IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL

TRACTUS CERTUS, LLC, ET. AL., Plaintiffs,	:	March Term 2016
v.	:	No. 2897
MALVERN FEDERAL SAVINGS BANK, ET.AL.: Defendants.	:	Commerce Program
	:	Control Nos. 17090063/17082806/ 17090714

ORDER

AND NOW, this 8th day of January, 2018, upon consideration of Defendants' Motions for Summary Judgment, Plaintiffs' response in opposition and all matters of record, and as explained in our attached Memorandum Opinion, it is hereby **ORDERED** and **DECREED:**

1. Defendants Plumer & Associates, Inc., Leon Aksman and Vivian Gilliam Motion for Summary Judgment is **Granted** and plaintiffs' case against them **is DISMISSED.**
2. Defendants Chicago Title Insurance Company, Fidelity National Financial, Inc. and Fidelity National Title Group, Inc.'s Partial Motion for Summary Judgment is **Granted** and plaintiffs' tort claims and statutory bad faith claims against these defendants are **DISMISSED** because they are barred by the statute of limitations.
3. Defendants Coldwell Banker Preferred, NRT LLC, Vincent Tagliente's Motion for Summary Judgment is **Granted in part** and the plaintiffs' tort claims against these defendants are **DISMISSED** since they are barred by the statute of limitations. As related to plaintiffs' contract claims, these defendants' Motion for Summary Judgment is **Denied** because genuine issues of material fact remain.

BY THE COURT

Tractus Certus, Llc Eta-ORDOP

RAMY I. DJERASSI, J.

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OPINION

This action arises from the sale of land in the City of Philadelphia. Presently before the court are defendants' motions for summary judgment.[1] For the reasons discussed below, the motions for summary judgment are granted in part and denied in part.

Factual Background

Plaintiffs are Tractus Certus, LLC ("Tractus") and Brian Rago ("Rago"). Rago is the sole member and president of Tractus. On July 5, 2012, Tractus offered to purchase 1231 Bainbridge Street in Philadelphia from defendant Malvern Federal Bank. Tractus and Rago believed that 1231 Bainbridge Street consisted of two parcels of land, 1231 Bainbridge Street and 1236 Kater Street.[2] In the transaction, plaintiffs were represented by defendants Coldwell Banker Preferred, NRT LLC and Vincent Tagliente, an independent sales associates ("Coldwell defendants").

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[1] The motions were filed by Defendants Chicago Title Insurance Company, Fidelity National Financial, Inc. and Fidelity National Title Group, Inc., Defendants Coldwell Banker Preferred, NRT, LLC and Vincent Tagliente and Plumer & Associates, Inc., Leon Askman, and Vivian Gilliam, respectively. Defendants Chicago Title Insurance Company, Fidelity National Financial, Inc. and Fidelity National Title Group, Inc. ("Title Insurance defendants") titled their motion as "Judgment on the Pleadings, or Partial Motion for Summary Judgment, on Counts XI, XII, XIII and XV of the Complaint." At this stage of the litigation, Title Company defendants' motion is treated here as a motion for partial summary judgment.

[2] In their Complaint, plaintiffs aver that both parcels were in common ownership but were severed by Mary Jalilvand when she sold the 1231 Bainbridge lot to Land Holdings, who sold it to Malvern Federal Savings, who then sold it to Tractus. During the time these 1231 Bainbridge transactions were taking place, Jalilvand maintained ownership of the 1236 Kater Street lot.

Defendant Malvern Federal Bank was represented by defendants Plumer & Associates, Inc. and Lean Askman and Vivian Gilliam ("Plumer defendants"), the designated agents/licensees in the transaction. Defendant Chicago Title Ins. Co. insured the title for the property.[3] Plaintiffs allege that the defendants represented that Malvern Federal Bank owned all of the building and property of 1231 Bainbridge and that 1231 Bainbridge was referred to as a single lot with square footage of 21'2" wide by 120' in depth. Plaintiffs intended to use 1231 Bainbridge as a martial arts jiu-jitsu academy and two apartments, one of which Rago was going to use as his residence.

