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2016 Jul 28 PM 4:12
CLERK OF THE APPELLATE COURT
CASE NUMBER: 115434

No. 16-115434-A

IN THE COURT OF APPEALS FOR THE STATE OF KANSAS

LCL, LLC

Plaintiffs

vs.

JAMES W. FALEN, in his capacity as sole Trustee of the James W. Falen Living Trust U/A dated April 30, 2007; JULIE D. FALEN; GREGORY A. FALEN; and MARYL M. WESLOWSKI

Defendants/Third-Party Plaintiffs – Appellants

vs.

RICE COUNTY ABSTRACT & TITLE CO., INC.

Third-Party Defendants - Appellees

REPLY BRIEF OF APPELLANTS

Appeal from the District Court of Rice County, Kansas
The Honorable Steve Johnson
District Court Case No. 2014 CV 35

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STATEMENT OF ISSUES ON REPLY

I. K.S.A. §58-2222 does not specifically modify K.S.A. §60-513(b) as required by K.S.A. §60-501 to establish per se the fact an injury is reasonably ascertainable for purposes of K.S.A. §60-513(b).

II. RCAT relies on facts rejected by the District Court

III. Need for additional discovery

I. **K.S.A. §58-2222 does not specifically modify K.S.A. §60-513(b) as required by K.S.A. §60-501 to establish per se the fact an injury is reasonably ascertainable for purposes of K.S.A. §60-513(b).**

RCAT repeatedly claims that, pursuant to K.S.A. §60-513(b), the defect in the Deed drafted by RCAT became "reasonably ascertainable" to the Falens when the Deed was filed of record in the Register of Deeds Office. According to RCAT's theory, once filed, the two year statute of limitation began to run even though RCAT's improper preparation and filing of the Deed did not actually cause any real injury to the Falens for several years thereafter. The facts adopted by the District Court in its Memorandum provided ample evidence for the District Court to conclude that the Falens did not know the Deed was improperly prepared and that the Falens and their buyer acted at closing and for many years thereafter as though the transaction had occurred properly and, by reason thereof, no injury had actually occurred prior to the Dean/LCL transaction.

RCAT has requested the District Court (and now the Appellate Court) to rule that "constructive notice" created by filing the Deed under K.S.A. §58-2222 made the Falens' injury "reasonably ascertainable" as a matter of law in that the Falens were charged with knowledge of the mistake in the Deed as of the date of filing. This position is tantamount to using an unrelated statute to make a de facto modification of K.S.A. §60-513(b). This issue was not raised in the Falens' Brief in Response to RCAT's Motion for Summary Judgment but was argued to the Court at the hearing on the Motion.

RCAT wants the Court to rule that a filing under K.S.A. §58-2222 gives knowledge to the entire world not just that the deed existed, but also that the Deed was prepared in error. The purpose of K.S.A. §58-2222 is to create an estoppel argument - once a document is recorded, knowledge of the *existence* of that document and its contents are going to be imputed to everyone dealing with the property so no one can claim relief due to the ignorance of the *existence* of the recorded document. To claim, as RCAT presently does, that the purpose of K.S.A. §58-2222 is to impute an *understanding* of the recorded document's explicit meaning and legal effect is to unreasonably stretch the purpose of the statue.

Moreover, it was not the purpose of K.S.A. §58-2222 to create a statutory definition of "reasonably ascertainable" for the purpose of the statute of limitations statutes, nor does the subsequently adopted Kansas Code of Civil Procedure indicate that constructive notice pursuant to K.S.A. §58-2222 displaces the provisions concerning whether an injury is "reasonably ascertainable" pursuant to K.S.A. §60-513(b). K.S.A. §60-501 specifically states "[t]he provisions of this [Article V. Limitations of Action] govern the limitation of time for commencing civil actions, except where a different limitation is *specifically* provided by statute." (Emphasis added). RCAT cannot use K.S.A. §58-2222 to eliminate the necessary factual evaluation that needs to be undergone to determine whether or not a fact of injury was reasonably ascertainable until sometime after the initial act. If such a holding were the intent and purpose of K.S.A. §58-2222, it would have been specifically stated in that statute and K.S.A. §60-513. An example of such a

statute is K.S.A. §58-2802 concerning licensing and bonding of abstractors. After language about the bond and license issues, K.S.A. §58-2802 makes specific statements about the statute of limitation for damages caused by an abstractor's errors; no such language is found in K.S.A. §58-2222.

It is apparent neither RCAT nor the Falens were aware of the defect in the Deed at the time of drafting, signing *or* recording. Somehow RCAT believes that recording the Deed imbued the Falens with knowledge they did not have before the deed was filed despite the fact that they were the signatories to the recorded Deed. Should the Falens be imputed with knowledge of the error in the Deed by virtue of its recording, then so was RCAT. Such imputed knowledge on the part of RCAT inevitably leads to the factual question of why RCAT did not immediately notify the Falens of the mistake so it could be immediately corrected. The answer to that question is obvious - recording of the Deed and K.S.A. §58-2222 did nothing to change the mental state, knowledge and actual notice of RCAT or the Falens. That becomes a fact issue that must be resolved at trial.

