

DA 19-0159

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 46

JOHN PAYNE; RICHLAND PARTNERS, LLC,
a Montana limited liability company; and MALLARD
LAKE PROPERTIES, LLC, a Washington limited liability company,

Plaintiffs and Appellants,

v.

ROGER HALL and ERIC SHIELDS,

Defendants and Appellees.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DV-15-648
Honorable Karen Townsend, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Bruce A. Fredrickson, Angela Marie LeDuc, Rocky Mountain Law
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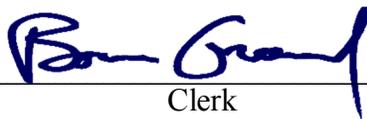
For Appellee:

David B. Cotner, Kyle C. Ryan, Cotner Law PLLC, Missoula, Montana

Submitted on Briefs: January 2, 2020

Decided: February 25, 2020

Filed:


Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 John Payne (Payne) appeals the order granting summary judgment in favor of Roger Hall (Hall), entered by the Montana Fourth Judicial District Court, Missoula County. We affirm, and restate the issues as follows:

1. *Did the District Court err by granting Hall’s motion for summary judgment based on its conclusion that Payne’s claims were time barred?*
2. *Did the District Court err by granting Hall’s motion for summary judgment on his counter claim?*

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In early 2012, Hall and his business partner, Eric Shields (Shields), began looking for real property to buy in eastern Montana (the Bakken Area) for potential commercial development. On February 10, 2012, Hall and Shields signed a buy-sell agreement to purchase a 37-acre tract of land (the Property) and, the same day, were provided the Seller’s Property Disclosure Statement (Disclosure Statement), which disclosed the presence of two oil wells and pipelines, underground pipelines, and an old oil reserve pit. Jerriann Franzen (Franzen), Hall and Shields’ real estate agent, also kept a copy of the Disclosure Statement in a file she maintained of the transaction.

¶3 In April of 2012, Hall met Payne, and they began to discuss working together to develop a commercial and RV subdivision on the Property. Payne visited the Property with Hall and observed two oil pads with “pump jacks,” which were plainly visible. Shortly thereafter, Payne and Hall formed an entity to develop the Property, Richland Partners, LLC (Richland Partners) and Payne purchased Shields’ contractual interest in the

Property. On May 24, 2012, Payne signed an addendum to the buy-sell agreement that provided the buyers would be Payne and Hall, removing Shields. At that time, Payne and Hall were jointly represented by Franzen as their real estate agent. Payne alleges neither Franzen nor Hall provided him with the Disclosure Statement.

¶4 Payne has worked in the construction industry since 1985, and was the owner of Fowler Construction Company, specializing in heavy industrial, multi-family, educational, and commercial projects. After purchasing Shields' interest, Payne began investigating the Property on his own. He confirmed the Property had adequate access to the nearby highway and power availability. He hired an attorney to look into the oil leases and mineral rights on the Property, and obtained an updated title report to check easements and encumbrances on the Property. Payne asked Franzen to locate the owner of the Property's mineral leases, which was Cowry Enterprises, Ltd. (Cowry). However, Payne did not ask Franzen for any documents she possessed relating to the Property, and she did not provide Payne with the Disclosure Statement.

¶5 The sale of the Property closed on June 28, 2012. The purchase price was \$371,000, financed by a note guaranteed by Payne and Hall. In early August of 2012, while digging test pits for groundwater monitoring, the project engineer for Richland Partners encountered the reserve oil pit. Even so, Richland Partners proceeded with development activities on the Property. As time went on, however, other issues delayed the development, including concerns about a high water table, the need to obtain an agriculture exemption before development, and significant concerns relating to the potential of

hydrogen sulfide gas being released from the two active wells on the property. Richland County's preliminary plat approval issued in June of 2013 identified the hydrogen sulfide gas as the Property's most significant hazard to public health and safety. The County required a 300 foot "clear zone" around the oil well heads, which could be only used for outdoor storage, and access to the area was restricted to individuals who were safety certified. The County also required installation of an evacuation alarm and development of a subdivision evacuation plan due to the dangerous gas. Finally, the County mandated that any soil contaminated by the reserve pit be mitigated by removal or cleaning or by designating the area as a no-build zone.

