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IN THE
COURT OF APPEALS OF INDIANA

FIRST SAVINGS BANK, F.S.B.,	)	
Appellant,	)	
	)	
vs.	)	No. 22A05-1008-CT-479
	)	
BAIRD REALTY APPRAISAL	)	
CONSULTANTS, INC.,	)	
RICHARD R. BAIRD,	)	
GLEN SPERZEL,	)	
	)	
Appellees.	)	

APPEAL FROM THE FLOYD CIRCUIT COURT
The Honorable J. Terrence Cody, Judge
Cause No. 22C01-0701-CT-62

September 1, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

First Savings Bank, F.S.B. ("the Bank") filed a complaint in Floyd Circuit Court against Baird Realty Appraisal Consultants, Inc., Richard Baird, and Glen Sperzel (collectively "the Appraisers"), alleging that the Appraisers negligently appraised certain real estate causing the Bank to loan more money to the borrower than the properties were worth. The Bank also claimed the Appraisers committed breach of contract and breach of express and implied warranties. The trial court ultimately dismissed the Bank's complaint as being filed outside the two-year statute of limitations for negligence claims. The Bank appeals and raises the following arguments:

> I. Whether the trial court erred when it determined that the Bank's cause of action accrued no later than January 2004, which is a date prior to the reappraisal of the real estate at issue; and,
>
> II. Whether the trial court erred when it determined that the Bank's contract and warranty claims were, in essence, negligence claims subjecting those claims to dismissal upon application of the two-year statute of limitations

We affirm.

Facts and Procedural History

The Bank is an Indiana bank with its principal place of business located in Clarksville, Indiana. In 2003, David Gregory requested that the Bank refinance multiple loans secured by real estate that Gregory had leased to tenants. The Bank and Gregory agreed that the refinanced loans would again be secured by the real estate at issue. The Bank then required appraisals on the properties as a condition of refinancing the loans. The Bank contacted the Appraisers and asked them to conduct appraisals of Gregory's twenty-five rental properties.

After receiving the appraisals, a member of the loan committee, John Lawson ("Lawson") expressed concern with the appraisals, particularly with regard to the comparables used by the Appraisers. Lawson, who was also a vice president of the Bank, and David Eckerty ("Eckerty"), the Bank's president, met with the Appraisers to discuss their appraisals. The Appraisers argued that the appraised values for the Gregory properties were correct. Other members of the loan committee did not find any cause for concern after reviewing the appraisals at issue. The Bank ultimately decided to refinance the loans on Gregory's rental properties.

A few months later, Lawson and Eckerty met with the Appraisers to further discuss their concerns over the Gregory property appraisals. Shortly thereafter, the Bank sent a letter to the Appraisers stating that the Bank would no longer be using their services.

In 2006, Gregory defaulted on the loans. Foreclosure proceedings ensued in both Floyd and Clark counties. Therefore, the Bank also contacted a different appraisal firm to appraise the Gregory properties. The new appraisals estimated the value of Gregory's properties to be worth one-third to one-half of the appraised value provided by the Appraisers in 2003. During its subsequent liquidation of Gregory's properties, the Bank suffered substantial losses. Consequently, on January 24, 2007, the Bank filed a complaint against the Appraisers alleging negligence, fraud, breach of contract and breach of express and implied warranties. In its answer to the complaint, the Appraisers argued that the Bank's claims were barred by the statute of limitations.

The Appraisers then filed a motion for summary judgment, and a hearing was held on the motion on December 23, 2008. On January 9, 2009, the trial court entered summary judgment in favor of the Appraisers only on the Bank's fraud claim. Thereafter, the Appraisers filed a motion to reconsider. This motion was denied, but the court certified its order for interlocutory appeal. Our court denied the Appraisers' motion to accept appellate jurisdiction of the trial court's interlocutory order.

On June 4, 2010, the Appraisers filed another motion requesting that the court reconsider its orders denying the Appraisers' statute of limitations defense. In support of their motion, the Appraisers attached the deposition testimony of the Bank's chairman of the board, which deposition was taken after the trial court denied the Appraisers' motion for summary judgment. The Appraisers argued that the deposition testimony supported their contention that the Bank knew no later than January 2004 that the appraised values of the Gregory properties were flawed.