Malvern Federal Bank accepted Tractus' offer and on July 17, 2012, Tractus closed on the property. On August 31, 2012, the deed transferring the property from Malvern Federal Bank to Tractus was filed in the office for the Recorder of Deeds. Plaintiffs believed that Tractus purchased 1231 Bainbridge Street and 1236 Kater Street because the structure on the property was situated on two lots, 1231 Bainbridge Street and 1236 Kater Street.

In October 2013, plaintiffs were informed by their architect that the deed did not include the 1236 Kater Street lot. Thereafter, plaintiffs contacted the title agent and title underwriter for clarification and was informed that Tractus did not own the Kater street property. On November 5, 2013, during construction, Tractus was put on notice of an encroachment claim by Mary Jalilvand, the owner of 1236 Kater Street. In November, 2013, plaintiffs retained counsel to represent them in connection with the encroachment claim made by the adjoining neighbor on Kater Street property. On November 25, 2013, plaintiffs' counsel, the Padova Firm, LLC, sent a letter to the Coldwell defendants and the Plumer defendants stating:

> Please be advised that I represent Tractus Certus, LLC. There appears to be an issue regarding the Company's Title and Ownership interest in the above property. Brian Rago, of Tractus Certus, LLC, was placed on notice that the

[3] In addition to Chicago Title, plaintiffs also sued Fidelity National Title Group, Inc. and Fidelity National Financial, Inc. These defendants are collectively the "Title Company" defendants.

> building that he purchased is encroaching upon 1236 Kater Street, the property directly behind 1231 Bainbridge Street. From your representation from the dimensions and square footage of the property, Mr. Rago was under the impression that his purchase of 1231 Bainbridge Street, along with the building on the property, included the footprint or square footage which has now come to light as 1236 Kater Street. [4]

On November 26, 2013, plaintiffs' counsel also forwarded a letter to the Title Company defendants putting them on notice of a claim. The letter provides in pertinent part as follows:

> There is a dispute regarding the Title and ownership of 1231 Bainbridge Street, Philadelphia, PA. Accordingly, this letter serves to put you on notice of a claim that has been asserted against the company for encroachment of the building that the company purchased at 1231 Bainbridge Street, Philadelphia, PA, encroaching upon the property behind the Bainbridge property, known as 1236 Kater Street, Philadelphia, PA. I am enclosing a copy of the letter from Deborah Cianfrani, Esquire, regarding the encroachment issue. Please provide a defense and coverage pursuant to the Title Insurance Policy. [5]

On January 9, 2014, the Title Company defendants denied plaintiffs' claim against the title insurance policy and refused to defend plaintiffs and provide coverage for Ms. Jalilvand's encroachment claim. On February 11, 2014, plaintiffs' counsel and counsel for Jalilvand agreed that she would sell 1236 Kater Street to plaintiff for $25,000. The property was conveyed on March 11, 2014 by special warranty deed to Tractus.

On March 29, 2016, plaintiffs commenced this action against the Coldwell defendants, the Plumer defendants and the Title Company defendants and other defendants by writ of summons. A complaint was filed on June 16, 2016.

Procedural History

I. Coldwell Defendants.

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[4] Title Company defendants' Motion for Summary Judgment Exhibit "6" –letters dated November 25, 2013 to Coldwell defendants and Plumer defendants.

[5] Exhibit "1" to Title Company defendants 'partial motion for summary judgment – Exhibit "O" – letter dated November 26, 2013 to Title Company defendants from plaintiffs' counsel.

Against the Coldwell defendants', plaintiffs asserted claims for breach of contract, breach of implied contract, breach of fiduciary duty, negligence, fraudulent misrepresentation, negligent misrepresentation and violation of the Unfair Trade Practices & Consumer Protection Law ("UTPCPL"). On July 6, 2016, the Coldwell defendants filed preliminary objections. On July 28, 2016, plaintiffs filed preliminary objections to Coldwell defendants' preliminary objections because the statute of limitations was raised. On November 8, 2016, this court sustained Coldwell defendants' preliminary objections in part and dismissed plaintiffs' claim against Coldwell claiming violation of the UTPCPL. This included attorneys' fees claims under the UTPCPL as to both defendant Coldwell Banker Real Estate, LLC and defendant Realogy Holdings Corporation.

