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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

NANCY OWENS, Plaintiff and Appellant, v. WILLIAM C. OWENS, Defendant and Respondent.	A135407 (Alameda County Super. Ct. No. RG10515158)

INTRODUCTION

Plaintiff and appellant Nancy Owens (Nancy) is a sister of defendant and respondent William C. Owens (William), the former general partner of a family investment business started by their father. One of the investments William made was a commercial loan secured by an industrial laundry facility in Gilroy. The transaction went awry, resulted in a loss to the partnership of $1.65 million in principal, and Nancy eventually sued. The trial court granted summary judgment in favor of William on two grounds: Nancy's claims are time barred and William's actions are non-actionable under the business judgment rule. We affirm on statute of limitations grounds and therefore do not reach the business judgment rule.

PROCEDURAL AND FACTUAL BACKGROUND

This case arises out of investments William made in his capacity as the general partner of the Milton N. Owens Family Limited Partnership (the Partnership). His sisters, Nancy and Carol L. Owens (Carol), were limited partners. William was also the president and chief executive officer of Owens Financial Group, Inc. (Owens Financial),

a mortgage banking company engaged in the business of arranging commercial loans, which were generally funded by Owens Mortgage Investment Fund (the Fund).

In July 2003, Owens Financial recommended to the Fund that it make a loan to Lohrey Investments, LLC (Lohrey LLC) in the amount of $7.5 million (the first loan). Lohrey LLC owned Lohrey Enterprises, Inc., which owned a commercial laundry facility in Gilroy (the laundry business), on which there was a $10 million mortgage with Bank of America. Lohrey LLC was in bankruptcy, and had reached an agreement with Bank of America to accept "$7 million to settle its $10 million loan." The bank mortgage was paid off with the first loan from the Fund, which was secured by a first deed of trust in favor of the Fund.

William "determined from the outset . . . to share this business opportunity with my sisters by making a further loan to Lohrey LLC by the Partnership" in the amount of $2.75 million at an interest rate of 15 percent. He had investigated the laundry business, and learned it owned water and sewer allocation rights from the City of Gilroy, the cost of which to replace was about $3.4 million. The business had contracts to provide laundry services to eight major hotels and letters of intent to contract with 10 other hotels. William's investigation also revealed "Lohrey had approximately 25 years' experience and valuable contacts in the industry." The real estate had been appraised in 1998 for approximately $13.8 million.

The Partnership, however, did not have $2.75 million in capital on hand, so William arranged a multi-part transaction. In August 2003, William, as general partner, entered into a "Participation Agreement" between the Partnership and the William Owens Trust to "co-fund the Second Loan to Lohrey LLC and the Business." The second loan, in the amount of $2.75 million was "funded through [Owens Financial] so that the proceeds could be wired in a single transaction," and was secured by a second deed of trust. William then "reimbursed to [Owens Financial] forty percent (40%) of the loan amount from the William Owens Trust and sixty percent (60%) of the loan amount from the Partnership." "By the terms of the Participation Agreement, the Partnership invested $1.65 million for a senior sixty-percent (60%) ownership in the Second Loan . . . and the

William Owens Trust invested $1.1 million for a junior forty-percent (40%) ownership interest . . . ."

William provided "annual balance sheets and profit and loss statements" to Nancy and Carol, along with "intermittent accountings as distributions of Partnership assets were made." These statements included notations of when and from whom interest was received. The second loan was disclosed in the Partnership's annual reports for 2003 through 2009.

The Partnership Agreement provided in part: "From time to time, the General Partners may, at their sole discretion, send notice to the Partners of actions taken. If objection is not received by the General Partners within thirty (30) days of said notice, then said action shall be binding upon all of the Partners." On February 4, 2004, William wrote to Nancy and Carol enclosing the annual report, and indicating the second loan was on an industrial building in Gilroy that housed a commercial laundry, had a 15 percent interest rate, and a due date of September 2005. William also informed them "The notes should be worth their face amount, but if there are problems with any of the loans, which there does not appear to be today, this could change." His letter invited their questions and offered to provide further information if requested. They made no inquiries.

