STATE OF MICHIGAN

COURT OF APPEALS

FREDERICK A. SAUER and ANNE M. SAUER,

Plaintiffs-Appellants,

v

ERA PREFERRED REALTORS,

Defendant-Appellee,

and

JEAN JACOBS,

Defendant.

UNPUBLISHED
July 1, 1997

No. 189883
Kalamazoo Circuit Court
LC No. 94-001993-NZ

Before: Markey, P.J., and Michael J. Kelly and M.J. Talbot,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendant ERA Preferred Realtors' motion for summary disposition under MCR 2.116(C)(7) and(C)(10). We affirm.

First, this Court reviews a trial court's ruling on a motion for summary disposition de novo. *G&A Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994). Regarding plaintiffs' fraud claim against defendant ERA Preferred, we find that the trial court properly granted defendant Preferred's motion for summary disposition but for a somewhat different reason than that stated on the record. See *Welch v District Court*, 215 Mich App 253, 256; 545 NW2d 15 (1996). We find that the six-year statute of limitations applicable to fraud actions per MCL 600.5813; MSA 27A.5813 bars plaintiffs' recovery for fraud. See *Blue Cross and Blue Shield of Michigan v Folkema*, 174 Mich App 476, 481; 436 NW2d 670 (1988); *Kwasny v Driessen*, 42 Mich App 442, 445-446; 202 NW2d 443 (1972). Our review of the documentary evidence in the lower court record, including

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* Circuit judge, sitting on the Court of Appeals by assignment.

transcripts from the federal Fair Claims Act case filed against plaintiffs,[1] plaintiffs' affidavits, and real estate closing documents leads us to the conclusion that no factual development could provide plaintiffs with a basis for recovery.[2] See *Florence v Dep't of Social Services*, 215 Mich App 211, 213-214; 544 NW2d 723 (1996).

Plaintiffs' complaint alleges in count I that defendants had a legal duty to plaintiffs to "truly represent and fully disclose to the lending institution . . . all agreements and documents made between the Plaintiffs and the purchasers relating to the properties involved," and to "fully disclose to the Plaintiffs that the representations made to the lending institution could subject the Plaintiffs to liability to the United States Government." In their general allegations, plaintiffs claimed that defendant Jacobs, by her actions (which are not described), induced plaintiffs to sign the FHA's required seller' statement. Plaintiffs also alleged that defendants' representations to the lending institution and plaintiffs were false and proximately caused plaintiffs to be held liable in federal court under the False Claims Act. Even after construing the pleadings in a light most favorable to plaintiffs, *Florence*, *supra*, we find that any alleged fraud by defendant Preferred occurred on April 11, 1984.

On April 11, 1984, plaintiffs attended the real estate closing involving their rental property on Pearl Street and two rental properties on Cedar Street in Kalamazoo. During the first closing, which involved only Pearl Street, plaintiffs executed a "STATEMENT OF SELLER" acknowledging their receipt of payment in full on only one of three properties they sold that day to the Crees. This property on Pearl Street was the only one of the three properties that was presented to the mortgage company for an FHA guaranteed mortgage. After the first closing, the parties closed the land contract sales of the two properties on Cedar Street, although the details of these subsequent closings are not set forth with specificity. Based upon our review of the record, we find no evidence that plaintiffs received more than the FHA approved mortgage amount as payment on the Pearl Street location as well as the two Cedar Street locations.[3] Thus, plaintiffs could not have departed from the three closings on April 11, 1984, without realizing that they, as sellers of the properties, received only the FHA mortgage amount, and they received it not as payment in full on the Pearl Street property but as down payments on all three properties.

Undoubtedly, it was at this point that plaintiffs knew or should have known that defendant Preferred had structured a deal that was premised upon plaintiffs making false statements to the federal government in order to secure the FHA mortgage.[4] We can construct no factual scenario where plaintiff Frederick Sauer, who is an attorney and was represented by an attorney at this closing, would fail to realize what had just transpired as he left the closings. Thus, plaintiffs' fraud action against defendant Preferred had to be filed by April 11, 1990, six years after the closing on the three rental properties. It was not. Therefore, we find summary disposition was appropriate under MCR 2.116(C)(7).

