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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002544-MR

ANNA MARIE NEWBOLD — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 07-CI-07203

CENTRAL BANK OF JEFFERSON
COUNTY, INC., F/K/A FIRST BANK, INC.,
CENTRAL BANK & TRUST CO.,
CENTRAL BANCSHARES, INC.,
DAVID S. GREENBERG AND
PREMIER HOMES, INC. — APPELLEES

AND NO. 2008-CA-000003-MR

CENTRAL BANK OF JEFFERSON
COUNTY, INC., F/K/A FIRST BANK, INC.,
CENTRAL BANK & TRUST CO.,
CENTRAL BANCSHARES, INC., — CROSS-APPELLANTS

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 07-CI-07203

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

NICKELL, JUDGE: Anna Marie Newbold brings this appeal from an opinion and order entered by the Jefferson Circuit Court on November 21, 2007, dismissing her verified complaint as being time barred by KRS 413.120(7) and (12). By cross-appeal, Central Bank of Jefferson County, Inc., formerly known as First Bank, Inc. (FBMC), Central Bank & Trust Co., and Central Bancshares, Inc., (Bank),[2] challenges that portion of the same opinion and order that found Newbold's claims were not compulsory counterclaims that had to be affirmatively asserted in a prior foreclosure action, and were not barred by *res judicata.* The remaining defendants, David S. Greenberg and Premier Homes, Inc., (collectively Builder) have not cross-appealed. After considering the law and the record, we affirm the trial court as to the direct appeal and deem the Bank's cross-appeal to be moot in light of our resolution of the direct appeal.

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[2] Over time, the banking entities were involved in various mergers, acquisitions, and name changes which are not of real consequence to the resolution of the direct appeal and will not be explained.

On July 31, 2007, Newbold filed a verified complaint against the Bank and the Builder alleging fraud, fraud in the inducement, negligence, gross negligence, bad faith and predatory lending. The genesis of the claims was Newbold's desire to build a new home. She discussed a particular model home with Greenberg and disclosed her financial situation to him. It was Newbold's theory that Greenberg, as president of both FBMC and Premier Homes, recklessly advised her she could afford to build a $500,000.00 home even though she was newly widowed, unemployed with only a high school education, and was living on income from investments and her late husband's pension fund. Greenberg offered to not only build Newbold's desired home, but also offered to secure financing for the new home.

Newbold went forward with the project. She purchased a lot for $115,300.00 in Bridgemoore Estates in Jefferson County. She applied for and received a $500,000.00 construction loan from PNC Bank on which she closed in mid-November 1998. As collateral for the construction loan, she pledged a security interest in a $100,000.00 certificate of deposit.

Once construction was underway, at Greenberg's direction, Newbold applied for a $500,000.00 mortgage loan from FBMC. Upon learning her application would be rejected because she had no income, Newbold did as FBMC Vice President of Sales, Charles Hall, Jr., directed her to do—withdraw money from the construction loan account in $10,000.00 increments over several months, place that money into her checking account, and spend it to give the appearance of

income. Upon making the suggested withdrawals, the mortgage loan was approved and on August 30, 1999, Newbold signed the closing documents,[3] again at Greenberg's direction and with little knowledge of what she was signing. Premier built the home and Newbold used the mortgage loan from FBMC to repay the construction loan to PNC Bank.

Within a matter of months, it became apparent that Newbold could not afford the monthly mortgage payment of $4,204.27 on her new home. By April of 2000, she sold the condominium in which she was living to make the mortgage payments on the new house. By May of 2001, she had exhausted her financial resources and defaulted on the $500,000.00 mortgage loan. By the summer of 2001, she had put her new home on the market, and in October of 2001, the home was in foreclosure. Final judgment in the amount of $494,693.16 plus interest was entered in favor of the Bank in the foreclosure action on February 4, 2003. On April 6, 2004, Newbold's home, which was appraised at $625,000.00 for loan purposes, was bought by the Bank for $510,000.00 at a court-ordered auction.

On July 31, 2007, Newbold filed a verified complaint alleging fraud in the inducement, fraud, bad faith and predatory lending, negligence and gross negligence based upon the allegedly reckless advice Greenberg had given her and his assurances that she could afford the desired home. On August 15, 2007, citing CR[4] 12.02, the Builder moved to dismiss the complaint as being time barred

[3] Included in the closing packet were two promissory notes, each in the amount of $500,000.00, and two "hold harmless" agreements insulating Premier and Greenberg from liability for the advice they had given Newbold and encouraging her to seek legal counsel.

[4] Kentucky Rules of Civil Procedure.

because it was filed nearly three years *after* the five-year statute of limitations expressed in KRS 413.120 had expired. The Builder argued all of the challenged conduct by Greenberg and Premier occurred in 1998 and 1999, with the last challenged act occurring at the mortgage loan closing on August 30, 1999. According to the Builder, to be considered timely, Newbold's complaint had to be filed by August 30, 2004.

