

IN THE SUPREME COURT OF THE STATE OF IDAHO

JEFRI DAVIS and DEBBIE DAVIS,

Plaintiffs/Appellants,

vs.

DONALD McCANLIES, CHARLES TUMA,
and JOHNSON HOUSE COMPANY,

Defendants/Respondents.

Supreme Court No: 46721-2019

Bonner County No. CV-09-18-0672

Appeal from the District Court of the First Judicial District
Of the State of Idaho, in and for the County of Bonner

Honorable Barbara A. Buchanan, Presiding

APPELLANTS' OPENING BRIEF

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I. STATEMENT OF THE CASE

A. Nature of the Case.

Plaintiffs/Appellants, Jefri and Debbie Davis (hereinafter referred to as “the Davises”) hired Defendants/Respondents, Charles John Tuma (hereinafter referred to as “Tuma”) and Donald J. McCanlies (Tuma’s broker) to assist them in purchasing a home in North Idaho. Tuma worked directly with the Davises and when they found a home they liked, he alone investigated the title documents prior to closing. Tuma failed to notice that the road that both he and the Davises believed provided access to the home did not in fact do so. The Davises filed suit against Defendants/Respondents alleging fraud, constructive fraud, and negligence.

B. Facts.¹

In 2009, the Davises, resided in Dublin, California. (R. Vol. I, p. 250, ¶ 2). In September of 2009, they hired a broker to assist them in purchasing a home in North Idaho and Tuma, who worked for the broker, assisted them with the purchase of their current home. (R. Vol. I, p. 363-364, ¶ 2 - 3).

Debbie Davis suffers from Crohns and Celiac disease, multiple sclerosis, seizures and heart issues and it was very important for her to have a smooth, gently sloped access to her home. Tuma was informed of this fact. (R. Vol. 1, p. 200).

Prior to closing on the home, Tuma provided the Davises with a video of the property in which he showed them, amongst other things, that the access to the property was provided via Gray Wolf Road. (R. Vol. I, p. 201, ¶ 18). Tuma believed the property had access via Gray Wolf Road based on his investigation of the property. (R. Vol. I, p. 85, ¶ 17).

¹ The District Court agreed that some of the facts in Plaintiffs’ Affidavits on Summary Judgment were not admissible but failed to clarify which ones. (R. Vol 1, 366). The facts alleged here are all based on personal knowledge.

Also prior to closing, Tuma was provided with a Preliminary Title Report and a copy of the Covenant, Conditions and Restrictions (hereinafter referred to as “CC&Rs) which encumbered the Davis’s home and various surveys of the property which were attached to the CC&Rs. (R. Vol. I, p. 85, ¶ 18 - 19). Tuma did not provide a copy of any of this information to the Davises prior to closing. (R. Vol. I, p. 200, ¶ 15). Instead, Tuma himself examined these documents, (R. Vol. I, p. 86, ¶ 22) and reassured the Davises that the CC&Rs contained no material adverse information. (R. Vol. 1, p. 200, ¶ 16). The Davises relied exclusively on Tuma’s assurances regarding the access to their property. (R. Vol. I., p. 200-201, ¶ 16).

The information Tuma reviewed prior to closing shows that the access to the Davis’s home is not from Grey Wolf Road but from another point off of the highway. (R. Vol. I, p. 86, ¶ 22). Tuma failed to notice this fact as he readily admits. (R. Vol. I, p. 86, ¶ 24). The Davises closed on the home on October 1st, 2009, (R. Vol. I, p. 364, ¶ 4), and utilized Gray Wolf Road to access the home until August of 2016 when they were made aware that they did not have legal access over that road. (R. Vol. I, p. 251, ¶ 3)

More than two months after closing, the Davises received an e-mail from a title company employee who subject line only read “record of survey”. (R. Vol, 1, p 112) The e-mail contained the following attachment. (R. Vol. I, p. 86, ¶ 28).

property because they had constructive notice of the access issue or in December 2009 when the record of survey was provided to them.

The District Court ruled that the Davises had constructive knowledge of their claim against Tuma in October of 2009 when they closed based on the constructive notice provisions of Idaho Code § 55-811. (R. Vol. I, p. 368-369). In addition, the District Court held that the Davises had inferred actual knowledge of their claim against Tuma because if they had exercised due diligence, and reviewed the attachment to the e-mail that was sent to them two months after closing, they would have noticed their claim against Tuma. (R. Vol. I, p. 369-370).

The Davises moved to amend their complaint to add causes of action for breach of statutory and contractual duties. The District Court denied that motion based on its findings that the Davises already plead causes of action were time barred. (R. Vol. 1, P 373).

