Filed 3/16/17 NNN Parkway Corporate Plaza 8 v. Hirschler Fleischer CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NNN PARKWAY CORPORATE PLAZA 8, LLC, et al., Plaintiffs and Appellants, v. HIRSCHLER FLEISCHER, APC, et al., Defendants and Respondents.	G050412, G050655 (Super. Ct. No. 30-2013-00653302) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kim Garlin Dunning, Judge. Affirmed.

Catanzarite Law Corporation, Kenneth J. Catanzarite, Nicole M. Catanzarite-Woodward and Eric V. Anderton for Plaintiffs and Appellants.

Lester & Cantrell, Mark S. Lester, David Cantrell and Colin A. Northcutt for Defendant and Respondent Hirschler Fleischer.

Morgan, Lewis & Bockius, J. Warren Rissier, and Jordan McCrary for Defendants and Respondents CBRE, Inc. and William Palmer.

Hahn Loeser & Parks LLP, Michael J. Gleason, Rupa G. Singh, and Samuel C. Sneed for Defendants and Respondents Chicago Title Company and Chicago Title Insurance Company.

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This appeal is déjà vu all over again. It is one of several cases presenting similar fact patterns, and in some cases, they are functionally identical. This is one of those cases. It is functionally identical to a case we already decided, *WA Southwest 2, LLC v. First American Title Ins. Co.* (2015) 240 Cal.App.4th 148 (*WA Southwest*).

The gist of the complaint is that plaintiffs invested in property, and certain costs were allegedly concealed from them. Those costs, however, were disclosed in the private placement memorandum (PPM) that plaintiffs received prior to investing. Plaintiffs contend the PPM contains confusing and contradictory statements concerning those costs. But even if that were enough to state a claim, plaintiffs face a more acute problem — they filed their lawsuit after the statute of limitations had run. To get around that, they rely on the discovery rule. But even if the PPM was unclear, the allegedly concealed costs were sufficiently disclosed to put plaintiffs on notice of their claim at the outset of their investment. Thus, their claims are time barred. The trial court sustained demurrers on this ground, and we affirm those rulings.

FACTS

The following factual allegations are derived from the first amended class action complaint with separate claims (FAC). Because we have described the allegations in detail multiple times before, we present a simplified version of the 110 page FAC.

Plaintiffs (the putative class) invested $23.8 million to purchase tenant in common (TIC) interests in a property located in Roseville, California. The promoters had acquired the property for $63.65 million, then sold TIC interests, structured as securities, to various investors, including plaintiffs. The purpose of the investment, in addition to profit, was to acquire like-kind property that enabled plaintiffs to defer the 15 percent capital gains tax on a prior sale of real estate under Internal Revenue Code section 1031 (1031 exchange).

Because one purpose of the investment was to defer the 15 percent capital gains tax, it was important to plaintiffs that the costs associated with the TIC investment be less than 15 percent. Plaintiffs allege they were told the costs would not exceed 10.5 percent.[1] They would not have invested had the costs exceeded 15 percent.

Unbeknown to plaintiffs, defendants were conspiring to hide certain costs that, in fact, did raise costs above 15 percent. In particular, defendants and the original seller agreed the price at which the property could be acquired was approximately $62 million. They then increased the price by $1.65 million, to $63.65 million, and used the extra money to pay a real estate commission to an entity affiliated with defendants (we refer to this as the "markup"). They then described the fee as being paid by the *sellers*, when in fact, for all practical purposes, it was the buyers, including plaintiffs, who were

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[1] In their briefs, plaintiffs clarify that it is the securitization and organizational costs that needed to be below 15 percent. Costs associated with standard real estate transactions would have been incurred whether or not plaintiffs performed a 1031 exchange.

paying that fee by virtue of the markup. This increased the sales load to 17.5 percent, an amount greater than the capital gains taxes plaintiffs sought to avoid.

The investment closed in November 2003. Plaintiffs filed suit in December 2012, over nine years later. Plaintiffs named 29 defendants. Most of the defendants are not parties to this appeal.

The respondents to this appeal are not the parties who were most directly involved in marketing and organizing the investment, who we refer to generally as the "promoter defendants." Respondent CBRE, Inc. (CBRE), was the broker that represented the original seller of the property. Respondent William Palmer was the managing director in the capital markets division of CBRE and the lead agent/broker involved in the sale of the property. Respondent Hirschler Fleischer, APC (Hirschler Fleischer), is the law firm that drafted an opinion letter supporting the 1031 exchange, which was included with the offering memoranda. Respondents Chicago Title Company and Chicago Title Insurance Company (collectively Chicago Title) provided escrow and title insurance services.

The FAC sets forth the following 20 causes of action: breach of fiduciary duty — broker; legal malpractice; breach of fiduciary duty – attorney; "breach of contract, statute, and fiduciary duties;" constructive fraud; intentional misrepresentation; negligent misrepresentation; fraud by concealment; conversion; restitution and unjust enrichment; negligence; unfair business practices (Bus. & Prof. Code, § 17200, et seq.); accounting; violation of standards of reasonable basis suitability (NASD Rule 2310, FINRA Rule 2310(b)) and just and equitable principles of trade (FINRA Rule 2010); fraud, misleading statements, misleading omissions of material information (NASD Rule 2210(d)(1)), just and equitable principles of trade (FINRA Rule 2010); breach of fiduciary duty; negligent misrepresentation; negligence; elder abuse; aiding and abetting elder abuse.

The court sustained demurrers by each of the respondents on the ground that plaintiffs' claims were time barred. The court based its ruling on the PPM, which plaintiffs had stipulated was in their possession.

