrow officer with Chicago Title, requesting that Duval proceed with SunCoast and the lenders it brought in and disregard communications from any other brokers, especially Denise Moore with Citizen Funding, because the SunCoast transaction was better for her.

The SunCoast loan was handled "outside of escrow."[3] The February 21, 2000, deed of trust signed by Melonee bears the following stamp: "This document is being recorded as an accommodation only and Chicago Title Insurance Company assumes no responsibility for the correctness or validity thereof." None of the funds from the loan were ever received or paid out of the escrow Duval handled. SunCoast assigned the deed of trust to Synergy Holdings, LLC, and Berger, with interests of 78 percent and 22 percent respectively. According to Caplan, the SunCoast loan did not change the debt

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[3] At the top left corner, the document specified the recording was requested by Chicago Title Company, but "when recorded [the document was to be] mail[ed] to" SunCoast Home Loans at its West Olympic Boulevard address in Los Angeles.

load much, but it brought all loans current (reducing the Wendover demand by $35,000), paid off some of the debts (including the Aames loan and property taxes) and was used for some remediation on the property. Caplan said he was unable to locate the SunCoast file but testified the documents from Chicago Title's file effectively evidenced the same information, including the documented reductions in outstanding loan balances and payoffs in full as a result of the bridge loan. Duval confirmed that between February and April 2000, Wendover's demand was reduced by $35,460.85 although Melonee had not made any payments. Duval also confirmed that, after an initial payoff demand of $37,671.57, there was no further demand from Aames (and neither Melonee nor Jamie were ever contacted by Aames again). The SBA loan was in arrears in February but, following a paydown by cashier's check in the amount of $1,624.15 to cure the arrearages, was no longer in default by August.

At the time Melonee signed the SunCoast loan documents (in February 2000), the discussion related to the pending notice of sale and demand of more than $200,000; no one realized then that by adding Lorna Riley's name to the property, an $18,000 judgment and a tax lien against her had attached to the property as well. Also, there was a significant amount of fire damage to one of the residences on the property, and an institutional lender would not lend where a property is found to be in such "substandard" condition. The fire damage had to be remediated at least enough to bring the property into "working order."

At some point, it was agreed that Melonee would sell the property to Jamie who had good credit and a good job to keep the property in the family, and Melonee would continue to live there. Caplan was familiar with Long Beach Mortgage Company's lending policies and knew it would not lend more than 70 percent of value under the circumstances. The property was appraised for $275,000, so a loan in the amount of $192,500 was requested on Jamie's behalf. SunCoast opened escrow with Chicago Title for this transaction. Melonee was unsure about how much she owed on her outstanding obligations or how far behind she was in making payments; she said SunCoast was

handling everything. Berger, who had acquired a 22 percent interest in the SunCoast loan, negotiated a reduction in the $18,000 Lorna Riley judgment which was paid out of escrow and satisfied for $11,000.

Robert Silverman worked as a loan processor for SunCoast (which is no longer in business) at the time. He testified that he assisted Melonee and Jamie in the course of gathering the necessary paperwork for the Long Beach loan, and it was explained to them and was always clear that because of the shortfall in paying off the existing obligations, a second lien would be necessary. After the Long Beach mortgage was approved, Duval and Chicago Title obtained demands from existing lienholders. Adding the Wendover remaining balance of $87,509.05, the SBA remaining balance of $19,339.28, the $82,000 bridge loan, the judgment against Lorna Riley of $11,000 (reduced from $18,000), the remaining $400.63 due on Lorna Riley's tax lien, $11,484 in loan fees and $2,656.75 for various title and escrow fees left a balance of $214,389.71 (before adding property taxes, prepaid interest or other outstanding obligations) which could not be satisfied out of the $192,500 Long Beach loan so one or more of the demands had to be reduced for the Long Beach escrow to close.

Duval then prepared a closing statement that identified as "credits" the shortfall necessitating the $40,000 deed of trust to Berger recorded outside of escrow – $25,369.83 and $13,465.25 plus costs. These "credits" were not a discount or forgiveness of debt but rather a means to balance the escrow; similarly, the "gift" of equity did not mean a transfer of cash into escrow.

Jamie signed the documents relating to these transactions. After the close of escrow, Melonee continued to reside at the property and made payments on the Long Beach loan as well as five payments on the second trust deed, beginning in October 2000, made payable to "D.B. Servicing Co." which collected the payments for Berger, writing in Jamie's name on her checks. During that time, Jamie called to ask about D.B. Servicing and confirmed that it was the payee for the $40,000 second. Melonee

ultimately fell behind on the payments, and Jamie had lost her job by the following year; Long Beach pursued foreclosure on the property.

Without including Melonee in the discussion, Jamie spoke with Shay, a real estate broker and friend since middle school. She was concerned with her obligation on the property and about her mother's displacement if the property were sold. Shay said the earlier property appraisal for $275,000 was "fraud," told Jamie there was no equity in the property and said "blatant fraud" existed in the transaction. Although he said the one-to-four family property was worthless, for tax purposes, Shay gave Jamie $500 in exchange for the property (a 22,000 sq. ft. lot, with three structures—a 2,500 sq. ft. primary residence, another structure where tenants were living and the fire-damaged unit). Shay did not fix up the property at all but sold it for $475,000 less than 18 months later. Melonee moved in with Jamie in Palmdale. Shay did not give Jamie or Melonee any of the proceeds.

