

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-171

NOVEMBER TERM, 2019

DBI/Coinvestor Fund III, LLC* v. Craig	}	APPEALED FROM:
Cowles et al.	}	
	}	Superior Court, Chittenden Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 611-6-17 Cncv
		Trial Judge: Helen M. Toor

In the above-entitled cause, the Clerk will enter:

Plaintiff DBI/ASG Coinvestor Fund III, LLC filed this declaratory judgment action seeking a declaration that the former holder of the mortgage has no right or interest in the mortgage and that DBI is the sole mortgagee. Plaintiff appeals the court's order granting judgment to defendant on statute-of-limitations grounds. We affirm.

The court found the following facts after a hearing. Defendant Craig Cowles obtained a home equity line of credit from GMAC Mortgage Corporation in 1996 in the amount of \$27,500. The loan was secured by a mortgage on property owned by defendant in Richmond, Vermont. Defendant believed that at some point GMAC had written off the loan and that he did not have to pay it. There was no evidence as to how much remained owing on this debt at the time of trial. DBI purchased 700 mortgages in bulk in October 2010. DBI did not assure prior to closing the sale that it had a chain of assignments on each mortgage. The note signed by defendant was transferred to DBI in this sale and DBI possesses the original signed note.*

At some point, DBI realized that there was a missing assignment on defendant's mortgage. DBI attempted to obtain the missing assignment, but the company, which had previously held the mortgage, had gone out of business in 2013. In August 2013, the then-servicer of the loan recorded a document noting that it had been unable to find the missing assignment. DBI filed this declaratory action in June 2017, seeking a declaration that the former mortgage holder had no interest in the mortgage.

Following trial, the court issued a written order, granting judgment to defendant on the ground that DBI's action was filed beyond the statute-of-limitations period. The court concluded that the general six-year limitations period under 12 V.S.A. § 511 applied and that DBI had at least inquiry notice of the missing assignment when it purchased the mortgage in October 2010. Because the case was filed more than six years after that date, the court concluded that DBI's claim was barred. DBI moved to reconsider, arguing that the statute of limitations should be tolled because DBI did not have actual or constructive notice until 2012 or under equitable tolling and

* The uncontroverted testimony is that the note is endorsed in blank.

asserting that the limitations period in 12 V.S.A. § 501 applied. The court denied the motion. DBI appeals.

On appeal, DBI first argues that the court erred in dismissing the case on limitations grounds when this defense was not affirmatively pled by defendant. DBI argues that under Vermont Rule of Civil Procedure 8(c), the statute of limitations is waived if it is not raised as an affirmative defense.

We conclude that the court did not err in addressing the limitations issue even though defendant did not raise it as an affirmative defense in his answer. This Court has recognized “that Rule 8(c) is subject to exceptions allowing the court to act sua sponte if necessary to do substantial justice and if there is no prejudice to the parties.” DaimlerChrysler Servs. N. Am., LLC v. Ouimette, 2003 VT 47, ¶ 5, 175 Vt. 316. For this reason, in DaimlerChrysler we affirmed the court’s order raising the statute of limitations issue sua sponte where it was “apparent on the face of plaintiff’s complaint.” Id.

Here, the court acted within its discretion in addressing the limitations issue because although defendant did not include the statute of limitations in a written answer, he raised the issue at trial and DBI had an opportunity to respond. At the hearing, defendant stated that the missing assignment could have been worked out if DBI had showed him proof in 2010 that it bought the note. He also claimed that it was unfair for him to have to pay additional interest for the time in which DBI did not enforce its rights under the note. At the close of the evidence, the court indicated that it heard statute-of-limitations and laches claims raised by defendant and gave DBI an opportunity to file written argument on those issues. Insofar as defendant raised the limitations issue at trial and DBI had an opportunity to respond, we conclude that the court did not err in addressing the statute of limitations.

DBI next argues that judgment for defendant was improper because the statute of limitations began to run at the earliest in 2013. DBI claims that it was not on notice until that date that there was a missing assignment.

“The question of the applicability of the statute of limitations is one of law” and is subject to de novo review. Huntington v. McCarty, 174 Vt. 69, 71 (2002). “[T]he statute of limitation begins to run when the plaintiff has notice of information that would put a reasonable person on inquiry, and the plaintiff is ultimately chargeable with notice of all the facts that could have been obtained by the exercise of reasonable diligence in prosecuting the inquiry.” Agency of Nat. Res. v. Towns, 168 Vt. 449, 452 (1998) (quotation and alteration omitted).

We conclude that the statute of limitations began to run in 2010 when DBI purchased the mortgage and note because at that time DBI had all the facts necessary to discover the cause of action in this case. See id. (explaining that cause of action accrues when existence of facts puts person “on inquiry which, if pursued, would lead to the discovery” (quotation omitted)). At trial, a DBI employee testified that in 2010 DBI purchased the note and had possession of the original note. He testified that DBI did not check to ensure that all the assignments were included and became aware of the missing assignment in late 2012 or early 2013 during a review of documents. He testified that DBI attempted to contact the prior mortgage holder, but the company shut down in 2013. Even accepting that DBI did not have actual notice of the missing assignment until sometime in 2012 or 2013, this does not change the fact that the statute of limitations began to run in 2010. Regardless of whether it purchased one or 700 loans, DBI had all the facts available to it at the time of purchase to determine that the assignment was missing and its lack of due diligence to discover the deficiency did not toll the limitations period.

DBI's other arguments for avoiding the limitations period are unavailing. DBI asserts that the limitations period should not begin to run until 2013 when it was no longer possible for DBI to solve the missing assignment outside of litigation. DBI's efforts to cure the missing assignment through nonlitigation efforts did not toll the limitations period. DBI could have filed a declaratory judgment action even before 2013 when it discovered that the former mortgage holder went out of business.

Finally, there is no merit to DBI's assertion that the court's order is deficient because it does not indicate when the cause of action accrued. The court indicated that DBI should have learned of the missing assignment in 2010 at closing.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice