MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Lori Maletta,
Appellant-Plaintiff,

v.

Van Ristovski, David Taylor, and Lake County Trust 6292,
Appellees-Defendants

July 24, 2023

Court of Appeals Case No. 22A-CT-3090

Appeal from the Porter Superior Court

The Honorable Michael A. Fish, Judge

Trial Court Cause No. 64D01-2003-CT-2279

Memorandum Decision by Judge Mathias
Judges Vaidik and Pyle concur.

Mathias, Judge.

[1] Lori Maletta appeals the Porter Superior Court's grant of summary judgment in favor of Van Ristovski, David Taylor, and Lake County Trust 6292 ("the Trust") on her complaint alleging, among other claims, fraud. Maletta presents a single dispositive issue for our review, namely, whether the trial court erred when it found that her fraud claims are barred by the statute of limitations. We affirm in part, reverse in part, and remand for further proceedings.

Facts and Procedural History

[2] In 2007, Maletta bought a house in Crown Point with money she was awarded in a dissolution decree. Maletta had no mortgage on the house. By 2012, Maletta had fallen behind in paying her real estate taxes and homeowner's association ("HOA") fees, and her house was sold at a tax sale. In an effort to redeem the property within the redemption period, Maletta contacted Ristovski, who was "known to [her] as an expert in the area of real estate financing and leasing[.]" Appellant's App. Vol. 2, p. 32. Maletta asked him by text message "if she could borrow the money necessary to redeem her real property from the tax sale purchaser." *Id.* Ristovski responded that he could help her, and he instructed her, "Do not tell no one [sic] I am helping you[.]" *Id.* at 46.

[3] In October 2012, Ristovski, through the Trust, agreed to purchase Maletta's home for $180,000. However, while the closing documents indicated that the

Trust had paid Maletta $150,000 in earnest money prior to closing, that payment was in fact never made.[1] Instead, Ristovski told Maletta that the Trust would pay off her tax and HOA debts, thus redeeming her house from the tax sale; it would list the house for sale; and Maletta would receive her remaining equity in the house after a future sale to a third party. Maletta understood that the Trust would hold the warranty deed as collateral for a loan to pay off her tax and HOA debts. In the meantime, Maletta entered into a lease agreement with the Trust so that she could continue living in her house.

[4] After redeeming the property and taking title, Ristovski hired Bart Botkin, a real estate agent, to sell the house. But, after Botkin's efforts were unsuccessful, in March 2013, Ristovski hired David Taylor to list the house for sale. Taylor consistently emailed Maletta to let her know when he had scheduled showings and to give her feedback after showings. And in June, Taylor asked Maletta to sign an amendment to the listing agreement between the Trust and Taylor.[2] Finally, on March 14, 2014, the Trust sold Maletta's house. However, after closing, the Trust retained all of the money from the sale; Maletta did not get any of her equity in the house back.

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[1] As we discuss below, Ristovski maintains that he paid Maletta the $150,000. But it is well settled that we view the facts in favor of the nonmovant on summary judgment, and Maletta testified by affidavit that he did not pay her anything.

[2] The record does not reveal why Maletta was asked to sign this document, which listed only the Trust as the owner of the house.

[5] On March 9, 2020, Maletta filed a complaint against Ristovski, the Trust,[3] and Taylor alleging, among other claims, fraud. In particular, Maletta alleged that Ristovski and Taylor made material misrepresentations of past or existing facts, including that the Trust had loaned Maletta money rather than buying her house and that the transfer of ownership was "a mere formality to secure repayment[.]" Appellant's App. Vol. 2, p. 36. Ristovski and Taylor denied the allegations, and each moved for summary judgment. They alleged in relevant part that Maletta's claims were time-barred. The trial court agreed and entered summary judgment for Ristovski and Taylor. This appeal ensued.

Discussion and Decision

[6] Maletta contends that the trial court erred when it found that her fraud[4] claims are time-barred and entered summary judgment for Ristovski and Taylor.[5] Our standard of review is well settled.