This court also sustained plaintiffs' preliminary objections to preliminary objections and ruled that plaintiffs response to defendants' statute of limitations defensed remain available but at a later pre-trial stage after conclusion of discovery.

After dismissal of the UTPCPL claims against them at preliminary objection, the Coldwell defendants now move for summary judgment on all of plaintiffs' remaining tort claims and contract claims against them.

II. Plumer & Associates

Against the Plumer defendants, plaintiffs alleged claims for negligence, fraud in the inducement and fraudulent misrepresentation, negligent misrepresentation and violation of the UTPCPL. The Plumber defendants now move for summary judgment arguing that plaintiffs' tort claims are barred by the applicable statute of limitations, that the claim for violation of the UTPCPL is improper since the transaction was not for family, personal or household services

and that the release language contained within the agreement of sale barred any claims against defendants.

III. Title Company Defendants

Against the Title Company defendants, plaintiffs alleged claims for breach of contract, breach of fiduciary duty, negligence, fraud, negligent misrepresentation, violations of the UTPCPL, statutory bad faith under 42 Pa. C. S. § 8371 and common law bad faith. The Title Company defendants filed preliminary objection which included dismissing the tort claims based on the statute of limitations. Plaintiffs filed preliminary objections to preliminary objections. The court sustained plaintiffs' preliminary objections to defendants' preliminary objections based on the statute of limitations defense. The court also sustained defendants' preliminary objections in part and dismissed the claims for breach of fiduciary duty, violation of the UTPCPL and common law bad faith. Additionally, the court dismissed the claim for breach of contract which was brought by plaintiff Rago individually. Title Company defendants now move for partial summary judgment seeking to dismiss the tort claims and the claim for statutory bad faith based on the statute of limitations.[6]

Regarding statute of limitations issues, both plaintiffs and defendants legal positions are now ripe, and we address statute of limitations as well as other matters here.

[6]Title Company defendants have not moved for summary judgment on Tractus' breach of contract claims.

DISCUSSION

A. The tort claims of negligence, negligent misrepresentation, fraud and breach of fiduciary duty against the Coldwell defendants, the Plumer defendants and the Title Company defendants are barred by the applicable statute of limitations.

In Pennsylvania, tort claims for intentional conduct, negligence, and conduct based in fraud are subject to a two-year statute of limitations. 42 Pa.C.S.A. § 5524 states, in pertinent part as follows:

> "The following actions and proceedings must be commenced within two years:... [and] any other action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct or any other action or proceeding sounding in trespass, including deceit or fraud." [7]

The statute begins to run "as soon as the right to institute and maintain a suit arises; lack of knowledge, mistake or misunderstanding do not toll the running of the statute of limitations."[8] A person asserting a claim "is under a duty to use all reasonable diligence to be properly informed of the facts and circumstances upon which a potential right of recovery is based and to institute suit within the prescribed statutory period."[9] Once the prescribed statutory period has expired, the party is barred from bringing suit unless it is established that an exception to the general rule applies which acts to toll the running of the statute. The "discovery rule" is such an exception, and arises from the inability of the injured, despite the exercise of due diligence, to know of the injury or its cause. The salient point giving rise to the equitable application of the exception of

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[7] *Baselice v. Franciscan Friars Assumption BVM Province, Inc.*, 879 A.2d 270, 275 (Pa.Super. 2005), citing 42 Pa.C.S.A. § 5524 (7).

[8] *Id.*, citing *Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc.*, 503 Pa. 80, 468 A.2d 468, 471 (1983).