II. **RCAT relies on facts rejected by the District Court.**

RCAT claims in its Reply Brief that no unresolved issues of material fact exist and no further discovery should be completed that would prevent the District Court's granting of summary judgment or affirming the decision on appeal. This claim is without merit and is belied by RCAT's extensive reliance on disputed factual contentions within its Brief, even going so far as to point out the contradictions in the factual positions of both sides. RCAT assumes all factual issues are resolved as evidenced by its repeated use of

statements of fact which contradict the actual findings of fact made and relied upon by the District Court.

On Pages 4, 14, 17 and 22 of the Appellee Brief, RCAT recounts its "version" of drafting of the Deed, sending of it to the Falens, the Falens signing the Deed, the Deed's return to RCAT, and the Deed's recording. In its Memorandum Opinion, the Court specifically found that the facts utilized for the Motion for Summary Judgment and rendering the Court's decision were to be: (1) the facts which were alleged by RCAT in its Motion for Summary Judgment which were not controverted by the Falens; (2) the Falens' response to RCAT's Statement of Uncontroverted Facts, insofar as the facts were denied or controverted; and (3) the Falens' Statement of Additional Controverted Facts.[1] (Record on Appeal Vol. V. p. 1035-1046). RCAT certainly recites statements it made in the Statement of Facts in its Motion for Summary Judgment but fails to acknowledge that paragraph 13 in its Appellee Brief's Statement of Facts had been controverted by the Falens – the Falens denied that the Deed was sent to them for review and signature and that the inferences drawn therefrom did not support RCAT's claim. The Falens' position was that RCAT's only purpose in sending the Deed was for their signature and this was corroborated by depositions. Paragraph 14 in RCAT's Statement of Fact was also controverted in part and it was asserted by the Falens, as supported by deposition testimony, that Greg Falen and Julie Falen relied on the expertise of RCAT for the preparation of the Deed in accordance with the Contract. In their Appellee Brief, RCAT conveniently ignores and omits these

[1] These are attached as I, II and III Appendices to the Appellant Brief. The Appendix I was put out of order in filing but is located at the end of the Brief.

facts adopted by the Court. On Page 18 of their Brief, RCAT relies on these misleading references to the facts to support its conclusion that the fact of injury was reasonably ascertainable to Falens when they signed the Deed.

At a minimum, the deference of factual inferences given to a non-moving party on a Motion for Summary Judgment, along with the Court's express findings of fact support the Falens' position that they relied on RCAT to properly prepare the Deed and did not believe or know otherwise at the time of signing and returning for recording. The only conceivable purpose for including these disputed facts is to give the impression that the Falens had *actual* notice of the Deed's defects, an issue that was neither addressed nor resolved at trial and thus not on appeal. The failure of RCAT to adhere to the District Court's fact findings highlights the many material factual disputes still in existence that need to be resolved by a trial.

III. **Need for additional discovery.**

RCAT disingenuously claims at Page 25 of its Brief that it is not aware of any additional discovery which is needed in this matter and that RCAT has not been told by the Falens as to the need for additional discovery. Early on in this proceeding, the Falens filed a Motion to Bifurcate the initial claim from the Third Party claims for the reason that the trial of the Third Party case would require both fact witnesses and expert witnesses. It was the Falens' desire to minimize expenses by resolving the Plaintiff's quiet title action first and then try the indemnity claim of Falens if necessary. The Motion to Bifurcate expressly stated the trial of the indemnity action would require additional witnesses, including expert

witnesses for testimony relating to professional negligence, and valuation of minerals. (Record on Appeal Vol. I p. 207). In addition, the Falens presented extensive statements as to the need for additional discovery and expert witnesses at the hearing on RCAT's Motion for Summary Judgment.

While the Falens and the initial Plaintiff were in the process of resolving the case between them by settlement, RCAT prematurely filed their Motion for Summary Judgment so as to prevent the Falens from having the opportunity to present expert testimony in this matter. In its Brief, RCAT tries to give the impression that its services were limited to title insurance and therefore there were no obligations to the Falens as sellers. As a closing agent, however, RCAT's obligations were much broader. Falens believe expert testimony will reveal the full nature of the mistakes of RCAT in this transaction, including improper real property record analysis, improper preparation of the Deed, improper closing of the transaction in accordance with its terms, improper preparation of the settlement statement for the close of the transaction. Expert testimony is needed to show the proper way to close a transaction that involves a sale and transfer of minerals that were producing versus the sale and transfer of the property with minerals being reserved. Expert testimony is needed as to the Deed defect and the deficiencies of RCAT's title reviews. This expert testimony would have disclosed, in fact, how the handling of the matter by RCAT created a false sense of security in the Falens causing them to believe the matter had been closed properly and the Falens' reliance was reasonable. For instance, expert testimony will establish that a settlement statement for closing where producing minerals are transferred

with the land *should* provide for a pro-ration of production payments and mineral ad valorem taxes; a sale where producing minerals are properly reserved does not have those items in the settlement statement as was the case in this instance.

CONCLUSION

RCAT does not want a full trial of this case with a presentation of all the facts necessary for the trier of fact to find it was not reasonably ascertainable for the Falens to discover the RCAT mistakes. What RCAT wants is this Court to find as a matter of law that RCAT, a company engaging in closing professional real estate transactions, is not responsible for its own mistakes if their clients could have caught its mistakes by relying on *another* real estate professional.

Respectively submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 28th day of July, 2016, a true and correct copy of the above and foregoing Reply Brief of Appellants was mailed to the following:

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and the original e-filed with the Kansas Court of Appeals.

Josh V.C. Nicolay