COLORADO COURT OF APPEALS

DATE FILED: January 21, 2021
CASE NUMBER: 2019CA1733

Court of Appeals No. 19CA1733
City and County of Denver District Court No. 18CV33958
Honorable David H. Goldberg, Judge

Koren Vining, Michael Vining, Nicholas Hodgdon, and Rhidian Orr,

Plaintiffs-Appellants,

v.

Steve Travers and Kentwood DTC, LLC, d/b/a The Kentwood Company, a Colorado limited liability company,

Defendants-Appellees.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division V
Opinion by JUDGE NAVARRO
J. Jones and Yun, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced January 21, 2021

Chipman Glasser LLC, David S. Chapman, Dean B. Shaffer, Denver, Colorado, for Plaintiffs-Appellants

Shortridge & Fitzke PC, Curtis W. Shortridge, R. Scott Fitzke, Diana M. Mendez, Englewood, Colorado, for Defendants-Appellees

¶ 1 Plaintiffs, Michael and Koren Vining, Rhidian Orr, and Nicholas Hodgdon, appeal the summary judgment entered in favor of defendants, Steve Travers and Kentwood DTC, LLC. The district court decided that the statute of limitations barred the plaintiffs' claims. The plaintiffs argue that summary judgment was inappropriate because a genuine issue of material fact exists as to when their claims accrued. We agree and reverse.

I. Background

¶ 2 The plaintiffs own homes on Riviera Lake in Denver. Their homes are part of the Riviera Circle Lake Club, a homeowners' association.[1] The plaintiffs purchased their homes through the defendants, as the sellers' agents, between 2012 and 2014. Central to their purchasing decision, the plaintiffs contend, was Travers's representations that the homeowners and the HOA own, in common, water rights to Riviera Lake sufficient to permit recreational use. According to the plaintiffs, these representations turned out not to be true.

[1] We will refer to the Riviera Circle Lake Club as the "HOA."

¶ 3 The plaintiffs sued the defendants in October 2018, alleging fraudulent misrepresentation, fraudulent concealment, and violations of the Colorado Consumer Protection Act. The defendants moved for summary judgment arguing, among other things, that the plaintiffs' claims were time barred because they should have been discovered before October 2015. The district court agreed. Koren Vining filed a C.R.C.P. 59(d) motion for a new trial arguing that her claims were not time barred. The court denied the motion.

II. Summary Judgment Was Inappropriate

¶ 4 The plaintiffs contend that granting summary judgment on statute of limitations grounds was improper because a genuine issue of fact exists as to whether their claims accrued before October 2015 or in February 2017. If the latter date, their claims were timely under section 13-80-108(3), C.R.S. 2020, and section 6-1-115, C.R.S. 2020. We agree that the defendants did not establish their right to summary judgment on the accrual date, and that it is a factual question for the jury.

A. Additional Facts

¶ 5 The following facts appear to be undisputed at this stage.

¶ 6 Several years before the plaintiffs purchased their homes, the HOA retained a consulting firm specializing in water rights to determine whether there were any deficiencies in the rights pertaining to Riviera Lake. The firm determined that the HOA lacked the rights to store water from Clear Creek in Riviera Lake for more than seventy-two hours.[2] In 2006, this determination was presented to the HOA board — of which Travers was a member.

¶ 7 In 2012, Orr purchased a home on Riviera Lake. Before his purchase, the home was offered for sale through a multiple listing service (MLS) post drafted by Travers. The MLS post read as follows:

> Enjoy boating, water skiing, wake boarding, fishing, swimming and ice skating right outside your back door! Some lucky buyer will get the rare opportunity to live on the waterfront in Denver[']s] Lake Community! This picturesque lake community offers an amazing lifestyle and setting hard to find in Denver and is shared with only 36 homeowners. Only one of three private waterski lakes on the front range, Riviera Lake owners have the only association that owns the water rights and have private docks for your boat. You can enjoy fishing for Bass,

[2] We refer to these rights as "water storage rights" to distinguish them from other rights pertaining to Riviera Lake.

> Perch and Bluegill as well in this annually stocked lake.

¶ 8 While giving Orr a tour of the home, Travers told Orr that the HOA owned the lake and that homeowners could use Riviera Lake for waterskiing, fishing, and the like. Later, when Orr twice sought to refinance the mortgage on his home, Travers represented to Orr and the bank that the value of the property should take into account the HOA's water rights and the ability to use the lake recreationally.

¶ 9 In 2014, plaintiffs Michael and Koren Vining purchased a home on Riviera Lake after viewing an MLS post drafted by Travers. The post read as follows:

> A fantastic opportunity to live on Denver's best kept secret — Riviera Lake! This small enclave is comprised of 36 homeowners that share a private ski lake. Enjoy boating, water skiing, wake boarding, fishing, swimming and ice skating right outside your back door! . . . A full waterski membership is included in the sale.

