STATE OF MICHIGAN

COURT OF APPEALS

CAPITAL BANKCORP LIMITED, Plaintiff-Appellant, v LANDHEER APPRAISAL SERVICE and DAVID J. LANDHEER, Defendants-Appellees.	UNPUBLISHED July 15, 2010 No. 291966 Ottawa Circuit Court LC No. 08-061263-NM

Before: TALBOT, P.J., and FITZGERALD and DAVIS, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition in this professional malpractice case. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In 2002, at plaintiff's request, defendant Landheer[1] appraised real estate consisting of a 20-unit motel built in 1952 and a duplex or single family home situated on one parcel. The appraisal was undertaken to permit plaintiff to consummate a commercial loan to Erik and Mary Lanka, who wanted to develop the property as separate units. Plaintiff would be financing the units individually as separate mortgages. Because of these plans, plaintiff requested defendant appraise the property not as a single parcel but as an aggregate of separate units, which all parties knew would increase their value. Defendant completed the report, assigning a value of $801,000 to the aggregate, and plaintiff loaned the Lankas $600,750. The maturity date on the loan was March 11, 2005.

The Lankas did not make the payment required at maturity. Plaintiff issued a new note with a maturity date of May 11, 2005, and on that date, when payment was not forthcoming, issued another new note with a maturity date of May 11, 2006. It is plaintiff's policy to conduct a new appraisal when it refinances, but it did not do so until September 4, 2007. At that time, a different appraiser valued the property "as is" (as a single parcel) at $350,000. On October 29,

[1] Defendant Landheer and his appraisal service share identical interests in this case and are collectively referred to herein as "defendant."

2007, a third appraiser reviewed defendant's 2002 appraisal and the September 2007 appraisal. This report advised that the property should have been appraised as a single parcel and not separate units, and that defendant was not licensed to appraise anything larger than four units.

Plaintiff filed suit on April 23, 2008, alleging professional malpractice. Defendant moved for summary disposition under MCR 2.116(C)(7) and (C)(10). The trial court rejected plaintiff's argument that it could not have discovered its claim until October 29, 2007, finding instead that plaintiff knew it might have a claim when the second appraisal, conducted on September 4, 2007, came in at far below defendant's original valuation. Accordingly, the trial court found that both the two-year statute of limitations for claims of professional malpractice, MCL 600.5805(6) and the six-month discovery rule, MCL 600.5838(2), had lapsed.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999), the non-moving party "must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case," *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

The parties do not dispute that plaintiff's claim is barred by the two-year statute of limitation set forth in MCL 600.5805(6) unless the requirements of the six-month discovery rule as delineated in MCL 600.5838(2) are satisfied. That statute provides:

> (1) Except as otherwise provided in section 5838a, *a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession* accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.
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> (2) Except as otherwise provided in section 5838a, an action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. *The burden of proving that the plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim shall be on the plaintiff.* A malpractice action which is not commenced within the time prescribed by this subsection is barred. [MCL 600.5838(2) (emphasis added).]

By its own language, the statutory discovery rule places the burden on plaintiff to prove it could not have discovered the claim earlier. In this case, plaintiff cannot meet that burden. The Lanka loan was refinanced several times after it first matured, but plaintiff did not have it reappraised until 2007. Even then, it waited seven months after the 2007 appraisal before filing suit. Plaintiff could have discovered its claim by reappraising the property at the time it was refinanced. Plaintiff also had in its possession a 2001 appraisal of the property as a single parcel. From this, it could have discerned that the subdivided property value was higher. Plaintiff

provides no proof that it did not know, and could not have known, without being told by its appraiser in October 2007, that property appraised, as separate units would have a higher value than property appraised as one unit. Nor does plaintiff explain how it could not know that defendant lacked the requisite qualifications to appraise the property when it had available as part of defendant's appraisal the information that he was licensed, not certified, and when the current statutes set forth the limitations imposed on licensed appraisers. MCL 339.2613, repealed by 2006 PA 414. Because plaintiff's inaction was what prevented it from discovering the claim, the grant of summary disposition was appropriate.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Alton T. Davis