During the June 11, 2010 hearing on the Appraisers' motion to reconsider, the trial court and the parties treated the motion as a renewed motion for summary judgment. On July 6, 2010, the court issued an order granting the Appraisers' motion, and concluding that the Bank's claims were barred by the two-year statute of limitations for negligence claims. Specifically, the court found:

> Plaintiff, First Savings Bank, by and through those who can be expected to redress the Bank's interests, had reason to know of the alleged negligence committed by Defendants against it no later than January of 2004. The applicable two (2) year limitations period on the Bank's negligence claims thus began to run in January of 2004 and would have expired on or around January of 2006. Plaintiff, First Savings Bank, filed

> the present action against Defendants on January 24, 2007. The negligence claims of Plaintiff, First Savings Bank, are thus untimely and must be dismissed with prejudice as barred by the applicable statute of limitations.
>
> The additional claims of Plaintiff, First Savings Bank, although styled as claims for breach of contract and express and implied warranties, are, despite Plaintiff's assertions and argument to the contrary, in substance negligence claims to which the two (2) year limitations period for negligence claims applies because they are contingent upon Plaintiff's allegation that Defendants breached the applicable standard of care for professional appraisers. Again, because Plaintiff had knowledge of Defendants' alleged negligence no later than January of 2004, the limitations period for filing such claims expired in January of 2006. Plaintiff's Complaint being filed on January 24, 2007, its allegations styled as claims for breach of contract and express and implied warranties which are in substance negligence claims, are untimely, barred by the applicable statute of limitations and must be dismissed with prejudice.

Appellant's App. pp. 17-18. The Bank now appeals. Additional facts will be provided as necessary.

Standard of Review

We review a summary judgment order de novo. Atterholt v. Herbst, 902 N.E.2d 220, 222 (Ind. 2009), clarified on reh'g, 907 N.E.2d 528 (Ind. 2009). We must determine whether the evidence that the parties designated to the trial court presents a genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C); Dreaded, Inc. v. St. Paul Guardian Ins. Co., 904 N.E.2d 1267, 1269-70 (Ind. 2009). We construe all factual inferences in the nonmoving party's favor and resolve all doubts as to the existence of a material issue against the moving party. Id. But "[w]hen the moving party asserts the statute of limitations as an affirmative defense and establishes that the action was commenced outside of the statutory period, the burden

shifts to the non-moving party to establish an issue of fact material to a theory that avoids the affirmative defense." Garneau v. Bush, 838 N.E.2d 1134, 1140 (Ind. Ct. App. 2005), trans. denied (citing Boggs v. Tri–State Radiology, Inc., 730 N.E.2d 692, 695 (Ind. 2000)).

I. The Applicable Statute of Limitations

Statutes of limitation are favored in Indiana because they afford security against stale claims and promote the peace and welfare of society. Shaum v. McClure, 902 N.E.2d 853, 855 (Ind. Ct. App. 2009), trans. denied. "They are enacted upon the presumption that one having a well-founded claim will not delay in enforcing it." Id. "The defense of a statute of limitation is peculiarly suitable as a basis for summary judgment." Id. at 502–503. "The nature or substance of the cause of action, rather than the form of the action, determines the applicable statute of limitations." King v. Terry, 805 N.E.2d 397, 400 (Ind. Ct. App. 2004).

In its order granting summary judgment in favor of the Appraisers, the trial court dismissed the Bank's claims "with prejudice as untimely under the applicable two (2) year statute of limitations periods expressed in IC 34-11-2-3 and IC 34-11-2-4 for negligence claims." Appellant's App. p. 17. The parties do not agree which of the two statutes of limitations are applicable to the Bank's claims.

Both sections 34-11-2-3 and 34-11-2-4 establish a two-year statute of limitations for negligence actions, but Indiana Code section 34-11-2-3 provides:

> An action of any kind for damages, whether brought in contract or tort, based upon professional services rendered or which should have been rendered, may not be brought, commenced, or maintained, in any of the

> courts of Indiana against physicians, dentists, surgeons, hospitals, sanitariums, or others, unless the action is filed within two (2) years from the date of the act, omission, or neglect complained of.