The Vinings' real estate agent emailed Travers asking, "Who owns the lake? Does the HOA, the county, the city, or is it an entity[?]" Travers responded, "The property owners own the lake and the water rights in common."

¶ 10 In 2014, Hodgdon purchased a home on Riviera Lake after viewing Travers's MLS post advertising the property. The post read as follows:

> This remodeled ranch home is sited on the south side of Riviera Lake and includes a dock, boat lift and water ski boat! . . . A fantastic opportunity to live on Denver's best kept secret — Riviera Lake! This small enclave is comprised of 37 homeowners that share a private ski lake. Enjoy boating, water skiing, wake boarding, fishing, swimming and ice skating right outside your back door! . . . A full waterski membership is included in the sale.

In the contract to purchase Hodgdon's home — which Travers drafted — a provision states, "Homeowners that are in good standing . . . have the right to use the water . . . for motorized recreational use."

¶ 11 In February and May 2015, the HOA held meetings that the plaintiffs attended, with the exception of Koren Vining. The minutes of the February 2015 meeting state that the following was discussed:

- We own 72 inches of Clear Creek [the stream that feeds Riviera Lake], in 1958 donated 67 inches, keep record so know we are getting what we are suppose[.] [sic]

- We have flow rights not storage rights, will begin checking reservoir levels so can begin to have a history if ever need to prove anything. [sic] . . . .
- Water Commissioner Report was mentioned and was approved.

Those matters were also discussed at the May 2015 meeting. The plaintiffs who attended those meetings did not know the difference between a flow right and a storage right. Those plaintiffs inferred that a flow right was sufficient to keep Riviera Lake stocked with water.

¶ 12 In February 2017, the HOA received a letter from the Colorado Department of Water Resources stating that the department was "not aware of a decree that awarded a storage right in Riviera Lake" and that "[w]ithout a storage right, water cannot be held in Riviera Lake for more than 72 hours." The letter went on to state that, if the HOA could not prove that it owned a water storage right, "[the department] may be required to order the release of all water improperly stored . . . ."

¶ 13 At a subsequent HOA meeting in February 2017, the HOA informed the homeowners about the letter and the prospect of the

department releasing some of the water in Riviera Lake. At a later deposition, Travers admitted,

> I think everyone was surprised with the letter. I've talked to every homeowner on the lake, and most of them were in the same position as all of us. It was a complete surprise. . . . The letter indicated that our water was in jeopardy, and anything that requires water on the lake would be at risk, so boating, fishing, [and] swimming . . . .

¶ 14 Based on these revelations, the plaintiffs sued the defendants in October 2018 asserting multiple claims of fraud; they argued that the fraud caused them to overpay for their homes.[3]

¶ 15 After conducting discovery, the defendants moved for summary judgment arguing, among other things, that the plaintiffs' claims were time barred. The defendants maintained that the plaintiffs' claims accrued in February and May 2015 when the plaintiffs learned that the HOA had "flow rights not storage rights." The plaintiffs argued that the circumstances surrounding the 2015 HOA meetings made the disclosures too indefinite to put them on notice of their claims. According to the plaintiffs, they were not

[3] In December 2017, the HOA applied for water storage rights in Riviera Lake from Clear Creek. That litigation remains pending in Colorado's Water Division 1.

informed of the possible consequences of lacking water storage rights until February 2017, and their claims could not have accrued before then.

¶ 16 The district court agreed with the defendants and entered summary judgment in their favor.

B. Relevant Principles

¶ 17 We review de novo an order granting summary judgment. *McCarville v. City of Colorado Springs*, 2013 COA 169, ¶ 5.

¶ 18 Summary judgment is a drastic remedy that should be granted only when the pleadings and the supporting documents demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Preferred Pro. Ins. Co. v. The Doctors Co.*, 2018 COA 49, ¶ 11. The moving party carries the burden to establish the absence of a genuine issue of fact. *Id.* The opposing party is entitled to the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party. *Ryser v. Shelter Mut. Ins. Co.*, 2019 COA 88, ¶ 10 (*cert. granted* Apr. 13, 2020).

¶ 19 Fraud claims and violations of the Colorado Consumer Protection Act are governed by three-year statutes of limitation. *See* § 13-80-108(3); § 6-1-115. Section 13-80-108(3) provides that a claim for "fraud, misrepresentation, concealment, or deceit shall be considered to accrue on the date such fraud, misrepresentation, concealment, or deceit is discovered or should have been discovered by the exercise of reasonable diligence." Section 6-1-115 pertains to claims under the Colorado Consumer Protection Act and contains similar language.