¶6 In January of 2014, Payne, Hall, and Richland Partners brought suit against Cowry, alleging claims arising out of Cowry's alleged contamination of the property. On June 4 and 5 of 2014, Payne was deposed in the Cowry litigation. Payne contends that, during this deposition, he first learned of the Disclosure Statement and, indeed, he stated then that he had never seen the document before. However, upon further questioning, Payne testified he may have seen the document and remembered mentioning it to Hall sometime in the Winter of 2013, after the reserve pit was discovered on the Property.

¶7 While the Cowry litigation was pending, Hall and Payne entered into a Sale and Purchase Agreement, whereunder Payne purchased Hall's interests in Richland Partners for \$750,000 (the Partnership Purchase Agreement or Agreement). The sale was finalized hours after Payne's Cowry deposition. The Warranty Deed for the property was delivered to Payne the next day, June 6, 2014, and on June 9, 2014, Payne wired Hall \$500,000 for

the initial payment, as provided by the Agreement. Almost a year later, on May 31, 2015, Payne refused to pay Hall the remaining \$250,000 of the agreed purchase price, asserting he was not aware of the Disclosure Statement when he entered into the Agreement and, therefore, it was voidable. In February of 2015, the district court in the Cowry litigation entered summary judgment in favor of Cowry.¹

¶8 On June 30, 2015, Payne filed this action against Hall and Shields, claiming fraud, fraudulent inducement, negligent/intentional misrepresentation, negligence, breach of good faith and fair dealing, and punitive damages. Payne alleged Hall and Shields failed to disclose the existence of the reserve pit prior to the sale in 2012. Hall counterclaimed, alleging breach of contract and breach of good faith and fair dealing by Payne's failure to make the \$250,000 final payment under the Partnership Purchase Agreement. Payne settled his claims against Shields in August of 2016. Hall moved for summary judgment, arguing all of Payne's claims were barred by statutes of limitation. Hall also moved for summary judgment on his counterclaim because Payne lacked justification to refuse to perform his obligation under the Partnership Purchase Agreement. The District Court granted Hall's motions. Payne appeals.

STANDARD OF REVIEW

¶9 This Court reviews a grant of summary judgment *de novo*, applying the same criteria as the district court based on M. R. Civ. P. 56. *Beckman v. Butte-Silver Bow Cty.*, 2000 MT 112, ¶ 11, 299 Mont. 389, 1 P.3d 348. A party moving for summary judgment bears

¹ *Richland Partners, LLC v. Cowry Enters., Ltd.*, 2015 U.S. Dist. LEXIS 24186.

the initial burden of establishing that no genuine issue of material fact exists and that the party is therefore entitled to judgment as a matter of law. Once the moving party has met this burden, the burden then shifts to the non-moving party to prove by more than mere denial and speculation that a genuine issue of material fact exists. *Beckman*, ¶ 11 (quoting *Bruner v. Yellowstone Cty.*, 272 Mont. 261, 264, 900 P.2d 901, 903 (1995)). The non-moving party may not rely on “speculative, fanciful, or conclusory statements.” *Sprunk v. First Bank Sys.*, 252 Mont. 463, 466, 830 P.2d 103, 105 (1992).

DISCUSSION

¶10 *1. Did the District Court err by granting Hall’s motion for summary judgment based on its conclusion that Payne’s claims were time barred?*

¶11 Payne argues his claims are not time barred because he did not become aware of Hall’s actions allegedly constituting fraud until June 5, 2014, less than two years prior to his filing of this action. Payne contends the District Court erred by finding that knowledge of facts underlying his fraud claim were imputed to him as early as June of 2012, and also by concluding the statute of limitations was not tolled due to concealment. Hall counters that the District Court did not err in holding Payne’s claims were time barred because Payne had imputed knowledge of the facts constituting fraud through Franzen’s representation, and that tolling does not apply because the facts constituting fraud were not self-concealing or concealed by Hall’s affirmative actions. The parties do not dispute the statute of limitations for a fraud claim is two years, and that the period of limitations for Payne’s other claims is three years. Sections 27-2-203 to 204, MCA.