> We review a summary judgment ruling de novo. *Broadbent v. Fifth Third Bank*, 59 N.E.3d 305, 310 (Ind. Ct. App. 2016), *trans. denied*. "A party seeking summary judgment bears the burden to make a prima facie showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law." *Id.* "Once the moving party satisfies this burden through

[3] For ease of discussion, we will refer to Ristovski and the Trust, collectively, as Ristovski.

[4] Maletta alleged both fraud and constructive fraud in her verified complaint. However, on appeal, she does not mention her claims for constructive fraud. Accordingly, it appears as though she has abandoned those claims against both Ristovski and Taylor for purposes of this appeal.

[5] Maletta does not dispute that her additional claims, including conversion, are barred by the applicable two-year statutes of limitations.

evidence designated to the trial court, the non-moving party may not rest on its pleadings, but must designate specific facts demonstrating the existence of a genuine issue for trial." *Id.* at 311. Mere speculation is insufficient to create a genuine issue of material fact to defeat summary judgment. *Beatty v. LaFountaine*, 896 N.E.2d 16, 20 (Ind. Ct. App. 2008), *trans. denied* (2009).

"Our review of a summary judgment motion is limited to those materials designated to the trial court." *City of Bloomington v. Underwood*, 995 N.E.2d 640, 644 (Ind. Ct. App. 2013), *trans. denied* (2014). "[W]e construe the evidence in a light most favorable to the non-moving party and resolve all doubts as to the existence of a genuine factual issue against the moving party." *Broadbent*, 59 N.E.3d at 310. A trial court's findings and conclusions on summary judgment are helpful in clarifying its rationale, but they are not binding on this Court. *Whitley Cty. Teachers Ass'n v. Bauer*, 718 N.E.2d 1181, 1186 (Ind. Ct. App. 1999), *trans. denied* (2000). We are not constrained to the claims and arguments presented to the trial court, and we may affirm a grant of summary judgment on any theory supported by the designated evidence. *Manley v. Sherer*, 992 N.E.2d 670, 673 (Ind. 2013). The party that lost in the trial court has the burden of persuading us that the trial court erred. *Underwood*, 995 N.E.2d at 644.

"The statute of limitations defense is particularly suitable as a basis for summary judgment." *Myers v. Maxson*, 51 N.E.3d 1267, 1276 (Ind. Ct. App. 2016), *trans. denied*.[] A plaintiff need not anticipate a statute of limitations defense and plead matters in avoidance in the complaint. *Bellwether Props., LLC v. Duke Energy Ind., Inc.*, 87 N.E.3d 462, 466 (Ind. 2017). But when the party moving for summary judgment "asserts the statute of limitations as an affirmative defense and establishes that the action was commenced beyond the statutory period, the burden shifts to the nonmovant to establish an issue of fact material to a theory that avoids the defense." *Myers*, 51 N.E.3d at 1276.

Biedron v. Anonymous Physician 1, 106 N.E.3d 1079, 1089-90 (Ind. Ct. App. 2018).

Fraud Allegations

[7] To establish fraud, Maletta would have to prove that Ristovski and Taylor made (1) material representations of past or existing fact (2) that were untrue and known to be untrue, or else recklessly made, and (3) Maletta did in fact rely on the representations, (4) which proximately caused her to suffer injury. *See Circle Ctr. Dev. Co. v. Y/G Indiana, L.P.*, 762 N.E.2d 176, 179 (Ind. Ct. App. 2002), *trans. denied*. In her verified complaint, Maletta alleged that Ristovski and Taylor had fraudulently represented to her that the transfer of the deed to the Trust was "a mere formality to secure the financing necessary" to pay off her tax debt and HOA debt. Appellant's App. Vol. 2, p. 34. She further alleged that Ristovski and Taylor had assured her that, despite the transfer of the property by deed, her "ownership of the real property" would not be "impair[ed.]" *Id.* at 36. In other words, Maletta alleged that Ristovski and Taylor had duped her into transferring ownership of her home to the Trust and that she was injured when she did not receive any part of her equity in the home upon the sale to a third party in March 2014.