The PPM contains disclosures about the precise costs plaintiffs claim were concealed. It states, **"Purchase Price Increase. The purchase price for the Property negotiated by the Manager and the seller has been increased by the approximately $1,650,000 real estate commission to be paid by the seller to the Property Manager, an Affiliate of Thompson, which increases the compensation payable to the Manager and its Affiliates in connection with this Offering. . . . While the real estate commission is being paid by the seller, the Company could have obtained a reduced purchase price if the commission was not paid. Since the purchase price for the Property was increased to include the additional commission, the value of the Property, and the related proceeds to be raised in this Offering, should be considered inflated by this additional cost."**

The PPM also contains a chart setting forth the estimated use of proceeds. It contains the following information:[2]

	Percentage of Gross Proceeds
Gross Offering Proceeds	100.0%
Organization and Marketing	(4.00%)
Selling Commissions	(8.00%)
Marketing and Due Diligence	(2.50%)
Available for Investment	(85.50%)

[2] The actual table in the PPM contains additional information not relevant to this appeal. For the sake of clarity, we note that the percentages here are of the equity invested.

Down Payment for Purchase of Real Estate	(80.20%)
Loan Fee and Costs	(2.40%)
Closing and Carrying Costs	(1.00%)
Reserve	(1.90%)
Proceeds Utilized	85.50%
Offering and Organization Expenses and Fees	14.50%
Total Application	100.0%

In the PPM, most of the line items in this chart have footnotes that explain various facets of the line item. The "Down Payment for Purchase of Real Estate" line contains a footnote with another warning concerning the $1,650,000 real estate commission: "The seller will pay Triple Net Properties Realty, Inc., an Affiliate of Thompson, an approximately $1,650,000 million real estate commission at settlement for arranging the purchase. The real estate commission will be paid by the Seller of the Property and will not be paid out of the proceeds of the Offering. While the commission is being paid by the seller, a reduced purchase price could have been obtained if the commission was not paid. Therefore, the value of the Property and the related proceeds to be raised in this Offering should be considered increased by this additional cost."

On the other hand, elsewhere the PPM states, "The total aggregate amount of commissions and expense reimbursements . . . will not exceed 10.5% of the Gross Proceeds." The markup does not appear to have been accounted for either in the chart (with the exception of the footnote) or in the 10.5% limitation on commissions and expense reimbursements.

DISCUSSION

Plaintiffs contend that, by operation of the discovery rule, the statute of limitations began running when they consulted with counsel regarding removing a manager and concerns about a foreclosure in 2012. On this issue, this case is functionally identical to *WA Southwest*, which we quote at length below. To the extent this case differs, we have bracketed the facts corresponding to the facts of the present case.

"The court sustained the demurrers at issue on statute of limitations grounds. Our de novo review of the orders 'is limited to issues which have been adequately raised and supported in [appellants' opening] brief.' [Citations.]

"Applicable California statutes of limitations in this case range from one to four years. [Citations.] . . . [Citations.] Plaintiffs' briefs do not identify the applicable statutes of limitations or contest the notion that the longest potentially applicable statute of limitations in this case is four years.

"Plaintiffs purchased their interests in the Property in [November 2003]. The initial complaint was not filed until [December] 2012. The only argument plaintiffs make on appeal is that the court should have applied the delayed discovery rule to postpone accrual of the statute of limitations. 'By their reliance on the "discovery rule," plaintiffs concede by implication that, without it, their claims are barred by one or more statutes of limitations.' [Citations.] Unless the discovery rule applies, the statute of limitations began running when plaintiffs made what they now deem to be unsuitable investments, paid what they now deem to be an unreasonable (and undisclosed) sales load, and had in their possession documents disclosing the downsides of the investment (e.g., the risks of the investment and the expenses beyond the acquisition price of the Property). . . .

"'An important exception to the general rule of accrual is the "discovery rule," which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action.' [Citation.] 'The discovery rule only delays accrual until the plaintiff has, or should have, inquiry notice of the cause of action.' [Citation.] A plaintiff relying on the discovery rule must plead '"(1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence."' [Citation.] Plaintiffs have an obligation to plead facts demonstrating reasonable diligence. [Citation.]

"'Where a fiduciary obligation is present, the courts have recognized a postponement of the accrual of the cause of action until the beneficiary has knowledge or notice of the act constituting a breach of fidelity. [Citations.] The existence of a trust relationship limits the duty of inquiry. "Thus, when a potential plaintiff is in a fiduciary relationship with another individual, that plantiff's burden of discovery is reduced and he is entitled to rely on the statements and advice provided by the fiduciary."' [Citation.] But, even assuming for the sake of argument that each of the respondents had a fiduciary duty to plaintiffs, this does not mean that plaintiffs had no duty of inquiry if they were put on notice of a breach of such duty." (*WA Southwest, supra,* 240 Cal.App.4th at pp. 155-157.)

The discovery rule has no application here. The supposedly secret $1.65 million markup was explicitly disclosed in two different places in the PPM. The two disclosures of the markup were obviously sufficient to put plaintiffs on notice. As we said in *WA Southwest*, "Reasonable diligence in such circumstances does not consist of ignoring a private placement memorandum received prior to making an investment." (*WA Southwest*, *supra*, 240 Cal.App.4th at p. 157.) And while we can understand some confusion resulting from the limitation on commissions and expenses to 10.5 percent of the gross proceeds, the fact remains that the commissions and expenses were accounted for apart from the markup, and the markup was separately disclosed. At minimum, these facts put plaintiff on notice that the markup was "inflat[ing]," to use the PPM's term, the cost of the investment. We see no way for plaintiffs to amend the complaint to cure this deficiency. Accordingly, there was no error in sustaining the demurrers.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs incurred on appeal.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.