a. Imputed knowledge

¶12 Section 28-10-604, MCA, provides, “[a]s against a principal, both principal and agent are deemed to have notice of whatever either has notice of and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other.” Phrased differently, “[u]nder Montana law, a principal is deemed to have notice of all information known by his or her agent that the agent should, in good faith and exercising due care and diligence, have communicated to the principal.” *Kaeding v. W.R. Grace & Co.*, 1998 MT 160, ¶ 26, 289 Mont. 343, 961 P.2d 1256 (citing § 28-10-604, MCA; *Williams v. State Medical Oxygen & Supply, Inc.*, 265 Mont. 111, 874 P.2d 1225 (1994)). This is true regardless of whether the agent actually communicated the information to the principal. *Kaeding*, ¶ 26. This principle of Montana’s agency law has been used to impute facts known by a real estate agency to its clients, even though such imputation negated the clients’ fraud claims. *See Aetna Life Ins. Co. v. McElvain*, 221 Mont. 138, 148-49, 717 P.2d 1081, 1087-88 (1986). Similarly, we have held that imputed knowledge is an appropriate basis on which to conclude a claim is time barred. *See Kaeding*, ¶¶ 25-27.

¶13 As an initial matter, Payne challenges the District Court’s determination that an agency relationship existed between him and Franzen, but we conclude he has not demonstrated a genuine issue of material fact in that regard. Franzen testified in her deposition that she was Payne’s real estate agent and represented him at the time the buy-sell addendum was signed in May of 2012. Likewise, Payne testified in his deposition that Franzen represented his interest in purchasing the property, was paid a commission,

and performed “due diligence” work at his request. While Payne now contends Franzen was not his agent, “parties cannot create a material factual issue by taking a contrary position to an earlier position.” *Puryer v. Barstis*, 2016 MT 188, ¶ 27, 384 Mont. 261, 378 P.3d 1151.²

¶14 Payne’s argument that Franzen was not his agent because no listing agreement was signed is likewise unpersuasive. While Payne correctly notes that § 37-51-313(10), MCA, requires a licensed broker or salesperson to obtain an appropriate agreement prior to performing the acts of an agent, it also provides that “[a] licensed broker or salesperson who is acting as a buyer agent . . . without a written buyer broker agreement or written listing agreement is nevertheless obligated to comply with the requirements of this chapter.” Nothing in the statute prohibits creation of an agency relationship where a written agreement has not been signed and, to the contrary, the statute provides that a buyer’s real estate agent is not excused from the requirements of the chapter merely because no written agreement exists. Thus, the District Court did not err by concluding Franzen was Payne’s agent.

¶15 As Payne’s agent, Franzen’s knowledge was imputed to Payne under § 28-10-604, MCA, and our precedent. In *Aetna Life Ins. Co.*, the sellers hired a real estate agent to list

² Additionally, the complaint filed by Payne and Hall in the Cowry litigation identified Franzen as Payne’s agent. “The doctrine of judicial estoppel binds a party to their judicial declarations and precludes a party from taking a position inconsistent with previously made declarations in a subsequent action or proceeding.” *Stanley L. & Carolyn M. Watkins Trust v. Lacosta*, 2004 MT 144, ¶ 33, 321 Mont. 432, 92 P.3d 620 (citing *Kauffman-Harmon v. Kauffman*, 2001 MT 238, ¶ 15, 307 Mont. 45, 36 P.3d 408).