Similarly, on August 24, 2007, the Bank moved to dismiss the complaint alleging it was time barred and did not state a claim upon which relief could be granted. The Bank alleged Newbold's own complaint showed she knew of her injury as early as April 2000 when she sold her condominium to make monthly mortgage payments on the new home. There was also proof that she knew of her injury as early as 2001 when she placed the newly built home on the market and again when she defaulted on the mortgage, all of which occurred more than five years before the filing of the verified complaint in 2007. The Bank argued the latest date Newbold could have "discovered" the alleged fraud was October 2001 when the Bank filed the foreclosure action on the new home.[5] By that point she had already sold her condominium to pay the monthly mortgage, had unsuccessfully tried to sell the newly constructed home, and had been served with foreclosure papers. Using the October 2001 date, according to the Bank, the action

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[5] There is no allegation that Greenberg or Premier concealed or attempted to conceal the alleged fraud. Therefore, the statute of limitations began running when, through the exercise of ordinary care, Newbold should have discovered the fraud. *Shelton v. Clifton,* 746 S.W.2d 414, 415 (Ky. App. 1988).

would have been timely under KRS 413.120(12) and KRS 413.130(3) only if filed by October of 2006. By the Bank's calculation, the action was filed more than eight months too late.

On September 11, 2007, the Bank filed a second motion to dismiss pursuant to CR 12.02(f) and CR 13.01 arguing Newbold's claims were barred by the doctrine of *res judicata* because her allegations of fraud and predatory lending arose from the same facts that gave rise to the foreclosure action instituted by the Bank and were lost when not asserted as compulsory counterclaims in that action. *DLX, Inc. v. Kentucky,* 381 F.3d 511, 520 (6th Cir. 2004). As support for its argument, the Bank asked the trial court to take judicial notice of the Final Judgment & Order of Sale and the Master Commissioner's Report in the foreclosure action as well as a deposition Newbold had given in a malpractice action she had filed against her former attorney for failing to file counterclaims in the foreclosure action. Both documents establish Newbold intended to pursue a predatory lending claim against the Bank as early as June of 2003, and she had retained an attorney as early as 2000 to assert counterclaims in the foreclosure action.

Newbold responded to all the motions to dismiss arguing the complaint was filed timely and if it was not, allowing her to amend the pleading was more appropriate than dismissal. Citing KRS 413.130(3), Newbold argued she had ten years from either the execution of the contract or the perpetration of the

fraud to file her claim for fraud. Additionally, citing KRS 413.160, she argued she had ten years in which to seek relief for any claims not provided for by statute.

In dismissing the complaint, the trial court concluded Newbold's claims of fraud and fraud in the inducement fell within KRS 413.120(12) pertaining to "[a]n action for relief or damages on the ground of fraud or mistake." Such claims must be asserted within five years of the accrual of the action and the ten year catch-all provision mentioned in KRS 413.160 does not extend the five-year window provided in KRS 413.120(7). The trial court went on to conclude the allegations of bad faith and predatory lending, as well as negligence and gross negligence, fell under KRS 413.120(7) pertaining to claims "for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated." The applicable statute of limitations for these claims is also five years. The trial court concluded Newbold had to be aware of the conduct leading to her injury well in advance of the foreclosure sale in 2004, and perhaps as early as April of 2000 when she had difficulty making the monthly mortgage payments. The trial court concluded the limitations period began running on May 1, 2001, the date of her default on the mortgage loan, and expired five years later on May 1, 2006. Since the complaint was not filed until July 31, 2007, the trial court determined it was time barred because the filing occurred outside the five year statute of limitations. This appeal follows.

STANDARD OF REVIEW

All parties agree our review of the trial court's grant of the motion to dismiss is *de novo. James v. Wilson,* 95 S.W.3d 875, 883-84 (Ky. App. 2002). As such, we will construe the pleadings liberally and in a light most favorable to Newbold and we will accept as true, all of her allegations. *Mims v. Western-Southern Agency, Inc*., 226 S.W.3d 833 (Ky. App. 2007). If Newbold was "entitled to relief under any set of facts" she could prove, the trial court should not have dismissed her complaint. *Pari-Mutuel Clerks' Union v. Kentucky Jockey Club,* 551 S.W.2d 801, 803 (Ky. 1977). While we need not give deference to the trial court's conclusions, we believe he accurately applied the law to the facts on the direct appeal. Therefore, we will adopt that portion of the trial court's opinion and order pertaining to the direct appeal as if it was our own. In the interest of time, we will set forth only the trial court's conclusions of law.