The second loan required monthly interest-only payments of $20,625 until maturity. William declared interest payments were "in fact paid for two years," and he made interest payments to the Partnership in 2005 so his sisters "might recover some unpaid interest."[1] Specifically, William made 2005 interest payments on February 10, May 5, June 8 and July 1, totaling $144,375. Until the last payment of interest by William on July 1, 2005, Nancy had been receiving $6,875 per month as her Partnership share.

The first loan made by the Fund matured in September 2005. Lohrey LLC sought a new loan from the Fund in the amount of $20 million to pay off the first loan and to

[1] The Partnership "Schedule of Receipts" indicates William, in fact, made every interest payment on the second loan from its inception.

expand the business. Neither the Fund, nor the William Owens Trust, nor the Partnership had sufficient funds to make a loan of that size.

William referred Lohrey LLC to Vestin Mortgage Company (Vestin), a company with which Owens Financial and the Fund had cooperated in the past. Vestin had an appraisal and two business valuations done, which valued the "market value of the leased fee interest in the Real Estate at $20.8 million," the value "of the two Lohrey entities" at $25 million in March 2004, and the value of the two Lohrey entities plus the assets of the Royal Laundry which Lohrey sought to acquire with the new loan at about $46.7 million.

Vestin loaned Lohrey $16 million secured by a new first deed of trust, some of which was used to pay off the first loan. Vestin conditioned the new loan on the Partnership and the William Owens Trust subordinating their second deed of trust. William agreed to do so, as well as agreed to extend the second loan, "in hopes of salvaging the Second Loan and its security." William stated the Fund "would have foreclosed on the first deed of trust if the First Loan was not repaid," which would have resulted in the second deed of trust securing the second loan being "wiped out."

William made additional loans to Lohrey LLC from his personal trust totaling about $15 million, all of which were junior to the new Vestin Loan and the second loan. He did so based on his "strong belief in the potential of the Business and exercising [his] best business judgment." In the "latter part of 2008," Lohrey entered into an agreement with Kaiser Permanente to provide laundry service for all its hospitals in the Bay Area. Kaiser's payments were not timely made, and Wells Fargo Bank, which had granted Lohrey LLC a line of credit, terminated it in October 2008.

The laundry business filed for Chapter 11 bankruptcy that month. Lohrey LLC defaulted on the Vestin loan, and had defaulted on the second loan made by the Partnership and the William Owens Trust, as well as the junior loans made by the William Owens Trust. Lohrey LLC and Lohrey personally also filed for bankruptcy.

The Partnership lost $1.65 million in principal based on the default on the second loan, a loss of $550,000 each to William, Nancy and Carol. William also personally lost

$1.1 million due to his Trust's loan, and approximately $15 million on the junior loans made by his Trust.

An e-mail dated May 10, 2009, from Nancy to a friend, Jon Olson, discussing the Partnership loan to Lohrey states "Does this have something to do with when I asked in 2005 why you don't just foreclose and [William] said they owe him a lot of money and he is trying to work something out[?]" Nancy stated in her declaration she "got the year wrong" in her e-mail, and "[t]he conversation actually occurred on June 29, 2006."

Nancy filed a complaint on May 14, 2010 alleging five causes of action, for breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, constructive fraud, and an accounting. The court granted William's motion for summary judgment, holding the first four causes of action were time barred and the undisputed evidence showed William "provided annual accountings as well as a final accounting." The court also held the undisputed evidence showed William acted in accordance with the Partnership Agreement and the business judgment rule applied. Nancy appeals as to the first four causes of action.[2]

DISCUSSION

"We review a grant of summary judgment de novo; we must decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law." (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) " 'Put another way, we exercise our independent judgment, and decide whether undisputed facts have been established that negate plaintiff's claims.' " (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 886.)

Due Process

Nancy first contends she was denied due process because she "did not have the opportunity to address [all of] the other statute of limitations issues raised by William Owens," because the trial court relied on statutes of limitations not specified by William

[2] William asserts the appeal is from a nonappealable order. Because the order granting summary judgment also stated "The case is hereby DISMISSED," the order is appealable under Code of Civil Procedure section 581d.

in his answer.[3] Relying on *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, she asserts "Where a remedy as drastic as summary judgment is involved, due process requires a party be fully advised of the issues to be addressed and be given adequate notice of what facts it must rebut in order to prevail." (*Id*. at p. 316.)