With respect to plaintiffs' indemnification claim, we find that defendants were entitled to summary disposition pursuant to MCR 2.116(C)(8) because no cause of action exists under the Fair Claims Act for indemnification or contribution. *Mortgages, Inc v United States District Court*, 934

F2d 209, 212-214 (CA 9, 1991).[5] This issue has not been decided by courts within our jurisdiction; however, we find the Ninth Circuit's decision in *Mortgages, Inc, supra*,

persuasive authority. *Florence, supra*, at 215; Nowak & Rotunda, Constitutional Law (4th ed, 1991), §1.6, p 21 and n 31. Thus, we affirm the trial court's dismissal but for a different reason. *Welch, supra*.

Affirmed. Defendant being the prevailing party, it may tax costs pursuant to MCR 7.219.

Jane E. Markey
Michael J. Talbot

I concur in result only.

/s/ Michael J. Kelly

[1] See *United States of America v Frederick A. Sauer and Anne M. Sauer*, Case No 1:90-CV-838, U.S. District Court for the Western District of Michigan. The government's complaint against plaintiffs, filed pursuant to 31 USC 3729 *et seq.*, was filed on October 4, 1990.

[2] Although the parties' briefs recount in detail the events preceding the April 11, 1984 closing at which plaintiffs accepted the assignment of the three rental properties at issue from the Applegrens and executed the "Statement of Seller" used to secure the Fair Housing Administration guaranteed mortgage loan from the Department of Housing and Urban Development on only one of these properties, the record is not as clear regarding the activities that the parties conducted after this first sale. In the absence of a contrary factual presentation, we presume that, as planned, the parties closed on the second and third properties after the first FHA-approved sale was consummated.

[3] While it is unnecessary for us to determine whether plaintiffs committed fraud, the facts reveal that on April 11, 1984, plaintiffs (1) made a material representation regarding the status of the Pearl Street property (while knowing about the pending land contract sale of the two Cedar Street properties), (2) that was false (i.e., the new owners of the Pearl Street location were "in no way indebted to us . . . [and] do not have outstanding any unpaid obligations contracted in connection with the purchase or construction of said property other than the insured mortgage"), (3) that plaintiffs knew was false or made it recklessly without any knowledge of its truth and as a positive assertion, (4) that plaintiffs signed the statement with the knowledge and intention that it would be relied upon, (5) that the government acted in reliance upon it in approving the FHA mortgage, and (6) that the government suffered injury by giving the FHA guaranteed mortgage when the Pearl and Cedar Street properties did not separately qualify for FHA mortgages. See *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 114; 313 NW2d 77 (1981).

[4] We do not find that defendant Preferred committed fraud, but we do find that defendant's material misrepresentations or failures to fully disclose the facts to the lending institution or plaintiffs were made on April 11, 1984 in order to mislead the lending institution to process the FHA mortgage application,

which depended in part upon the assertions contained in plaintiffs "Statement of Sellers." Due to defendant's alleged misrepresentations or omissions, HUD issued the FHA mortgage and plaintiffs received the mortgage for a purpose not authorized by HUD: down payment on nonowner-occupied rental housing units. Although plaintiffs arguably suffered "damages" only after the Crees' assignees defaulted on the FHA loan and plaintiffs were prosecuted, we believe that the government's injury occurred on April 11, 1984, because it approved an FHA guaranteed mortgage based in part upon plaintiffs' misrepresentations. The government could, therefore, have filed a False Claims Act case against plaintiffs on or after the closing date based upon plaintiffs' representations in the seller's statement. Thus, the elements of the alleged fraud occurred, if at all, on April 11, 1984, which is the same date that plaintiffs' cause of action against defendant Preferred accrued. See *Lumley v Bd of Regents for the University of Michigan*, 215 Mich App 125, 130; 544 NW2d 692 (1996).

[5] The United States Court of Appeals for the Ninth Circuit held in *Mortgages, Inc, supra* at 212, that "we conclude that there is no right of indemnity or contribution among participants in a scheme to defraud the government in violation of the FCA." The Ninth Circuit came to this decision "[b]ecause there is no basis in the FCA or federal common law to provide a right to contribution or indemnity in a FCA action, we conclude that there can be no right to assert state law counterclaims that, if prevailed on, would end in the same result." *Id.* at 214.