[8] The statute of limitations for fraud claims is six years. Ind. Code § 34-11-2-7 (2023). The trial court found that "Maletta knew or should have known any actions she now alleges to be fraudulent occurred October 22, 2012," which is the date she transferred her house to the Trust. Appellant's App. Vol. 2, p. 14. Thus, the court concluded that "the statute of limitations expired October 21,

2018, and this lawsuit was not filed until well after that deadline." *Id.* Because the issues relevant to Maletta's claims against Ristovski and Taylor are separate, we address each in turn.

Ristovski's Fraud

[9] On appeal, Maletta argues that, at the time of the October 22, 2012, sale, Ristovski had promised to pay her the remaining equity in the house upon the eventual sale to a third party. Thus, Maletta maintains that it was only when Ristovski did not pay her upon the sale of the house to a third party on March 9, 2014, that Ristovski's act of fraud had been completed. Prior to that date, Maletta thought that she and Ristovski had an agreement, however ill-conceived, whereby he had loaned her the money to pay her tax and HOA debts and she had given him a warranty deed[6] to the house as collateral for the loan. Thus, Maletta asserts that her complaint filed on March 9, 2020, was timely.

[10] But Ristovski argues that, as his affidavit designated as evidence in support of summary judgment states, he had paid Maletta $150,000 in cash prior to the October 2012 closing. In addition, Ristovski designated as evidence the October 2012 settlement statement showing that Maletta had received $150,000 in "earnest money" prior to closing. Appellee's App. Vol. 2, p. 2. Ristovski maintains that, to the extent Maletta claims she was defrauded out of $150,000,

[6] In her verified complaint, Maletta incorrectly refers to the warranty deed as a quitclaim deed. For purposes of this appeal, that error is of no moment.

that fraud occurred in October 2012, when she executed the closing documents but did not receive $150,000.[7]

[11] As Maletta correctly points out on appeal, the timeliness of her complaint rests on a determination whether Ristovski paid her $150,000 in October 2012, or whether Ristovski and Maletta engaged in a "sham" closing, with Ristovski promising in October 2012 to pay Maletta her remaining equity in the house upon the eventual sale, which did not occur until March 9, 2014. Because Maletta designated as evidence in opposition to summary judgment her affidavit stating in relevant part that she did not receive $150,000 as Ristovski had promised, her affidavit supports her assertion that there was no fraud until Ristovski sold the house on March 9, 2014, and only then refused to pay her the remaining equity in the house.

[12] "An issue of material fact is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth." *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014) (citing *Gaboury v. Ireland Road Grace Brethren, Inc.*, 446 N.E.2d 1310, 1313 (Ind. 1983)). Here, Ristovski satisfied his burden to establish a prima facie case that any alleged fraud occurred in October 2012. But Maletta's sworn testimony by affidavit is direct evidence that she had anticipated that Ristovski would pay her the remaining equity in the house upon the sale on March 9,

[7] Ristovski argues on appeal that Maletta had to have known about the alleged fraud when, in October 2012, she executed documents transferring ownership of her house to the Trust without receiving any money. But Ristovski ignores her argument that he committed fraud in the inducement.

2014. And it was only when Ristovski breached this agreement that he defrauded her. So "the fact finder must reconcile the credibility of those two accounts." *Id.* at 1005. Summary judgment "'may not be used as a substitute for trial in determining factual disputes,'" *id.* (quoting *Clipp v. Weaver*, 451 N.E.2d 1092, 1093 (Ind. 1983)), and it "'is not appropriate merely because the non-movant appears unlikely to prevail at trial.'" *Id.* (quoting *Tucher v. Brothers Auto Salvage Yard, Inc.*, 564 N.E.2d 560, 564 (Ind. Ct. App. 1991)).

[13] We hold that Maletta's affidavit is sufficient evidence to establish a genuine issue of material fact precluding summary judgment for Ristovski on her fraud claim. *See Hughley*, 15 N.E.3d at 1004 (holding self-serving affidavit sufficient to establish a genuine issue of material fact precluding summary judgment). In particular, according to Maletta's affidavit, Ristovski's alleged fraud occurred on March 14, 2014, when he failed to pay her her share of the equity in the house as he had promised to do, and her complaint, filed on March 9, 2020, was timely filed. *See, e.g.*, *Estate of Kalwitz v. Kalwitz*, 717 N.E.2d 904, 914 (Ind. Ct. App. 1999) (holding fraud claim timely filed where parents transferred property to son on his promise to reconvey it after foreclosure litigation had concluded, and it was only when son refused to reconvey property after conclusion of litigation that cause of action accrued). Accordingly, we reverse the trial court's grant of summary judgment in favor of Ristovski and remand for further proceedings.