[9] *Baselice, supra.*

the discovery rule is the inability, despite the exercise of diligence by the plaintiff, to know of the injury. [10]

Here, plaintiffs' claims for negligence, negligent misrepresentation, fraud and breach of fiduciary duty, which are governed by the two year statute of limitations, are time barred. Tractus purchased the property in July 2012 with the belief that he purchased two lots 1231 Bainbridge Street and 1236 Kater Street.[11] According to the record, plaintiffs maintained this belief until October 2013 when they were informed by an architect they retained that a discrepancy existed on what they believed to be the size of the lot they purchased and the deed filed. Rago testified as follows:

> Q. How did you first discover that the deed that you received from Malvern Bank only included a 60-foot deep lot that was known as 1231 Bainbridge Street and not the lot that's known as 1236 Kater Street?
>
> A. Well, an architect was investigating the code.
>
> Q. Who is the architect?
> A. Isa Toner. And while he was doing his basis research, he discovered something in one of the documents. I don't know if it was the deed. I forget exactly, but he was looking through...a lot of material, and he sent an e-mail to the contractor and then the contractor shared the e-mail with me which said "I think we have a problem. We can't account for the full space, the 120 feet. It looks like it's –we only have 21 x 60" or I think to be exact 21'2" x 60. So I thought it was a typo, clearly, and that began the whole, the whole business of discovering what happened and what the state of affairs was.
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> Q. When was this?
>
> A. Let's see 2000-I think it was October-early October 2013.[12]

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[10] *Pocono Intern. Raceway, Inc. v. Pocono Produce, Inc.*, 503 Pa. 80, 85, 468 A.2d 468, 471 (1983).

[11] The deed filed with the City of Philadelphia Recorder of Deeds identifies the property owned by Tractus as being on one lot, 1231 Bainbridge Street, 21' x 60'.

[12] Plumer defendants' Motion for Summary Judgment Exhibit 190a p. 61-62.

From this testimony it is clear that in October 2013 plaintiffs were put on inquiry notice that 1231 Bainbridge Street may not be as large as they originally believed.[13] It is also clear, that on November 5, 2013, any questions regarding the size of the 1231 Bainbridge Street lot and what plaintiffs thought they purchased from Malvern Federal Bank were resolved when plaintiffs received a letter from the owner of the Kater Street lot, Mary Jalilvand, informing plaintiffs that they were encroaching upon her land. Upon receipt of the letter, plaintiffs retained counsel who put the Coldwell defendants and the Plumer defendants on notice that their "representation of the dimension and square footage of the property" was incorrect and requested defendants to contact the appropriate insurance carrier. [14] Moreover, on November 26, 2013, plaintiffs through counsel, also put the Title Company defendants on notice and also sought a defense under the Title policy. Based on the foregoing, plaintiffs are unable to escape the fact that they knew as early as October 2013 and as late as November 26, 2013 that they were harmed and knew the cause of their harm. As such, plaintiffs had two years from November 26, 2013 to file their tort claims against defendants, i.e. November 26, 2015. Plaintiffs commenced this action on March 29, 2016, four months after the limitations period expired. Hence, plaintiffs' tort claims are time barred.[15]

In an attempt to overcome the statute of limitations bar, plaintiffs, relying upon Rago's affidavit, argue that the statute of limitations began to run in November 2014 when Tractus

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[13] As noted by the Plumer defendants, the filing of the deed at the time of closing should have alerted plaintiffs that there was an error in dimension and square footage of the property purchased. Giving plaintiffs the benefit of the doubt, the facts here are also analyzed under the discovery rule exception.

[14] See, Title Company defendants' Motion for Summary Judgment Exhibit "6" –letters dated November 25, 2013 to Coldwell defendants and Plumer defendants.