II. ISSUES ON APPEAL

- A.** Did the District Court commit an error when it determined that the Davises could not amend their Complaint because the originally plead causes of action (as opposed to the proposed new causes of action) were barred by the Statute of Limitations?
- B.** Did the District Court commit error when it determined that the Davises had constructive notice that Gray Wolf Road was not the deeded access to their property because a recorded survey showed that fact?
- C.** Did the District Court commit error when it decided on summary judgment the Davises failed to exercise due diligence and therefor had inferred actual knowledge that Gray Wolf Road was not the deeded access to their home?
- D.** Did the District court commit error when it decided that the Davises' negligence claims were time barred?
- E.** Are the Davises entitled to attorney's fees as costs on appeal because the Broker Representation Agreement authorizes it?

III. ARGUMENT

A. **The District Court Errored When It Determined that the Davises Could not Amend Their Complaint because Their Originally Plead Causes of Action were Barred by the Statute of Limitations.**

The District Court ruled the Davises could not amend their Complaint because the claims in Davis's original Complaint, as opposed to the proposed Amended Complaint, were time barred. (R. Vol. I, 373). This was an error because the District Court should have evaluated if the proposed additional claims were time barred in order to determine if the proposed amendment was futile.

A District Court's decision to allow an amendment to the pleadings is reviewed for an abuse of discretion. *Dickinson Frozen Foods, Inc. v. J.R. Simplot Co.*, 164 Idaho 669, 675, 434 P.3d 1275, 1281 (2019). Leave to amend pleadings should be freely granted unless certain circumstances are present, one of which is if the proposed additional claims are time barred. *PHH Mortg. v. Nickerson*, 160 Idaho 388, 396, 374 P.3d 551, 559 (2016). It is not an abuse of discretion to deny the Motion to Amend if the proposed additional claims are time barred. *Black Canyon Racquetball Club, Inc. v. Idaho First Nat. Bank, N.A.*, 119 Idaho 171, 175, 804 P.2d 900, 904 (1991).

The Davises moved to amend their Complaint to include a claim for breach of contract and for violations of the duties owed by a realtor to a client. (R. Vol. I, p. 272). Tuma objected on the grounds that the proposed additional claims were time barred. (R. Vol. I, p. 329, ¶ a., L. 12 - 13). The District Court denied the Motion to Amend because the claims in the original Complaint were time barred or not recognized and failed to analyze whether the proposed additional statutory or contractual claims were time barred, thus rendering the proposed amendment futile.

It was an abuse of discretion for the District Court to deny Davis's Motion to Amend to add new claims based on the fact that their existing claims were time barred. This Court should remand this matter with instructions to determine if the Davises proposed additional causes of action are time barred.

B. Idaho Code § 55-811 is not a Shield from a Claim Related to the Misrepresentation of the Contents of Recorded Documents.

i. Standard Review.

This matter was dismissed on summary judgment. This Court uses the same standard as the District Court when reviewing rulings on summary judgment and summary judgment is only proper if the moving party shows that there are no disputes as to any material fact and that the party is entitled to judgment as a matter of law. *Greenwald v. W. Sur. Co.*, 164 Idaho 929, 436 P.3d 1278, 1286 (2019).

Whether a claim is barred by the Statute of Limitations can be either a question of law or a question of fact. *Kawai Farms, Inc. v. Longstreet*, 121 Idaho 610, 614, 826 P.2d 1322, 1326 (1992). The interpretation and construction of a statute is a question of law over which this Court exercises free review. *Valiant Idaho, LLC v. JV L.L.C.*, 164 Idaho 280, 429 P.3d 168, 177 (2018).

Since the District Court interpreted Idaho Code § 55-811 in such a way to conclude that the Davises' Statute of Limitations commenced running in 2009, this Court freely reviews that conclusion.

ii. Idaho Code 55-811 Cannot be Used to Shield a Person from a Claim of Misrepresentation.

The crux of this appeal is when the Davises had knowledge of their claim sufficient to commence the running of the statute of limitations for fraud, constructive fraud and negligence claims. The District Court ruled that the Davises had constructive knowledge of the fact that the

deeded access to their home was not Gray Wolf Road when they closed on the home based on Idaho Code § 55-811 imputed constructive knowledge. (R. Vol. 1, 369). This was an error because that statute cannot be used to shield a person from a claim of misrepresentation pertaining to recorded documents.

A cause of action for fraud must be brought within three years. Idaho Code 5-218(4). A cause of action for fraud does not commence until the aggrieved party discovers the facts constituting the fraud. *Doe v. Boy Scouts of America*, 159 Idaho 103, 106, 356 P.3d 1049, 1052 (2015).

