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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THOMAS OLSON et al.,

Plaintiffs and Appellants,

v.

STECKLER & WYNN'S INSURANCE
SERVICES, INC., et al.,

Defendants and Respondents.

G050455

(Super. Ct. No. 30-2012-00613565)

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 and Eric V. Anderton for Plaintiffs and Appellants.

Evans & Kob and Jeffrey S. Kob for Defendants and Respondents.

* * *

In a concurrently filed opinion, *WA Southwest 2, LLC v. First American Title Insurance Company* (Sept. 4, 2015, G050445) __ Cal.App.4th __ (*WA Southwest*), we affirm judgments of dismissal in a lawsuit arising out of a failed real estate investment in Southwest Corporate Center (the Property), a three-story office building in Tempe, Arizona. This appeal is based on the same trial court case and the same failed investment, but features fewer plaintiffs and different defendants. We affirm the judgment of dismissal in this appeal for the same reason cited in *WA Southwest* — the applicable statutes of limitations foreclose recovery by plaintiffs.

PROCEDURAL HISTORY

In November 2012, seven plaintiffs filed their initial complaint against a lengthy list of defendants, including Steckler & Wynns Insurance Services, Inc. (SW Insurance), Larry Steckler, and Michael Wynns (collectively, the Steckler defendants).¹ Three amended complaints followed in response to motion practice by defendants.

We are only concerned here with two causes of action alleged against the Steckler defendants — elder abuse in the second amended complaint and breach of fiduciary duty in the third amended complaint. The Steckler defendants successfully demurred to the second amended complaint, and the court refused leave to amend as to the elder abuse cause of action. The court then sustained the Steckler defendants' demurrer to the third amended complaint without leave to amend. The court entered a judgment of dismissal as to the Steckler defendants in May 2014.

¹ Plaintiffs include appellants Thomas Olson and LaVonne Misner (husband and wife), as individuals and as trustees of the Thomas C. Olson and LaVonne Misner Revocable Trust dated September 21, 1999 (the Olson plaintiffs). The other plaintiffs are not appellants in this case.

FACTS

WA Southwest, supra, ___ Cal.App.4th ___, sets forth in detail the structure of plaintiffs' investment in the Property and the various disclosures made to plaintiffs in connection therewith.

Corporate defendant SW Insurance, a registered investment advisor, employed individual defendants Steckler and Wynns as investment advisors. At the recommendation of the Steckler defendants, the Olson plaintiffs purchased an ownership interest (6.159 percent) in the Property in March 2006 for \$311,029.50. By signing the purchase agreement, the Olson plaintiffs acknowledged their receipt and review of the confidential private placement memorandum, which made clear the investment was only being offered to accredited investors. The Olson plaintiffs also responded in writing to a questionnaire, in which they claimed a net worth in excess of \$1 million and experience in business and financial matters based on owning and operating rental property for 40 years.

Breach of Fiduciary Duty Allegations

In addition to deferring payment of capital gains taxes, the Olson plaintiffs had the objective of procuring a conservative investment capable of generating growth and income. The Olson plaintiffs reposed trust and confidence in the Steckler defendants. The Olson plaintiffs trusted the Steckler defendants to provide accurate information regarding the suitability of investments and to conduct due diligence on proposed investments.

The Steckler defendants had legal and moral obligations as fiduciaries to the Olson plaintiffs. The Steckler defendants were aware of the Olson plaintiffs' goals. The Steckler defendants falsely represented that an investment in the Property was consistent with these goals. The tenancy-in-common securities were actually unsuitable

for the Olson plaintiffs, a fact of which the Steckler defendants were aware. The Steckler defendants breached their fiduciary duties “by providing untrue, false, and misleading information . . . , in failing to determine suitability of the investment recommendations and to conduct due diligence prior to recommending the security.” The Steckler defendants recommended unsuitable investments to advance their own financial gain. The Olson plaintiffs lost their entire investment.

The court sustained the demurrer to the breach of fiduciary duty cause of action on statute of limitations grounds. The court reasoned that information contradicting the alleged misrepresentations pertaining to the Steckler defendants’ breaches of fiduciary duty was disclosed in writing to the Olson plaintiffs at the time they agreed to invest.