[15] Even assuming *arguendo* that plaintiffs did not discover their harm until March 12, 2014, the date, they purchased the Kater Street lot, their claim is also time barred since this action was not commenced until March 29, 2016, more than two years later.

spoke to an attorney and became aware that defendants could be found negligent. According to plaintiffs, Tractus was only aware that the encroachment claim was a boundary line dispute that should be covered by the title insurance policy. This affidavit contradicts the record evidence, is self-serving and does not apply the law properly. [16] The commencement of the limitations period is grounded on "inquiry notice" that is tied to "actual or constructive knowledge of at least some form of significant harm and of a factual cause linked to another's conduct, without the necessity of notice of the full extent of the injury, the fact of actual negligence, or precise cause." [17] The discovery rule operates to balance the rights of diligent, injured plaintiffs against the interests of defendants in being free from stale claims, in furtherance of salient legislative objectives. The *sine qua non* of the factual inquiry into the applicability of the discovery rule in any given case is the determination whether, during the limitations period, the plaintiff was able, through the exercise of reasonable diligence, to know that he or she had been injured and by what cause. There are very few facts which diligence cannot discover, but there must be some reason to awaken inquiry and direct diligence in the channel in which it would be successful.[18]

Here, plaintiffs were placed on inquiry notice in October 2013 when the architect they retained informed Rago of a problem with the lot size. They knew or should have known as late as November 26, 2013 that they were injured and the cause of their injury. The letters from plaintiffs' counsel to the Plumer defendants, the Coldwell defendants and the Title Company

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[16]The "affidavit ... strains the chords of credibility" as it appears to totally contradict Rago's deposition testimony. *Stephens v. Paris Cleaners, Inc.*, 885 A.2d 59, 65 (Pa. Super. 2005). *See also, Gruenwald v. Advanced Computer Applications, Inc.*, 730 A.2d 1004, 1009 (Pa.Super.1999) (a trial court may disregard an affidavit, sworn in response to a motion for summary judgment, when it directly contradicts a fact, such as the minutes of a meeting, and the court therefore finds it not wholly credible).

[17] *Gleason v. Borough of Moosic*, 609 Pa. 353, 362, 15 A.3d 479, 484–85 (2011).

[18] *Gleason, supra.*

defendants dated November 25 and 26, 2013, respectively, is evidence of plaintiffs' knowledge. The clock for statute of limitation purposes does not begin to run, contrary to plaintiffs' assertion, once all the theories of liability are known and all the damages are calculated.[19] Once plaintiffs knew they were injured and that defendants were the cause of the injury, the clock began.[20] Based on the foregoing, defendants' motions for summary judgment are granted as it pertains to the statute of limitations defense and the torts claims are dismissed as barred by the statute of limitations.[21]

B. The UTPCPL is not applicable under the circumstances in this case.

The UTPCPL is Pennsylvania's consumer protection law which protects against [u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce...." [22] The purpose of the UTPCPL is to protect the public from unfair or deceptive business practices.[23] In order for a private individual to bring a cause of action, that individual must first establish the following: 1) that he or she is a purchaser or lessee; 2) that the transaction is dealing with "goods or services"; 3) that the good or service was *primarily* for personal, family, or household purposes; and 4) that he or she suffered damages arising from the purchase

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[19] *See Adamski v. Allstate Ins. Co.*, 738 A.2d.1033, 1041-42 (1999).

[20] Plaintiffs reliance upon *Kramer v. Dunn*, 749A.2d 984 (2000) is misplaced since legitimate question of fact existed in *Kramer* as to when it was reasonable for them to realize that White's claim was serious. The Kramer's lived on the property for eight years before White made the claim and the claim was made after the Kramer's dog bit White. In *Kramer*, on the one hand, it was quite reasonable for plaintiff not to take White's claim seriously for reasons explained in the court opinion. Here on the other hand, plaintiffs retained counsel and forwarded letters to defendants putting them on notice of a potential claim against them. There are no genuine issues of facts relevant to the legal question whether it was reasonable for plaintiffs to discover their harm and damages.

[21] Since the statute of limitations bars plaintiffs' tort claims, the court need not address defendants' argument regarding the release language contained within Agreement of Sale for 1231 Bainbridge Street.

[22] 73 P.S. § 201–3.