Idaho Code § 55-811 provides that if a purchaser of real property fails to search the recorded documents before finalizing the transaction, the purchaser is deemed to have constructive knowledge of contents of recorded documents. *Large v. Cafferty Realty, Inc.*, 123 Idaho 676, 680, 851 P.2d 972, 976 (1993). The statute imports constructive knowledge to a purchaser for the sole purpose of protecting third party's holding prior recorded interest in real property from lawsuit. "The purpose and effect of I.C. § 55-811 is to protect persons with a recorded claim or lien on the property from claims by other persons who acquire an interest in the property after the interest is recorded." *Large v. Cafferty Realty, Inc.*, 123 Idaho 676, 680, 851 P.2d 972, 976 (1993).

As far back as 1905, the Idaho Supreme Court has held that the constructive notice provisions of Idaho Code §55-811 do not shield a person from a claim for fraud based on misrepresentations of the contents of recorded documents. *Eastwood v. Standard Mines & Milling Co.*, 11 Idaho 195, 81 P. 382, 383 (1905). The doctrine is based on principles of equitable estoppel.

A public record is an available means of information as to questions of title, and one who does not take advantage of it cannot claim estoppel against one who merely fails to furnish such

information. There are, however, cases in which the representation, by actively misleading the person setting up the estoppel and preventing him from having recourse to available means of information, has been held to excuse his failure to inform himself of the facts, even in the case of constructive notice by matter of record.

And more recently and more directly on point is *Large v. Cafferty Realty, Inc.*, 123 Idaho 676, 851 P.2d 972 (1993).

I.C. § 55–811, however, is not meant to be a shield against fraud and misrepresentation. Large is not claiming a right in the property adverse to the recorded restrictive covenants. Rather, Large claims he was induced to purchase the property based on the misrepresentations of Cafferty and Diversified in failing to disclose the existence of the restrictive covenants.

Id at 123 Idaho 676, 680, 851 P.2d 972, 976 (1993).

In this case, the Davises did not allege that Tuma has an unrecorded interest adverse to their own. They alleged they were induced into purchasing their home based on Tuma's misrepresentations regarding access to their home. (R. Vol. 1, p 13). Idaho Code §55-811 only imparts constructive notice of adverse, recorded, interest to a prospective buyer to protect holders of prior recorded interests and has no application to claim that your relator mislead you.

This Court should reverse and remand this matter with instruction to reinstate the Davises claims for fraud, constructive fraud and negligence.

C. Whether or not a person exercised due diligence is a question of fact that should not have been resolved on summary judgment since the facts of this case could lead to the conclusion that the Davises had no reason to make further attempts to open an e-mail that was sent to them two months after closing.

i. Standard of Review.

Whether a claim is barred by the Statute of Limitations can be either a question of law or a question of fact. *Kawai Farms, Inc. v. Longstreet*, 121 Idaho 610, 614, 826 P.2d

1322, 1326 (1992). The District Court ruled that the Davises statute of limitations began to run in December of 2009 because they would have discovered the problem if they had exercised due diligence and opened the e-mail sent to them two months after closing.

Whether or not a person has exercised due diligence is generally a question of fact.

The Court of Appeals has held that “[o]rdinarily, what constitutes [the exercise of] reasonable diligence to discover fraud so as to affect the time when the statute of limitations begins to run is a question of fact for the jury....Of course, where only one conclusion can be drawn from the evidence, the question of reasonable diligence to discover fraud may be decided by the court as a matter of law.”

Kawai Farms, Inc. v. Longstreet,
121 Idaho 610, 614, 826 P.2d
1322, 1326 (1992) *citing Full
Circle, Inc. v. Schelling*, 108
Idaho 634, 638, 701 P.2d 254,
258.

Thus, the question is refined to: whether more than one conclusion as to whether Kawai exercised due diligence could be drawn from the evidence in this case.

Id.

ii. A Reasonable Person Could Conclude That it was Reasonable for the Davises to Make no Further Attempts to Open an E-mail Sent to Them Two Months After They Had Closed.

The District Court ruled that the Davises could have discovered the access issue had they exercised proper due diligence and therefor had inferred actual knowledge that Gray Wolf Road was not their deeded access. The District Court reached this conclusion because the Davises had failed to take further steps to download a survey sent to them two months after closing had occurred. (R. Vol. 1, p. 370). This is an error because facts existed on summary judgment from which a reasonable person could conclude that the Davises did exercise proper due diligence when they did not open an attachment that had something to do with a transaction they had completed two months earlier.