Elder Abuse Allegations

At the time of their investment in the Property, the Olson plaintiffs were California citizens over the age of 65. They were the sole income beneficiaries of their trust and were dependent on this income. The Steckler defendants committed elder abuse by recommending the purchase of interests in the Property “with knowledge the sales loads exceeded the investors capital gains taxes, knowing over-concentration would result, taking, appropriating or retaining [the Olson plaintiffs’] real or personal property to a wrongful use or with an intent to defraud [the Olson plaintiffs], and assisted each other in taking, securing, appropriating or retaining said property or properties to a wrongful use and with intent to defraud.” The Olson plaintiffs lost at least \$311,029.50 as a result of the Steckler defendants’ conduct.

The court sustained the demurrer to the elder abuse cause of action on the grounds that the financial elder abuse statute does not apply to a wealthy, accredited investor choosing to engage in a risky investment. “These people went in and affirmatively stated they were accredited investors. . . . I think there would be a real

problem as a matter of public policy in California if we say that people over 65 can't do things because it falls under the elder abuse statutes.”

DISCUSSION

Our de novo review of the orders sustaining the Steckler defendants' demurrers without leave to amend “is limited to issues which have been adequately raised and supported in [appellant's opening] brief.” (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6; see *McGettigan v. Bay Area Rapid Transit Dist.* (1997) 57 Cal.App.4th 1011, 1016, fn. 4.)

Statute of Limitations Bars Breach of Fiduciary Duty Cause of Action

The Olson plaintiffs solely argue 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.” (*McKelvey v. Boeing North American, Inc.* (1999) 74 Cal.App.4th 151, 160, superseded by statute on other grounds as stated in *Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 Cal.4th 623, 637, fn. 8.) It is uncontested that the applicable statute of limitations was, at most, four years, and this lawsuit (filed in November 2012) was untimely absent the applicability of the delayed discovery rule. (See Code Civ. Proc., §§ 338, subd. (d) [fraud, three years], 343 [claim not provided for, including nonfraudulent breach of fiduciary duty, four years].)²

²

At the trial court, the parties stipulated that Arizona law applies to the breach of fiduciary duty claim. Arizona law provides for a two-year statute of limitations with regard to breach of fiduciary duty claims. (See *Mohave Elec. Coop. v. Byers* (Ariz.Ct.App. 1997) 189 Ariz. 292, 310.) This two-year difference is theoretically worse for the Olson plaintiffs, but is of no consequence to this appeal. The parties' appellate briefs focus on California cases for basic principles of law and we do the same.

We affirm the court's ruling. The statute of limitations on the Olson plaintiffs' breach of fiduciary duty claim against the Steckler defendants began running at the time of the investment. The discovery rule does not rescue the claims of an investor who ignores or misunderstands disclosures provided with an investment. (*WA Southwest, supra*, __ Cal.App.4th __.)

Statute of Limitations Bars Elder Abuse Cause of Action

The Olson plaintiffs assert they pleaded an elder abuse cause of action based on the Steckler defendants' recommendation that the Olson plaintiffs (who were over 65) purchase an interest in the Property.

“Financial abuse’ of an elder or dependent adult occurs when a person or entity does any of the following: [¶] (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.” (Welf. & Inst. Code, § 15610.30, subd. (a).) A wrongful use includes situations in which “the person or entity knew or should have known that [their] conduct is likely to be harmful to the elder or dependent adult.” (Welf. & Inst. Code, § 15610.30, subd. (b).) The wrongful taking may occur “by means of an agreement.” (Welf. & Inst. Code, § 15610.30, subd. (c).)

Neither party cites case law for their respective positions or provides more than cursory analysis of whether the facts before us can constitute financial elder abuse. The court thought the cause of action must fail, based on problematic policy consequences of allowing such a cause of action (i.e., calling into question the sale of unregistered securities to self-identified accredited investors over the age of 65). We need not reach this question, and choose not to because of the minimal efforts of the parties to provide briefing.

Instead, we affirm on an alternate ground. At most, the statute of limitations for the trustee plaintiffs' elder abuse claim is four years. (Welf. & Inst. Code,

§ 15657.7.) The Steckler defendants demurred to the elder abuse cause of action in the second amended complaint on statute of limitations grounds, and raise this as an alternative ground for affirming the judgment in the appellate brief. Even assuming the allegations in the second amended complaint could, in theory, support an elder abuse cause of action, the same statute of limitations rationale set forth in *WA Southwest, supra*, __ Cal.App.4th __ forecloses recovery.

DISPOSITION

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

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.