Taylor's Fraud

[14] Next, we address Maletta's argument that a genuine issue of material fact exists to preclude summary judgment in favor of Taylor. On appeal, Maletta argues that Taylor, through his emails to her in 2013 and 2014, "lulled [her] into believing she 'owned' the real estate equity, subject to repaying Ristovski." Appellant's Br. at 9. And she maintains that, by treating her like the owner of her house, Taylor prevented her from "inquiring about the equity she is owed." *Id.* at 21.

[15] But, other than the statute of limitations issue, which we resolve in her favor, Maletta does not explain how she was injured by Taylor's conduct. Further, while Maletta alleged in her verified complaint that Taylor was directly involved in the 2012 fraudulent loan agreement with Ristovski, the undisputed designated evidence shows that Taylor was not involved in that transaction. It was not until March 2013 that the Trust hired Taylor to be the listing agent for the sale of Maletta's house.

[16] "[A] party who is asserting actual fraud in a summary judgment proceeding must demonstrate a genuine issue of material fact as to each of the elements of actual fraud." *Abbott v. Bates*, 670 N.E.2d 916, 923 (Ind. Ct. App. 1996). Under Trial Rule 56(C), "a party opposing a summary judgment motion [must] designate each material issue of fact precluding summary judgment and the relevant evidence thereto." *Id.* Whether Taylor made the type of representation on which an action for fraud may be based, whether the representations were false, and whether Maletta justifiably relied on the representations to her

detriment are distinct factual issues which must be demonstrated by Maletta in order to defeat summary judgment. *See id.*

[17] Taylor argues that "[t]here are no set of circumstances that Maletta can prove to show that she detrimentally relied on a representation by Taylor that gave rise to an actionable injury[.]" Appellee Taylor's Br. at 23. Taylor asserts that

> Maletta admits the only time Taylor was materially involved in the transfer of the real estate was in 2013-2014, when he was the broker for the Trust. Any potentially actionable communications or representations between the two would have had to be exchanged during that time and would have had to induce Maletta to change her position based on her reliance on those communications. By 2013, though, Taylor did not and could not have done anything to induce Maletta to change her position because Maletta did not own the property. For argument's sake, even if Taylor had communicated something false to Maletta, it would not have mattered, because the Trust already owned the real estate.

Id.

[18] We agree with Taylor. While Maletta designated evidence showing that Taylor's communications with her, including instructing her to sign the amended listing agreement, may have misled her about whether she "owned" her house in 2013 and early 2014, Maletta could not have relied on anything Taylor said or did in falling for Ristovski's fraudulent plan to steal her equity,

which began in 2012 and concluded upon the sale to a third party in 2014.[8] Accordingly, Maletta has not shown a genuine issue of material fact to preclude summary judgment for Taylor on her fraud claim.

Conclusion

[19] Considering the evidence in the light most favorable to Maletta, as we are required to do in our review of the grant of summary judgment, in 2012, Ristovski instructed Maletta to transfer ownership of her house to the Trust. But Ristovski assured her that she would get her share of the equity out of the house upon the sale to a third party, which did not occur until March 14, 2014. It was not until that sale and Ristovski's refusal to pay Maletta her share of the equity in the house that Maletta learned she had been defrauded. Accordingly, her complaint was timely filed on March 9, 2020, and the trial court erred when it entered summary judgment for Ristovski. Maletta has not designated evidence, however, to show that she was injured by her reliance on communications with Taylor during 2013 and early 2014. Thus, we affirm the trial court's entry of summary judgment for Taylor.

[20] Affirmed in part, reversed in part, and remanded for further proceedings.

Vaidik, J., and Pyle, J., concur.

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[8] In an effort to show that her complaint was timely filed, Maletta argues that Taylor fraudulently concealed the plot to defraud her of her equity in the house. We do not address her fraudulent concealment allegation because we hold that her complaint was timely filed.