Whereas, Indiana Code section 34-11-2-4 more generally provides:

> An action for:
> (1) injury to person or character,
> (2) injury to personal property; or
> (3) a forfeiture of penalty given by statute;
> must be commenced within two (2) years after the cause of action accrues.

The Bank argues that section 34-11-2-3 applies only to medical professionals,[1] and therefore, the trial court erred when it cited that section in dismissing its claims against the Appraisers. In support of its argument, the Bank relies on Shideler v. Dwyer, 275 Ind. 270, 417 N.E.2d 281 (1981), in which our supreme court held that "the doctrine of *ejusdem generis* limits the application to the term 'or others,' as used in [Indiana Code section 34-11-2-3], to others of the medical care community." Id. at 283 (discussing the statute, which was previously codified at Indiana Code section 34-4-19-1, in the context of a malpractice action against an attorney). See also Kroger Co. v. Estate of Hinders, 773 N.E.2d 303, 307 (Ind. Ct. App. 2002), trans. denied (concluding that the occurrence-based statute of limitations in section 34-11-2-3 does not apply to claims against pharmacists and pharmacies).

The Appraisers have not provided any argument or citation to relevant authority that would lead us to the conclusion that section 34-11-2-3 should apply to claims against

[1] The statutory time limit in Indiana Code Section 34-11-2-3 begins to run upon the occurrence of the alleged malpractice, without regard to the date of actual or constructive discovery of injury or malpractice by the injured party. See Overton v. Grillo, 896 N.E.2d 499, 502 (Ind. 2008); Booth v. Wiley, 839 N.E.2d 1168, 1170 (Ind. 2005).

appraisers.[2] By its own language, and as our supreme court concluded in Shideler, the phrase "or others" must be interpreted to include only others in the medical care field, particularly those medical care providers that are not "qualified healthcare providers," which are governed by the Indiana Medical Malpractice Act. See Overton v. Grillo, 896 N.E.2d 499, 502 (Ind. 2008) (observing that Indiana Code section 34-11-2-3 applied to a claim against a doctor, who was not a "qualified healthcare provider").

II. The Accrual of the Statute of Limitations

To determine whether the Bank's claims against the Appraisers are barred by the two-year statute of limitations set forth in Indiana Code section 34-11-2-4, we apply the discovery rule. Kroger Co., 773 N.E.2d at 307. "Under Indiana's discovery rule, a cause of action accrues, and the statute of limitation begins to run, when a claimant knows or in exercise of ordinary diligence should have known of the injury." Pflanz v. Foster, 888 N.E.2d 756, 759 (Ind. 2008). "For an action to accrue, it is not necessary that the full extent of the damage be known or even ascertainable, but only that some ascertainable damage has occurred." Cooper Indus., LLC v. City of South Bend, 899 N.E.2d 1274, 1280 (Ind. 2009). See also Bambi's Roofing, Inc. v. Moriarty, 859 N.E.2d 347, 356 (Ind. Ct. App. 2006) (stating that the exercise of reasonable diligence means simply that an

[2] The Appraisers reliance on Resolution Trust Corp. v. O'Bear, Overholser, Smith & Huffer, 840 F.Supp. 1270 (N.D. Ind. 1993) to support its argument that section 34-11-2-3 applies to professionals other than those in the medical community is not well taken in light of our supreme court's Shideler opinion, and our court's subsequent opinion in Kroger Co. v. Estate of Hinders. In Resolution Trust Corp., the Northern District Court cited both former Indiana Code section 34-4-19-1, which was recodified as section 34-11-2-3, and former Indiana Code section 34-1-2-2, which was recodified as section 34-11-2-4, in its discussion of a negligence claim against an appraiser. 840 F. Supp. at 1283. The court generally cited both statutes for the proposition that the statute of limitations for negligence is two years without any specific discussion of which statute applied.

injured party must act with some promptness where the acts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist).