However, the record reveals Nancy was fully cognizant of the limitations issues. William acknowledges his initial moving papers did not raise the statute of limitations, but his attorney explained in a declaration filed with his reply memorandum that Nancy belatedly produced requested documents on July 18, 2011: "Due to the size of Plaintiff's production and the fact that I was necessarily completing my moving papers for filing . . . I was unable to carefully review all of Plaintiff's documents . . . before I was required to file my moving papers. After Defendant's moving papers were filed and I had an opportunity to review Plaintiff's document production, I found one document . . . in which Plaintiff stated . . . that she was aware in 2005 (a) that the Second Loan had gone into default, (b) that a legal remedy, foreclosure, was available to the Partnership, and (c) that Defendant did not intend to in 2005, and did not in 2005, pursue that remedy notwithstanding the default."

The trial court then continued the hearing and ordered supplemental briefing as follows: "The Court requests supplemental briefing from the parties regarding Defendant's assertion at page nine of defendant's reply brief that each of plaintiff Nancy Owens's claims is barred by the applicable statutes of limitations." Nancy filed supplemental briefing and the declaration in which she stated she misstated the date in the e-mail produced to William, and actually meant June 29, 2006, and also discussed the

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[3] William raised the statute of limitations as a defense in his answer to the complaint, specifically citing Code of Civil Procedure sections "337 (1-3); 337a and 339(1-3)." William also asserted the following defense "[William] reserves the right to include additional affirmative defenses upon discovery of facts sufficient to support such defenses." None of the authorities on which Nancy relies for her claim that William waived his statute of limitations defense by not pleading every code section in his answer addressed an answer that included this additional defense, and this omission in the answer did not preclude her from addressing the issue and specific code sections in the trial court.

statutes of limitations in Code of Civil Procedure sections 337(1) and 343. Her attorney then argued the statute of limitations issues at the hearing. Thus, Nancy had ample opportunity to, and did, address the statute of limitations issues.

Statute of Limitations

Nancy asserts the applicable statutes of limitations did not begin to run until she suffered injury, which she claims did not occur until 2008 or 2009. She also asserts she was not on inquiry notice before then due to her fiduciary relationship with William. The trial court found "[t]he evidence shows that [Nancy] waited to file her complaint until May 14, 2010, when as early as August 2003, or as late as the Fall of 2005, [she] learned about 'the second loan' at issue here and at the very least by 2005, she knew that the loan was in default and that [William] was not pursuing repayment remedies."

The parties do not dispute the longest statute of limitations for any of the four causes of action at issue is four years (for breach of a written contract and breach of the implied covenant of good faith and fair dealing). (Code Civ. Proc., §§ 337(1), 338, subd. (d).)[4]

Under the discovery rule, "the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her. . . . [T]he limitations period begins once the plaintiff ' " 'has notice or information of circumstances to put a reasonable person *on*

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[4] Nancy asserts the statute of limitations for breach of fiduciary duty is also four years, while William claims it is three years because it is a "hybrid" claim sounding in tort. "The Code of Civil Procedure does not specify a statute of limitations for breach of fiduciary duty. The cause of action is therefore governed by the residual four-year statute of limitations in Code of Civil Procedure section 343 governing '[a]n action for relief not hereinbefore provided for' in the code. [Citation.] [¶] . . . [However,] '[t]o determine the statute of limitations which applies to a cause of action it is necessary to identify the nature of the cause of action, i.e., the "gravamen" of the cause of action. [Citations.] "[T]he nature of the right sued upon and not the form of action nor the relief demanded determines the applicability of the statute of limitations under our code." ' [Citation.]" (*Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 606–607.) We need not decide, however, whether the limitations period here is four or three years, given our conclusion Nancy's claims are time barred even under a four-year statute.

inquiry . . . .' " ' [Citations.] A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Jolly v. Eli Lilly & Co*. (1988) 44 Cal.3d 1103, 1110–1111, fn. omitted.)