> All of the claims raised in Ms. Newbold's complaint are subject to the limitations period set out in KRS 413.120. The claims enumerated under KRS 413.120 must be brought within five (5) years after the cause of action accrued. The general rule is that an action "accrues" on the date of injury, and the limitations period begins to toll from that date. *Caudill v. Arnett,* 481 S.W.2d 668, 696 (Ky. App. 1972). However, provision is made for fraud claims where it would not have been reasonable for the plaintiff to have discovered the injury on the actual date the fraud was perpetrated. Instead, the aforementioned five (5) year limitations period does not begin to toll until the date that the fraud was discovered or, through the exercise of reasonable diligence, should have been discovered. KRS 413.130(3); *Hernandez v. Daniel,* 471 S.W.2d 25, 26 (Ky. 1971). This 'safe-harbor period' set out in KRS 413.130(3) is only available where the plaintiff is able to satisfy the Court as to why the fraudulent act could not, through reasonable

> diligence, have been discovered sooner. *McCoy v. Arena,* 174 S.W.2d 726, 729 (Ky. 1943). In any event, a fraud action must be brought within ten (10) years after the perpetration of the alleged fraud. KRS 413.130(3).
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> While there must be a cognizable injury in order for a claim to ripen, Kentucky law has never required a specific dollar amount to be known before the statute of limitations can run. *Matherly Land Surveying, Inc. v. Gardiner Park Development, LLC.,* 230 S.W.2d 586, 591 (Ky. 2007); *Meade County Bank v. Wheatley,* 910 S.W.2d 233, 235 (Ky. 1995). The statute of limitations begins to run as soon as the injury becomes apparent to the injured. *Matherly Land Surveying, Inc.,* 230 S.W.3d at 591. It is immaterial, with respect to the tolling of the limitations period, that the injured party was unaware that he or she had a cause of action against another so long as he or she was aware of the conduct giving rise to the injury complained of. *Graham v. Harlin, Parker & Rudloff,* 664 S.W.2d 945, 947 (Ky. App. 1983).
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> The Court must find that Ms. Newbold had to have been aware of the conduct giving rise to her injury well in advance of the date of the foreclosure sale (April 6, 2004). A strong argument may be made that she *should* have known that Mr. Greenberg grossly underestimated and/or misrepresented the sufficiency of her assets once she was (sic) began to have difficulty making the monthly mortgage payment (April of 2000). The circumstance/injury created as a result of that fraudulent conduct was certainly apparent by the time she had exhausted her financial resources and defaulted on the loan. As such, the limitations period began to run on the date of the default (May 1, 2001) and ended five (5) years later (May 1, 2006). Insofar as the instant action was filed on July 31, 2007, more than one (1) year after the limitations period tolled, it is time-barred by the statute of limitations.

Newbold must take responsibility for her predicament. While we must affirm the trial court's decision based upon Newbold's claims being time barred, no proof has

been taken in this case and we do not know whether Greenberg provided faulty advice or the bank loaned Newbold $500,000.00 knowing it was highly unlikely she could repay it. We do know, however, that it was ultimately Newbold's decision to go forward with construction and the closing packet bears her signature. She had the opportunity to seek advice from independent legal counsel who would have only her best interests at heart, but instead she chose to rely on a builder and a bank, both of whom had a financial stake in seeing the project proceed. Realistically, as the trial court concluded, Newbold had to know she was in financial straits well before her dream home was sold at a court-ordered auction. There were many points along the way that Newbold *should* have realized she had taken on a debt she could not manage—when advised to engage in a creative financing scheme to qualify for the mortgage loan from FBMC; when her credit was destroyed; when she had to sell her condo to try to make the monthly mortgage payments; when she defaulted; and when she was served with foreclosure papers, all of which occurred well before the passage of five years from her signing of the closing documents on August 30, 1999. In light of all these significant events, it is unreasonable to say the statute of limitations did not begin running until Newbold's home had been lost to foreclosure on April 6, 2004. While she would have us start the clock running from the sale of her home, or entry of the foreclosure judgment on February 4, 2003, we decline to do so. Newbold's *injury* was fixed and non-speculative early on; it was only the *amount of her damage* that was yet to be calculated.

Under *Queensway Financial Holdings Ltd. v. Cotton & Allen, P.S.C.*, 237 S.W.3d 141, 151 (Ky. 2007) (quoting *Combs v. Albert Kahn Associates, Inc.*, 183 S.W.3d 190, 199 (Ky. App. 2006)), one who has suffered an injury "has a duty to investigate and discover the identity of the tortfeasor within the statutory time constraints." Based upon Newbold's deposition testimony and her admissions to the Master Commissioner, she contemplated taking action as early as 2000 or 2001. In light of that knowledge, we cannot say she did not have a cognizable cause of action at that time. Therefore, we hold the trial court properly dismissed the complaint as being filed outside the applicable statute of limitations. KRS 413.120.

CROSS-APPEAL

In addition to arguing Newbold's complaint was filed outside the five year statute of limitations, the Bank alleges Newbold's complaint is barred by the doctrine of *res judicata.* The Bank argues Newbold should have asserted her claims as compulsory counterclaims as part of the foreclosure action since all the activity sprang from the same transaction or occurrence. The trial court rejected this theory because none of the Bank defendants were part of the foreclosure action. Regardless, it is unnecessary for us to explore this question in detail due to our resolution of the direct appeal.

For the foregoing reasons, we affirm the trial court's dismissal of Newbold's claims as being filed outside the applicable five year statute of

limitations and therefore time barred. Further, we deem the Bank's cross-appeal moot.

ALL CONCUR.

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