¶ 20 The point of claim accrual is typically a question of fact. *Gognat v. Ellsworth*, 224 P.3d 1039, 1045 (Colo. App. 2009), *aff'd*, 259 P.3d 497 (Colo. 2011). But, "if the undisputed facts clearly show when a plaintiff discovered or should have discovered [the fraud], the issue may be decided as a matter of law." *Id.* (quoting *Murry v. GuideOne Specialty Mut. Ins. Co.*, 194 P.3d 489, 491 (Colo. App. 2008)). The point of accrual requires knowledge of the facts essential to the cause of action, not knowledge of the legal theory supporting the cause of action. *Murry*, 194 P.3d at 492. The reasonable diligence requirement is an objective standard that does not reward denial or self-induced ignorance. *Sulca v. Allstate Ins.*

Co., 77 P.3d 897, 900 (Colo. App. 2003). Claim accrual may not be decided on summary judgment except "in the clearest of cases." *Mastro v. Brodie*, 682 P.2d 1162, 1169 (Colo. 1984).

C. Analysis

¶ 21 In this context, claim accrual requires that the plaintiffs had notice of all material facts essential to show the elements of their fraud claims. *Miller v. Armstrong World Indus., Inc.*, 817 P.2d 111, 113 (Colo. 1991). As relevant here, an essential fact to the plaintiffs' claims is that Travers made a false representation to them. In assessing when the plaintiffs' claims accrued, therefore, we must consider the date on which the plaintiffs were on notice of facts indicating that the representations Travers made when the plaintiffs purchased their homes might be false.

¶ 22 The district court ruled that the claims accrued by May 2015 — the date by which the plaintiffs had been informed that the HOA had "flow rights not storage rights" to Clear Creek water in Riviera Lake. The question is thus whether the plaintiffs, upon hearing this statement in 2015, were on notice that Travers's prior representations regarding water rights might be false. In other words, would a reasonable person have known that water flow

rights alone would be insufficient to allow the homeowners to enjoy the lake as Travers had previously represented they could? For the following reasons, we conclude that these questions cannot be answered as a matter of law and instead must be decided by a trier of fact.

¶ 23 When the plaintiffs purchased their homes, Travers did not represent that the HOA owned water *storage* rights in Riviera Lake. He merely said that the HOA had water rights. To reiterate, Travers made the following representations:

- On the MLS post for Orr's home, Travers stated, "Riviera Lake owners have the only association that owns the water rights and have private docks for your boat." The posting indicated that Orr would be able to use Riviera Lake recreationally.
- Travers also represented to Orr and his bank that the value of Orr's property should include the HOA's water rights and the ability to use the lake recreationally.
- In addition to advertising the recreational activities available on Riviera Lake, Travers informed the Vinings' real estate agent that "[t]he property owners own the lake and the water rights in common."

- In the contract to purchase Hodgdon's home, which Travers drafted, a provision states, "Homeowners that are in good standing . . . have the right to use the water . . . for motorized recreational use."

¶ 24 So, when the plaintiffs were told in 2015 that the HOA had water flow rights but not storage rights, the plaintiffs were not necessarily made aware of facts that, on their face, contradicted or cast doubt on Travers's earlier statements. Moreover, as the district court noted, it is undisputed at this stage that none of the plaintiffs knew the difference between flow rights and storage rights and that they inferred that a flow right was sufficient to allow homeowners to use the lake recreationally.[4] Whether the plaintiffs' inference was reasonable or whether a reasonable person would have inquired further are questions for the fact finder.

¶ 25 Additionally, the circumstances surrounding the 2015 disclosures did not necessarily put the plaintiffs on notice that Travers's prior representations could be false. The meeting minutes indicate that the water rights disclosure was followed by this

[4] The defendants acknowledge that "[t]he issues with the nature and scope of the water rights for the lake are complex."

statement: "[The HOA] will begin checking reservoir levels so [we] can begin to have a history if [we] ever need to prove anything." This could suggest that the HOA believed it had the right to maintain a certain level of water in the reservoir. And the minutes do not indicate that "flow right" and "storage right" were defined; nor was there discussion that a flow right, by itself, is insufficient to allow homeowners to use the lake recreationally. Recreational activities were not, according to the minutes, discussed at all.