In its complaint filed on January 24, 2007, the Bank alleged that the Appraisers negligently prepared and delivered appraisal reports for the Gregory properties that "were neither valid nor accurate" causing the Bank to suffer monetary losses. Appellant's App. p. 46. In 2003, the Appraisers prepared the appraisals of the Gregory properties and submitted them to the Bank. At that time, a member of the loan committee and bank vice-president, John Lawson ("Lawson") expressed concern with the appraisals, particularly with regard to the comparables used by the Appraisers.

In his deposition, Lawson stated that he "did not like these appraisals from the start." Appellant's App. p. 329. Specifically, he believed that the Appraisers used owner-occupied comparables, instead of rental properties, to justify the appraised values of the Gregory properties. Id. Lawson also stated that he "was familiar with the neighborhoods" and the appraisals did not "seem right to" him. Id. at 330.

Former Bank President David Eckerty testified that Lawson expressed his concerns about the appraisals and the comparables used to value the properties. Specifically, Eckerty stated:

> [T]he rental houses that we're making loans on are not really compared to other rental houses of that particular price range, we felt. And so, therefore, . . . we're taking a house that's valued at X number of dollars and comparing it with houses three and four blocks away that are owner occupied and are nice houses. And when you look at pictures of those

> houses at the same dollar as you looking [sic] at the picture we're making the loan on, it immediately draws a flag that . . . these are overvalued.

Id. at 360. Eckerty even admitted that "the average person" could conclude that the appraisals overvalued the Gregory properties. Id. at 361.

Despite Lawson's and Eckerty's concerns, the Bank accepted the appraisals and loaned the money to Gregory. Id. at 362. The Bank did so in part because Gregory seemed to be a "capable borrower," and therefore, the Bank was "willing to take the risk[.]" Id.

In late 2003 or early 2004, Lawson and Eckerty met with the Appraisers to discuss the appraised values of the Gregory properties. In January 2004, the Bank sent a letter to the Appraisers stating that their services would no longer be required. Michael Ludden, the chairman of the Bank's board of directors, testified that the Appraisers were fired in part because the appraised values for the Gregory properties "were not in our opinion what they should have been." Id. at 585.

This undisputed testimony by the Bank's officers and board member establishes that the Bank knew or in exercise of ordinary diligence should have known that the Gregory properties' appraised values were "neither valid nor accurate" no later than January 2004. For this reason, we conclude that the Bank's negligence claims against the Appraisers filed in January 2007 were not timely filed and were therefore properly dismissed by the trial court.

Finally, in its January 2007 complaint, the Bank alleged that the Appraisers breached their unwritten contract with the Bank and also raised breach of express and

implied warranty claims.[3] The Bank argues that the trial court erred when it concluded that its other theories of recovery were, in substance, negligence claims. It is well-settled that "[t]he nature or substance of the cause of action, rather than the form of the action, determines the applicable statute of limitations." Shaum, 902 N.E.2d at 855; see also Shideler, 275 Ind. at 276, 417 N.E.2d at 285; Butler v. Williams, 527 N.E.2d 231, 233 (Ind. Ct. App. 1988), trans. denied.

Assuming for the sake of argument that the Bank and Appraisers had an implied-in-fact contract based on their twenty-five year business relationship, the Bank alleged that the Appraisers breached their unwritten contract with the Bank by failing to provide "valid and accurate appraisals." Appellant's App. p. 46. Similarly, concerning the breach of warranties claims, the Bank argues that the appraisals were not "fit for the use for which" the Bank intended. Id. But even the Bank admits that "these proceedings are based entirely on contracts to perform appraisals and *negligent preparation of the appraisals themselves*[.]" Appellant's Br. at 12 (emphasis added). The Bank's claims distill to one issue: whether the Appraisers negligently overvalued the Gregory properties when they prepared the appraisals for the Bank. For this reason, the two-year statute of limitations established in Indiana section 34-11-2-4 controls.

Under these facts and circumstances, we affirm the trial court's order dismissing the Bank's claims as untimely filed because they are barred by the two-year statute of limitations for negligence actions established in Indiana Code section 34-11-2-4.

[3] The statute of limitations for breach of an unwritten contract and the accompanying unwritten warranties is six years. See I.C. § 34-11-2-7 (2011).

Affirmed.

VAIDIK, J., concurs.

KIRSCH, J., dissents.