Nancy maintains she had no duty of inquiry because of the "relationship of trust" between herself and William. In *Miller v. Bechtel Corp.* (1983) 33 Cal.3d 868 (*Miller*), the Supreme Court rejected a similar contention. The plaintiff in *Miller* sought to set aside a marital settlement agreement due to claimed misrepresentation of the value of stock by her husband, his attorneys, and Bechtel Corporation. (*Id*. at p. 870.) She "knew at the time she entered into the marital settlement agreement that the value of the Bechtel stock was determined by the price attributed to it in the shareholders' agreement," but claimed she did not know the "agreement provided that the price was determined by a vote of the shareholders of the corporation rather than by some objective standard." (*Id*. at p. 874.) She also claimed "she had no duty to make inquiry regarding the accuracy of the representations as to the value of the stock because [her ex-husband] had an obligation as a fiduciary to provide her with full and correct information as to their worth." (*Id*. at pp. 874–875.) However, the court held "[e]ven assuming the correctness of this assertion . . . if [plaintiff] became aware of facts which would make a reasonably prudent person suspicious, she had a duty to investigate further, and she was charged with knowledge of matters which would have been revealed by such an investigation." (*Id.* at p. 875.)

The undisputed facts here show Nancy had notice of the existence of the second loan in 2003 and was specifically notified of its terms in February 2004, when William sent Nancy and Carol notice of the Partnership's investments, including the second loan and invited inquiries. He informed them of the amount of the loan, the fact it was on a commercial laundry facility in Gilroy, and that the interest rate was 15 percent. He also stated "The notes should be worth their face amount, but if there are problems with any

of the loans, which there does not appear to be today, this could change." Nancy made no inquiries, thus rendering the action binding on her under the Partnership Agreement.

The quarterly statements provided to Nancy showed William made all the interest payments on the second loan in 2005, not Lohrey LLC. And after July 2005, she received no further interest payment on the second loan, which she had acknowledged was "a big percentage of the partnership assets." Plus, within several months, she knew from the quarterly statements the second loan had not been repaid when it was due in September 2005.

Any reasonably prudent person who had been receiving $6,875 a month in interest payments on a loan about which he or she had been informed, would have been put on inquiry notice when those payments stopped prematurely. The fact the principal amount of the second loan was not repaid when due also would have put a reasonably prudent person on inquiry notice something was seriously amiss.

Nancy asserts in her appellate briefing she "first learned of the Lohrey default on June 29, 2006." She concedes, however, "she does not categorically say this was the first time she had *learned* of the default, [but claims] such a conclusion is implicit in her declaration executed November 3, 2011." (Italics added.) We disagree. Indeed, Nancy's carefully-worded declaration—indicating a "conversation" did not occur until June 2006, rather than stating explicitly that she first learned of the default in June 2006—is telling. In any case, as we have just discussed, she was on inquiry notice by August 2005.

Nancy also contends her causes of action could not accrue until 2008 or 2009, when she claims she first suffered damage. She asserts she "did not suffer damages until William Owens attempted to foreclose on the property, and came up empty-handed . . . in 2008." She alternatively claims "2009 is when [she] was injured," because Lohrey Investments filed for bankruptcy in January 2009 and William told her in March 2009 the "Lohrey loan would not be paid off." Nancy, however, stopped receiving interest payments on the second loan after July 2005 and thus sustained economic damage at that time—long before the final fallout of futile foreclosure and bankruptcy. Her assertion that she did not plead the loss of interest payments as damages is unavailing: she pleaded

she "lost her one-third interest in the $1.65 million in Partnership assets [and] . . . lost profits that would have been earned by the Partnership . . . ." She also sought in her prayer "damages in the amount of $550,000, and lost profits in an amount to be proven at trial [and] [¶] . . . interest continuing to accrue thereon[.]" In any case, whether she sought to recover the lost interest is beside the point; she was unquestionably sustaining that loss by at least August 2005.

In sum, at the very latest, the statutes of limitations began running by Fall 2005, after Nancy ceased receiving monthly interest payments on the second loan and the principal was not repaid. Accordingly, the four causes of action on appeal are time barred.

DISPOSITION

The judgment is affirmed. Respondent to recover costs on appeal.

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Banke, J.

We concur:

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Margulies, Acting P. J.

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Dondero, J.