their ranch for sale. The sellers entered a buy/sell agreement wherein they agreed to partially finance the buyers' purchase by carrying a second mortgage, on their understanding that Aetna Life Insurance Company (Aetna) was lending buyers up to \$1,100,000 secured by the first mortgage. *Aetna Life Ins. Co.*, 221 Mont. at 140, 717 P.2d at 1082. However, Aetna had actually approved a loan for \$1,550,000. Later, when Aetna sued to foreclose the property upon buyers' default, and the higher secured amount was revealed, the sellers claimed Aetna had committed fraud. *Aetna Life Ins. Co.*, 221 Mont. at 141-44, 717 P.2d at 1083-84. We held sellers' fraud claim could not be maintained because their real estate agent was aware the mortgage provided by Aetna would be in excess of \$ 1.5 million, and the agent's knowledge of this was imputed to the sellers. *Aetna Life Ins. Co.*, 221 Mont. at 148-49, 717 P.2d at 1087-88. Here, as in *Aetna Life Ins. Co.*, it is undisputed that Franzen, Payne's real estate agent, had knowledge of the facts that Payne alleges he did not know, and which form the basis of his fraud claim. Specifically, Franzen had received and maintained possession of the Disclosure Statement that disclosed the presence of the oil reserve pit on the Property. The District Court did not err by holding that Franzen's knowledge of the oil reserve pit was imputed to Payne.

b. Tolling

¶16 “The fact that a party does not know that he or she has a claim, whether because he or she is unaware of the facts or unaware of his or her legal rights, is usually not sufficient to delay the beginning of the limitations period.” *Christian v. Atl. Richfield Co.*, 2015 MT

255, ¶ 61, 380 Mont. 495, 358 P.3d 131 (citations omitted). However, § 27-2-102(3), MCA, provides,

The period of limitation does not begin on any claim or cause of action for an injury to person or property until the facts constituting the claim have been discovered or, *in the exercise of due diligence, should have been discovered by the injured party if:*

- (a) the facts constituting the claim are by their nature concealed or self-concealing; or
- (b) before, during, or after the act causing the injury, the defendant has taken action which prevents the injured party from discovering the injury or its cause.

(Emphasis added.) This Court has held that determining when a statute of limitations may be tolled under § 27-2-102(3), MCA, hinges on whether the party relying on the statute should have reasonably discovered the facts constituting the claim in the exercise of due diligence. *See Thieltges v. Royal Alliance Assocs.*, 2014 MT 247, ¶¶ 19-20, 376 Mont. 319, 334 P.3d 382; *Christian*, ¶ 61 (“The discovery rule constitutes an exception to this general principle, stating that if the facts constituting the claim are concealed or self-concealing in nature, or if the defendant has acted to prevent the injured party from discovering those facts, the period of limitations does not begin to run until the injured party has discovered, or in the exercise of due diligence should have discovered, both the injury and its cause.”) (citations omitted); *see also Draggin’Y Cattle Co. v. Addink*, 2013 MT 319, ¶ 21, 372 Mont. 334, 312 P.3d 451.

¶17 In *Kaeding*, this Court discussed the relation between imputed knowledge and the discovery doctrine. In June 1996, Plaintiff sued his former employer for exposing him to materials that caused him to develop asbestosis. *Kaeding*, ¶¶ 10-14. Prior to filing the

action, Plaintiff's attorney had sent Plaintiff's medical records to a doctor to investigate his injury. *Kaeding*, ¶ 10. In September 1992, the doctor sent a letter to the attorney concluding Plaintiff's history was consistent with asbestosis. *Kaeding*, ¶ 11. The employer argued Plaintiff filed his claim beyond the period of limitations because knowledge of the asbestosis was imputed to him more than three years prior to filing his complaint. *Kaeding*, ¶ 14. Plaintiff argued the attorney's knowledge of the doctor's letter could not be imputed to him "because the statute of limitations inquiry in latent injury cases is whether the claimant had actual knowledge of the elements of the claim." *Kaeding*, ¶ 14. Although we acknowledged that injuries such as latent diseases may toll the statute of limitations under § 27-2-102(3), MCA, because they are self-concealing, we ultimately disagreed with Plaintiff, explaining that under § 27-2-102(3), MCA, the proper inquiry "is when the claimant discovered or, in the exercise of due diligence, should have discovered the elements of the claim or cause of action." *Kaeding*, ¶ 26. Based on this inquiry, we held the Plaintiff "should have discovered that he suffered from asbestosis" when his attorney received the doctor's letter. *Kaeding*, ¶ 27. Thus, in cases where an agent's knowledge is properly imputed, the material fact in determining the commencement of a period of limitation under § 27-2-102(3), MCA, is when the agent discovered the elements of the claim or cause of action. At that point, the claimant is also considered to have discovered the elements of the claim.