¶ 26 Comparatively, the 2017 letter from the Colorado Department of Water Resources was more informative. The letter stated not only that the department was unaware of a decree awarding the HOA a water storage right from Clear Creek but also that "[w]ithout a storage right, water cannot be held in Riviera Lake for more than 72 hours." Further, the letter warned that, if the HOA could not prove that it owned a water storage right, "[the department] may be required to order the release of all water improperly stored . . . ." In Travers's deposition, he said that the homeowners were surprised by the letter, and he admitted that "[t]he letter indicated that our water was in jeopardy, and anything that requires water on the lake would be at risk," including boating, fishing, and swimming. From

this, one could infer that, at the 2017 meeting, the HOA informed the homeowners that the lack of a storage right for Clear Creek water could affect recreational activities on the lake.

¶ 27 Based on the above, a jury could reasonably conclude that it was not until the plaintiffs received the information in 2017 that they learned they might not be able to use Riviera Lake recreationally, as Travers had represented when they purchased their homes.

¶ 28 We acknowledge, as the defendants point out, that the plaintiffs alleged in their complaint that Travers had represented to them before they bought their houses that the HOA had a "Water Storage Right" and that they learned in February 2017 that the HOA lacked a "Water Storage Right." Because the plaintiffs learned that the HOA "[had] flow rights not storage rights" in 2015, the defendants argue, they were on notice of their claims in 2015. We are not persuaded.

¶ 29 A "Water Storage Right" is defined in the complaint as the "right to store water from Clear Creek in Riviera Lake for more than 72 hours." But the plaintiffs did not allege that Travers literally told them the HOA had a "Water Storage Right" in those words or in the

words used in the definition.[5] Rather, the plaintiffs alleged that Travers's representations, considered overall, gave the plaintiffs the impression that the HOA owned a certain right to water, which the plaintiffs later learned was called a "Water Storage Right."

¶ 30 Moreover, the plaintiffs asserted that Travers misrepresented to them that the HOA owned the water rights necessary to use the lake recreationally. For instance, the plaintiffs alleged the following in the complaint:

> 116. Travers, acting within the scope of his agency for Kentwood, represented to each Plaintiff that [the HOA] owned all rights to Riviera Lake necessary and sufficient to permit [the homeowners] to use Riviera Lake recreationally.
>
> . . . .
>
> 120. Travers knew, at the time of the representations, that a Water Storage Right was necessary for [the HOA] to use Riviera Lake for waterskiing, fishing, swimming, boating, and other recreational purposes.
>
> 121. Each Plaintiff was, at the time of Travers[']s misrepresentations and at the time Plaintiffs purchased their respective properties, ignorant of the fact that [the HOA] lacked rights necessary to permit [homeowners] to use

[5] In his summary judgment materials, Travers also asserted that he never used such words in his representations to the plaintiffs.

> Riviera Lake in the manner that Travers represented.

¶ 31 Given that such recreational activities were not expressly called into doubt until 2017 when the HOA received the letter raising the possibility of releasing water from the lake, we cannot say as a matter of law that the plaintiffs failed to exercise reasonable diligence when they did not make inquiries in 2015 after learning the HOA lacked water storage rights. *See Fin. Assocs., Ltd. v. G.E. Johnson Constr. Co.*, 723 P.2d 135, 139-40 (Colo. 1986) (recognizing that, for purposes of claim accrual, summary judgment is unwarranted where the facts could support conflicting reasonable inferences); *Salazar v. Am. Sterilizer Co.*, 5 P.3d 357, 363 (Colo. App. 2000) (recognizing that facts merely creating a "suspicion" of an injury "[do] not necessarily put a reasonable person on notice" of their claim).

¶ 32 In sum, because conflicting reasonable inferences about the accrual date are possible from the facts, this is not one of the clearest of cases where summary judgment is appropriate. *See Mastro*, 682 P.2d at 1169.

III. Remaining Contentions

¶ 33 The plaintiffs also contend that summary judgment was inappropriate because the defendants failed to show that no genuine issue of fact exists as to when the plaintiffs knew or should have known of Travers's allegedly fraudulent intent (i.e., his representations regarding the water rights in Riviera Lake were *knowingly* false). For two reasons, we do not resolve this contention: (1) it is unnecessary to do so because we reverse the summary judgment ruling for the other reasons already discussed, and (2) the plaintiffs did not raise this argument in their response to the summary judgment motion. *See GEICO Cas. Co. v. Collins*, 2016 COA 30M, ¶ 41 n.7.

¶ 34 Likewise, we need not address Koren Vining's challenge to the order denying her Rule 59(d) motion for a new trial. In that motion, she sought to undo the summary judgment against her on the ground that she did not attend the 2015 HOA meetings. We reverse the summary judgment on other grounds, making her appeal of the Rule 59 order moot.

IV. Conclusion

¶ 35 The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

JUDGE J. JONES and JUDGE YUN concur.

Court of Appeals

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PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Steven L. Bernard
Chief Judge

DATED: March 5, 2020

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