STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM P. HAMPTON, Receiver of COMMERCE MORTGAGE INVESTMENTS, LTD.,

Plaintiff-Appellant,

v

JAMES L. KARPEN, CARL TYSON, GERALD F. SHEPPARD, RONALD RUBACH, and FREDERICK HOFFECKER,

Defendants-Appellees.

UNPUBLISHED
November 12, 1996

No. 183200
LC No. 89-378335

Before: MacKenzie, P.J., and Jansen and T.R. Thomas*, JJ.

PER CURIAM.

Plaintiff, receiver for Commerce Mortgage Investments, Ltd. (CMI), brought this gross negligence claim against defendants, alleging that defendants failed to protect CMI from the securities fraud perpetrated by Diamond Mortgage Corporation and A.J. Obie and Associates. Defendants are the former deputy director of the securities bureau of the Michigan department of commerce, the former director of the bureau's enforcement division, investigators in the enforcement division, and the assistant attorney general in charge of the attorney general's consumer protection division. Plaintiff appeals as of right from an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10). We affirm.

CMI, Diamond, and Obie were an interrelated group of corporations controlled by Barton Greenberg. In 1973, Barton Greenberg and his brother, Sheldon Greenberg, formed Diamond which began doing business as a mortgage broker. Barton served as an officer, director, and at least a fifty percent shareholder of Diamond. Barton Greenberg also formed Obie, which acted as Diamond's securities broker and dealer, and served as that company's president and director. CMI was created by Greenberg in 1980, and shares in the company were also sold through Obie. Greenberg was also

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* Circuit judge, sitting on the Court of Appeals by assignment.

on CMI's board of directors. CMI commenced business in February 1981 as a real estate investment trust, pooling mortgages and then selling shares of the mortgage pool to Diamond customers.

On December 1, 1982, Diamond and CMI entered an automatic servicing agreement whereby Diamond agreed to service all of the mortgages in CMI's portfolio. The agreement further required Diamond to collect and pay CMI monthly payments of principal and interest. For the majority of time relative to this suit, CMI purchased most of its mortgages from Diamond or Commerce Mortgage Corporation (CMC), which was also owned and controlled by Barton Greenberg. CMC operated as a mortgage lender and broker which solicited, evaluated, approved, and closed mortgages.

The attorney general's office brought suit against Diamond/Obie in 1979, alleging that their operation violated the Michigan Consumer Protection Act. The enforcement division of the securities bureau also began an investigation of Diamond, culminating in the issuance of a consent order in 1981. The bureau continued to monitor Diamond to ensure its compliance with the consent order at least through 1982 and 1983. Diamond was placed in receivership and filed for bankruptcy in August, 1986.

Plaintiff's theory in this case, filed in October 1989, was that defendants' failure to seek the immediate closure of Diamond and Obie after they became aware of the fraudulent nature of the Diamond/Obie operation constituted gross negligence. Defendants asserted, and the trial court agreed, that plaintiff's claim was time-barred under MCL 600.5805(8); MSA 27A.5805(8), the three-year period of limitations for actions to recover damages for injury to persons or property, because the claim accrued no later than August 1986, when Diamond/Obie filed for bankruptcy.

On appeal, plaintiff asserts that the trial court relied upon the incorrect accrual date under the statute of limitations when it granted defendants' motion for summary disposition. This Court reviews a trial court's summary disposition order de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *G & A, Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994). Motions for summary disposition brought under MCR 2.116(C)(7) may be supported by affidavits, admissions, or other documentary evidence and, if submitted, must be considered by the court. *Home Ins Co v Detroit Fire Extinguisher Co*, 212 Mich App 522, 527; 538 NW2d 424 (1995). On appeal, this Court will take the well-pleaded allegations and the factual support submitted by the nonmoving party as true, and summary disposition is proper only if the moving party is then shown to be entitled to judgment as a matter of law. *Id.*, 527-528.

Because plaintiff's action is a tort-based gross negligence claim alleging financial injury, the three-year statute of limitations set forth at MCL 600.5805(8); MSA 27A.5805(8) controls. *Local 1064, RWDSU AFL-CIO v Ernst & Young*, 449 Mich 322, 327-328; 535 NW2d 187 (1995). MCL 600.5827; MSA 27A.5827, provides that "[t]he claim accrues at the time . . . the wrong upon which the claim is based was done regardless of the time when the damage results." In certain instances, courts will apply the "delayed discovery rule" in determining when a claim has accrued. See *Lemmerman v Fealk*, 449 Mich 56, 65-68; 534 NW2d 695 (1995). The delayed discovery rule provides that "the statute of limitations begins to run when the plaintiff discovers or, through the exercise of reasonable diligence, should have discovered a possible cause of action." *Moll v Abbott*

Laboratories, 444 Mich 1, 29; 506 NW2d 816 (1993). Although defendants concede that the discovery rule applies in this case, the matter is nonetheless time-barred because of plaintiff's delay in filing the action.

Plaintiff contends that he was not apprised of a possible cause of action until after he received information pursuant to his request under the Freedom of Information Act, MCL 15.231 *et seq.;* MSA 4.1801(1) *et seq.*, which led to the production of inculpating documents in September 1988. Nevertheless, like the trial court, we conclude that CMI should have known it had a potential cause of action by August 1986, the date Diamond was placed into receivership and filed for bankruptcy. CMC, the second source of CMI's mortgages, ceased doing business in late 1985 or early 1986. Therefore, the two sources of CMI's mortgages were either in receivership or bankrupt on or before August 6, 1986. As the trial court correctly held, plaintiff's claim accrued at the point Diamond or CMC ceased doing business. Even under the delayed discovery rule, CMI should have discovered a possible cause of action at that time. *Moll, supra*, p 29.

Additional evidence supports this conclusion. CMI, Diamond, Obie and CMC's interconnection strongly suggest that CMI should have known of a potential cause of action before the limitations period ran. Barton Greenberg owned Diamond, and he and his brother Sheldon Greenberg were the only shareholders of Diamond and Obie. Furthermore, Diamond, Obie and CMI shared the same attorney. Additionally, Diamond, Obie and CMC's offices were located across the hall from CMI, and their employees traveled freely between the offices. The trial court's decision to grant defendants' motion for summary disposition under MCR 2.116(C)(7) as a question of law is therefore affirmed.

Our disposition of the above issue makes it unnecessary to address plaintiff's remaining claims.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Kathleen Jansen
/s/ Terrence R. Thomas