“Actual knowledge of the fraud can be inferred if the aggrieved party could have discovered the fraud by reasonable diligence, although the Court will hesitate to infer such knowledge. *Nerco Minerals Co. v. Morrison Knudsen Corp.*, 140 Idaho 144, 150, 90 P.3d 894, 900 (2004) citing *DBSA/TRI v/ Bender*, 130 Idaho 796, 807, 948 P.2d 151, 162(1997). “We hold that a reasonable finder of fact could conclude that a layperson may justifiably rely of multiple assurances from a realtor as to the zoning status of property. Thus, because there is a genuine issue of material fact as to whether Path justifiably relied on Long's representations, the District Court erred in dismissing Path's fraud claim.” *Path to Health, LLP v. Long*, 161 Idaho 50, 59, 383 P.3d 1220, 1229 (2016).

The District Court ruled that with the exercise of proper due diligence, the Davises would have discovered the problem with their access in December 2009. The District Court did not, however, explain why the facts of this case could only lead to the conclusion that the Davises did not conduct proper due diligence in 2009. The facts on summary judgment could easily lead to the conclusion that the Davises did act with due diligence when they were sent the survey of the property two months after the purchase of their home.

No dispute of fact exists that the Davises relied upon Tuma's representation that the access to their home was provided by Gray Wolf Road. A reasonable fact finder could conclude that it was not unreasonable fail to open an attachment from a title company and examine its contents more than two months after you had purchased your property. More so the e-mail subject line just indicates it is a “record of survey” – meaning that it is of record and you can get it for your personal records anytime you like.

Furthermore, a reasonable person could conclude that a lay person would not be able to look at a survey and figure out that they did not have access on Gray Wolf Road. Even if the Davises had noticed that the road shown on the survey did not extend to their home, such would

not necessarily lead a lay person to believe that they could not use the road that existed when they bought the property.

It is undisputed that the Davises relied entirely upon Tuma as regards to any information pertaining to the access to the property and they were assured by him no issues existed. It was a question of fact as to whether they should have in the exercise of proper due diligence, opened that e-mail that was sent to them and whether they would have even noticed the issue with the access if they had. In light of these questions of fact, summary judgment was not proper.

This Court should reverse the finding of the District Court that the Davises failed to exercise due diligence and remand the matter for further proceedings.

D. The Davis's Negligence Claims are not Time Barred because They were not on Constructive Notice of the Problem with Their Access When They purchased the Home in 2009 or Actual Notice Two Months Later.

The District Court dismissed the Davis's negligence claims based on a finding that they were on constructive notice of the record of survey in October of 2009. (R. Vol. 1, p. 371) and the Statute of Limitations commenced on that day. This was an error for the reasons set forth in section B(ii) and C(ii) above, which are incorporated by reference here.

E. The Davises are Entitled to Attorney's Fees and Costs on Appeal because the Broker Representation Agreement Authorizes it.

Attorney's fees and costs may be awarded to the prevailing party on appeal if provided for in a contract or statute. I.R.C.P. § 54(e). *Kesting v. Kesting*, 160 Idaho 214, 220, 370 P.3d 729, 735 (2016).

The Broker Representation Agreement in this case provides for an award of attorney's fees to the prevailing party.

...relative to such suit or proceeding. Venue of any action arising out of this Agreement shall be in the Court of the county in which Broker's office is located. (R. Vol. 1, p 110, ¶ 12).

As set forth above, this matter should not have been decided on summary judgment and it should be remanded. If this Court agrees, then the Davises will be the prevailing party on appeal and are entitled to their reasonable attorney's fees as costs.

IV. CONCLUSION

It is undisputed that the Davises relied entirely upon Tuma's representations that access to their home was provided by Gray Wolf Road and that Tuma misrepresented that fact to the Davises. Tuma cannot use the constructive notice provisions of Idaho Code § 55-811 to shield himself from a claim of fraud because that statute is not designed to shield a person from a claim of fraud, but to protect subsequent purchasers from unrecorded third-party claims against the property. It was an error for the District Court to conclude that the Davises had constructive knowledge that they did not have the right to use Gray Wolf Road.

In addition, it was a question of fact whether the Davises should have, in the exercise of due diligence, open the e-mail that was sent to them in December of 2009. It was an error for the District Court to conclude on summary judgment that the Davises had failed to exercise due diligence and therefor had inferred actual knowledge that they did not have the right to use Gray Wolf Road.

This Court should reinstate the Davises claims and remand this matter to the District Court for further proceedings.

DATED this 12th day of June, 2019



ARTHUR M. BISTLINE
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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of June, 2019, I served a true and correct copy of foregoing APPELLANTS' OPENING BRIEF by the method indicated below, and addressed to the following:

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