In a letter to Shay in June 2003, Berger reiterated the second deed of trust was created because of debt already incurred which could not be paid out of the Long Beach first mortgage amount. Shay was advised the amount then outstanding on the second was $45,200 but that, given the circumstances, Berger was willing to accept a lower amount. Shay maintained the second deed of trust was fraudulent. Ultimately Shay had to pay Berger $79,000 pursuant to an indemnification agreement to clear the title. He acknowledged that he was familiar with transactions "outside of escrow" which meant the escrow company did not have responsibility for the transaction and did not have to reflect it within the escrow.

The parties presented their closing arguments in written briefs and, after taking the matter under submission, the trial court issued its ruling. The trial court observed (in part), "It is clear from trial testimony that the $82,000 'Bridge' loan was not handled through the Chicago Title escrow. [¶] Without the SunCoast file it is impossible to specifically calculate the exact amount that was paid out to satisfy the lien amounts. Circumstantially, it can be inferred that many of the liens and tax debts were satisfied

through the 'Bridge' loan inasmuch as many of the liens no longer show up on the HUD-1 form provided at the close of escrow. (What is more difficult to calculate is the discount, if any, that was negotiated.)

"At trial, Melonee admitted to signing the $82,000 'Bridge' loan and knew that the money was being used to take care of the defaults. SunCoast handled the 'Bridge' loan, but now claims to be unable to find their file. Testimony at trial established that the 'Bridge' loan was not part of the Chicago Title escrow. The escrow was only for the purpose of transferring title from Melonee and Jamie applying for new financing. Seth Caplan testified at trial that the 'Bridge' loan was used to bring the Wendover loan current, pay off the Aames home loan, and bring current the SBA loans. All this was done outside of escrow. Inasmuch as Melonee testified at trial that she did not make any payments to the above lenders/creditors, the unavoidable conclusion is that the 'Bridge' loan paid off or at least paid down $74,756.57 of defaulted debt. This allowed Jamie to apply for the Long Beach Mortgage for a new deed of trust.

"The $40,000 loan or silent second that was testified to during trial was also outside the Chicago Title escrow. The $40,000 silent second was recorded after the close of the sale of the property to Jamie. Jamie testified at trial that she signed the 'silent' second loan documents, including both the note and the deed of trust, but claimed not to understand their significance. Within a year after escrow closed, the Williams[es] defaulted on both the 'silent' second and the Long Beach Mortgage.

"Melonee and Jamie, again facing foreclosure, brought in family friend and real estate broker Allen Shay to assist them. In what appears to the court to be the most questionable transaction of all transactions involved, Shay purchased the Williamses' home for $500, brought the Long Beach Mortgage current and paid off the $40,000 second. Then, without making any improvements or repairs, he sold the property for $475,000 with no proceeds going to either Melonee or Jamie. . . ."

The trial court found the evidence did not support any of the plaintiffs' causes of action and that the statute of limitations also barred their claims.

An amended judgment was entered in May 2011.

Melonee, Jamie and Shay appeal.

DISCUSSION

As Melonee, Jamie and Shay concede, a judgment supported by substantial evidence will not be reversed on appeal.[4] (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.)

All of Melonee's claims were barred by the statutes of limitations. The original complaint was filed on October 24, 2003. The $40,000 trust deed was recorded on August 2, 2000, Jamie called Silverman on September 8, 2000, to confirm the payment on the second and the first payment on the $40,000 second was made on October 2, 2000. More than three years had passed since Melonee had notice of facts that would have put a reasonably prudent person on inquiry notice of the facts she claimed constituted fraud. (*Sun 'n Sand, Inc. v. United California Bank* (1978) 21 Cal.3d 671, 701-702; *Utility Audit Co,. Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 962.) The resolution of the statute of limitations issue is typically a question of fact. (*Cleveland v. Internet Specialties West, Inc.* (2009) 171 Cal.App.4th 24, 30-31.) Substantial evidence supports the trial court's determination that the statutes of limitations barred Melonee's claims.[5] (Code Civ. Proc., § 338, subd. (d) [An action for relief on the ground of fraud or mistake "is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake"].)

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[4] We include Jamie and Shay in our further references to Melonee unless otherwise indicated.

[5] In our prior opinion, we reversed the trial court's order sustaining the defendants' demurrer based on the three-year statute of limitations for fraud because the *allegations* of the complaint must be accepted as true for purposes of ruling on a demurrer, and according to the complaint, Jamie did not sign or authorize the $40,000 trust deed, the defendants concealed it from her and she did not discover it until 2002. (*Shay v. Berger, supra,* B186013.) At trial, however, the *evidence* did not support these allegations, and the plaintiffs were unable to prove delayed discovery of the facts alleged to constitute fraud.

Moreover, substantial evidence supports the trial court's determination Melonee had failed to establish any of her causes of action. Most fundamentally, for purposes of her fraud, constructive fraud, breach of implied covenant of good faith and fair dealing and breach of fiduciary duty claims, Melonee failed to present evidence to establish she was actually defrauded, notwithstanding her belief the bridge loan would take care of all debts and no second deed of trust would be necessary. (*SCC Acquisitions Inc. v. Central Pacific Bank* (2012) 207 Cal.App.4th 859, 864.) The bridge loan and $40,000 second were "outside of escrow," and the trial court's determination Melonee failed to establish her negligent supervision cause of action against Chicago Title is supported by substantial evidence as well. (*Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711.)

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs of appeal.

WOODS, J.

We concur:

PERLUSS, P. J. **ZELON, J.**