¶18 Here, because knowledge was properly imputed to Payne, it is immaterial when he actually discovered the facts constituting the alleged fraud. Rather, the material fact is

when Payne's agent, Franzen, became aware of the facts constituting the fraud, because Payne was then deemed to also be aware of the facts. This analysis would apply even if, as Payne argues, the reserve pit was concealed or self-concealing in nature because, nonetheless, the Seller had disclosed it to Payne's agent.

¶19 A further nuance in this case is that Payne was not imputed knowledge of the pit at the initial time Franzen received the Disclosure Statement, because Franzen received it prior to becoming Payne's agent. Franzen's knowledge was imputed to Payne when they entered their agency relationship, at which time Payne is considered to have discovered the Disclosure Statement received by Franzen and maintained in her file. The record does not indicate the exact date Franzen became Payne's agent, but it is undisputed that Payne signed a buy-sell agreement on the property, with Franzen as his agent, in May of 2012, which would have commenced the limitation period. Payne filed his complaint on June 30, 2015, more than a year beyond the two-year period of limitation for fraud, and at least a month beyond the period of limitation for Payne's other claims. We conclude the District Court did not err in holding Payne's claims were time barred.³

¶20 Even if Payne's personal discovery of the Disclosure Statement was material, his contention that the period of limitation should be tolled because he and Hall stood in a special relationship under the Limited Liability Company Act, § 35-8-101, et seq., MCA, is unpersuasive. While the failure of one in a fiduciary relationship to provide information

³ The closing of the transaction for which Franzen represented Payne's interests was June 28, 2012. Even using that later date, Payne's claims were time barred.

may toll a period of limitation, this rule applies only when a “confidential relationship exists between the parties, *which imposes a duty to disclose.*” *Estate of Watkins v. Hedman, Hileman & Lacosta*, 2004 MT 143, ¶ 25, 321 Mont. 419, 91 P.3d 1264 (emphasis added).

Payne correctly notes the Limited Liability Company Act addresses fiduciary duties between LLC members, but the statute limits such duties, as follows:

(1) *the only* fiduciary duties that a member owes to a member-managed company and the other members are the duty of loyalty imposed by subsection (2) and the duty of care imposed by subsection (3).

(2) A member’s duty of loyalty to a member-managed company and its other members is limited to the following:

(a) to account to the company and to hold as trustee for it any property, profit, or benefit derived by the member in the conduct or winding up of the company’s business or derived from a use by the member of the company’s property, including the appropriation of a company’s opportunity;

(b) to refrain from dealing with the company in the conduct or winding up of the company’s business on behalf of a party or as a person having an interest adverse to the company; and

(c) to refrain from competing with the company in the conduct of the company’s business before the dissolution of the company.

(3) A member’s duty of care to a member-managed company and the other members . . . is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of the law.

Section 35-8-310, MCA (emphasis added). Plainly, the Act does not impose any additional duty to disclose between LLC members necessary to establish a basis for tolling a limitation period by reason of a non-disclosure by a fiduciary.

¶21 2. *Did the District Court err by granting Hall’s motion for summary judgment on his counterclaim?*

¶22 Payne argues the District Court erred by concluding he should not be excused from the Partnership Purchase Agreement because there are questions of material fact about whether Payne consented to the Partnership Agreement with knowledge of the Disclosure

Statement. Hall counters that it is undisputed Payne knew about the Disclosure Statement prior to entering the Partnership Agreement, but, even if he did not, Payne ratified the Agreement by making a substantial payment after seeing the Disclosure Statement.