[23] *Agliori v. Metropolitan Life Ins. Co.*, 879 A.2d 315, 318 (Pa.Super.2005).

or lease of goods or services.[24] Here, the sale of 1231 Bainbridge Street to corporate plaintiff Tractus is alleged to have been sold *primarily* for personal, family or household purposes. The sale was, however, a commercial transaction for a commercial purpose—namely to open a martial arts jiu-jitsu academy along with an apartment for rental. We conclude the apartment alleged to have been intended as a residence for plaintiff Brian Rago was not the primary purpose of the transaction to corporate entity Tractus involving 1231 Bainbridge Street.

Accordingly, defendant Plumer's summary judgment motion against plaintiffs' UTPCPL claim is granted.

C. **The statutory bad faith claim against the Title Company defendants is barred by the statute of limitations.**

The complaint alleged a claim for statutory bad faith pursuant to 42 Pa.C.S. § 5524 against the Title Company defendants only. A bad-faith claim under § 8371 is subject to a two-year statute of limitations.[25] The limitations period begins to run on the date on which the defendant insurance company first denies the insured's claim in bad faith. In the case at hand, the Title Company defendants denied coverage for plaintiffs' claim on January 9, 2014. Therefore, in order to bring a timely bad faith claim, plaintiffs would have had to initiate this action by January 9, 2016, two years from the date the Title Company defendants denied plaintiffs a defense under the title insurance policy. This action was commenced on March 29, 2016, two months after the statute of limitations expired. Based on the forgoing, the statutory bad faith claim is dismissed as barred by the statute of limitations.

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[24] *Fazio v. Guardian Life Ins. Co. of America*, 62 A.3d 396, 409 (Pa.Super.2012).

[25] *See Ash v. Continental*, 593 Pa. 523, 932 A.2d 877, 885 (Pa.2007); *Adamski v. Allstate Ins. Co.*, 738 A.2d 1033, 1036 (Pa.Super.1999).

D. Genuine issues of material fact exist as to whether a contract existed between plaintiffs and the Coldwell defendants and, if so, whether the Coldwell defendants breached.

In their Complaint, plaintiffs claim both breach of contract and breach of implied contract. Specifically, they allege that as part of a contractual relationship, the Coldwell defendants promised to act in plaintiffs' best interests as their real estate representative relating to the purchase of property at issue in this case. Plaintiffs allege the Coldwell defendants breached their promise by failing to represent them effectively as contracted. Plaintiffs claim they were harmed financially by needing to pay additional sums to complete its purchase of the land needed for its development project and by many other costs associated with Coldwell's breach.

The Coldwell defendants argue that summary judgment should be granted because plaintiffs failed to produce a written contract setting forth the terms and conditions of Coldwell's alleged contractual obligations and therefore there can be no breach. Genuine issues of material fact exist as to whether a contract exists and, if so, whether such contract was breached. Accordingly, summary judgment is denied as to contract claims.

CONCLUSION

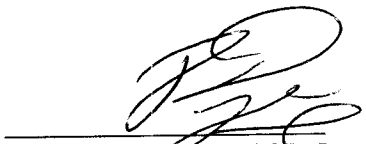
For reasons explained here, defendants' motions for summary judgment are granted in part and denied in part as follows:

1. Defendants Plumer & Associates, Inc., Leon Aksman and Vivian Gilliam Motion for Summary Judgment is **Granted** and plaintiffs' case against them **is DISMISSED.**
2. Defendants Chicago Title Insurance Company, Fidelity National Financial, Inc. and Fidelity National Title Group, Inc.'s Partial Motion for Summary Judgment is **Granted** and plaintiffs' tort

claims and statutory bad faith claims against these defendants are **DISMISSED** because they are barred by the statute of limitations.

3. Defendants Coldwell Banker Preferred, NRT LLC, Vincent Tagliente's Motion for Summary Judgment is **Granted in part** and the plaintiffs' tort claims against these defendants are **DISMISSED** since they are barred by the statute of limitations. As related to plaintiffs' contract claims, these defendants' Motion for Summary Judgment is **Denied** because genuine issues of material fact remain.

BY THE COURT,



RAMY I. DJERASSI, J.