¶23 A valid contract requires: (1) identifiable parties capable of contracting, (2) consent of the parties, (3) a lawful object, and (4) sufficient cause or consideration. Section 28-2-102, MCA. “Consent is not mutual unless the parties all agree upon the same thing in the same sense[.]” Section 28-2-303, MCA. A party may consent to a contract by voluntary acceptance of the contract’s benefit. Section 28-2-503(2), MCA. Even where a contract is voidable due to lack of consent, it may be ratified by subsequent actions or consent of the parties, binding them to the contract and the benefits of it. Section 28-2-304, MCA; *Erlor v. Creative Fin. & Invs.*, 2009 MT 36, ¶ 26, 349 Mont. 207, 203 P.3d 744. When determining whether a contract has been ratified, the outward manifestations of the ratifying party control, and such ratification may occur “by express declaration or implication, and it may be implied from any acts or conduct[.]” *Erlor*, ¶¶ 25-26. Finally, this Court has found that “voluntar[y] performance or payment on a previously unauthorized contract by a principal with knowledge of the material facts is presumptive proof of ratification where . . . the principal’s subsequent performance or payment is inconsistent with any other intention.” *Associated Mgmt. Servs. v. Ruff*, 2018 MT 182, ¶ 41, 392 Mont. 139, 424 P.3d 571.

¶24 Here, the undisputed facts establish Payne knew of the Disclosure Statement prior to entering the Agreement to purchase Hall’s share of Richland Partners in June 2014.

First, it is undisputed that Payne had knowledge of the reserve pit itself in August of 2012, when the pit was discovered by project engineers. Second, Payne’s deposition testimony from the Cowry litigation—which Payne also relies on to establish the facts of his claim—indicates that he had personal knowledge of the Disclosure Statement in the Winter of 2013, before the sale closed:

Q. Got you. So when you became involved in this project you were unaware of this disclosure statement?

A. Correct.

Q. Were you aware of it before today?

A. It may have come up. After we found the oil out there we started doing some backtracking and we—I’m not positive but I think I [brought] it up. And Roger was working in Sidney and I think I called him and asked him about that.

Q. When would that have been?

A. Winter of 2013, probably, early winter, is my guess. It’s after we drilled the holes for 19, 20, and 21, whenever that was.

Q. Okay. *So you had already known there was a presence of some old oil?*

A. *Right. It came up. And then we started saying, “What the heck?” And then we found this.* But to be honest, I wouldn’t have known what a reserve pit was before that.

(Emphasis added.) Payne now argues that he was unaware of the Disclosure Statement until June of 2014, after the Agreement had already been signed and just a half hour after the sale closed. However, his undisputed testimony reveals prior knowledge of the pit and the Disclosure Statement. A party may not avoid summary judgment by creating factual inconsistencies, and a party’s conflicting statements in depositions and affidavits do not create a genuine issue of material fact. *Herron v. Columbus Hospital*, 284 Mont. 190, 195, 943 P.2d 1272, 1275-76 (1997). We conclude the District Court did not err in finding Payne consented to the contract with knowledge of the material facts.

¶25 Lastly, even if Payne he did not see the Disclosure Statement until June 5, 2014, his subsequent actions ratified the otherwise voidable contract. It is undisputed Payne made a \$500,000 payment to Hall on June 9, four days after he claims he first saw the Disclosure Statement. Thus, while he knew of all the material facts, he nonetheless proceeded to make the payment and close the transaction. Payne does not point to any evidence that he expressed any intention to the contrary, until his refusal to pay the remainder of the purchase price almost one year later. Throughout that year, Payne accepted and retained the benefits of the Agreement, including ownership of the property he obtained by the Warranty Deed delivered to him on June 6, 2014. We conclude the District Court did not err by determining no dispute of material fact existed regarding whether Payne ratified the contract.

¶26 We conclude the District Court did not err by granting Hall's motions for summary judgment.

¶27 Affirmed.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ LAURIE McKINNON
/S/ INGRID GUSTAFSON