

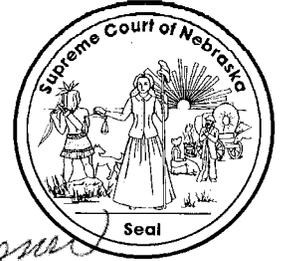
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1 Memo Opinion

Date
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Court of Appeals No: A-19-0349
Caption: Long v. Warneke
Trial Court: Buffalo County District Court
Trial Court No: CI18-638



IN TESTIMONY WHEREOF, I have placed my signature and seal of said court.

Date: December 2, 2019 BY THE COURT: Wendy A. Wussow
CLERK

IN THE NEBRASKA COURT OF APPEALS

NEBRASKA SUPREME COURT
COURT APPEALS

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PERMANENT PUBLICATION AND MAY NOT BE CITED
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Suzette L. Long,)
)
Appellant,)
)
v.)
)
Lon P. Warneke and Katherine)
Warneke, individually and as)
trustees of the 1992 Warneke)
Family Trust,)
)
Appellees.)

No. A-19-349

**MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL**

MOORE, Chief Judge, and BISHOP and ARTERBURN, Judges.

MOORE, Chief Judge.

INTRODUCTION

Suzette Long appeals from an order of the District Court of Buffalo County dismissing her amended complaint seeking a constructive trust on real property on the basis that the action was barred by the statute of limitations. We affirm.

BACKGROUND

In 1994, Long was divorced from her husband, and she was awarded the couple's home located in Kearney, Nebraska (the property). This award was subject to a judgment of \$27,900 in favor of Long's ex-husband, along with payment of the existing mortgage on the property. Long borrowed money against the property to pay



off the judgment to her husband, but eventually became unemployed which resulted in financial difficulty. In 2006, Long was sued by the attorneys who handled her divorce, which resulted in a judgment in favor of the attorneys for an amount of \$4,253.31. Shortly thereafter, Long was also sued by KLM Retirement in relation to a tax sale certificate against the property.

Long confided in a high school friend, Katherine Werneke, about her financial difficulties. Katherine and her husband (the Wernekes) agreed to assist Long by purchasing the property to extinguish Long's debt. The Wernekes agreed to allow Long to live on the property as a tenant.

On November 21, 2006, the parties entered in a Purchase Agreement wherein the Wernekes agreed to purchase the property from Long for \$71,000. According to a Buyer's Settlement Statement, the \$71,000 purchase price included \$18,200 for Long to use as a rent and repair allowance. This information was also included in a Seller's Closing Statement. On the same date, Long executed a Joint Tenancy Warranty Deed transferring the property to the Wernekes. The deed was publicly recorded by the Buffalo County Register of Deeds on November 22, 2006.

In addition, on November 21, 2006, Long and the Wernekes executed a residential lease. This residential lease let the property to Long, naming the Wernekes as the landlords and Long as

the tenant. Long was to pay the Wernekes \$6,200 annually under the lease. Included in the lease was a provision that the Wernekes had the full right to regain possession in the event that Long breached the lease.

On December 31, 2007, the parties executed a Purchase Option Agreement. This agreement granted Long the option to purchase the property from the Wernekes for an agreed-upon price. The Purchase Option Agreement required Long to notify the Wernekes by certified mail by December 31, 2016 to exercise the option to purchase.

Long alleged that the Wernekes did not discuss with her how they would help her financially; rather, they asked her to meet them at a realtor's office to sign papers. Long alleged she signed whatever papers the realtor placed in front of her, and she did not understand, nor was she told, that she was signing away title to the property. Long alleged that she assumed she was simply giving the Wernekes a lien against the property in exchange for a loan. Long also alleged that she did not receive any paperwork other than the Seller's Closing Statement.

Long contended that the agreement she entered into with the Wernekes in 2006 was that they would loan her the amount necessary to pay off her debt against the house and make \$18,000 available for potential future repairs to the house. She alleged that the

total amount agreed to was \$71,000. Long alleged that she agreed to pay a monthly sum of \$625 until the loan was paid off.

Long received a 30-day Notice to Terminate at the end of September 2018 and was ordered to vacate the property by October 31, 2018. On November 6, 2018 Long filed a complaint, containing the allegations noted above, and requesting that the district court impose a constructive trust granting Long a life estate in the property, and further asking for an accounting. Subsequently, on January 23, 2019, Long filed an Amended Complaint requesting that the district court impose a constructive trust granting Long full ownership instead of a life estate. Long also requested an accounting and that the Wernekes refund payments made over "a fair and reasonable amount to repay [the Wernekes] for the loan provided to [Long]." Long alleged that the Wernekes unjustly enriched themselves by taking advantage of Long and abusing an influential and confidential relationship.

The Wernekes filed a Motion to Dismiss the Amended Complaint on January 28, 2019 for failure to state a claim for relief which can be granted. The district court held a hearing on the motion on February 26. At the hearing, the Wernekes offered into evidence affidavits from both Katherine and her husband with attached exhibits. Long objected to the introduction of the affidavits, claiming the affidavits were not timely served and contained

hearsay. The district court accepted the affidavits of the Wernekes into evidence, along with the attached exhibits. The Wernekes' affidavit and the exhibits contain the information set forth above regarding the transactions. In addition, the affidavits state that at no time did either of the Wernekes make any affirmations indicating that they were not the owners of the property or that Long had any interest in the property. On March 3, Long's attorney filed a "Response to Defendants' Motion for Summary Judgment", containing legal argument, but Long did not submit any evidence.

On March 13, 2019, the district court granted summary judgment in favor of the Wernekes. The district court noted that it treated Wernekes' motion to dismiss as a motion for summary judgment pursuant to Rule 6-1112(b) and that Long was given an opportunity to present material pertinent to the motion. The district court concluded that Long's claims were barred by the ten-year statute of limitations under Neb. Rev. Stat. §25-202 (Reissue 2016). Although the Wernekes' affidavits stated that the parties executed the Purchase Option Agreement on December 31, 2017, the district court stated, after viewing the Purchase Option Agreement (dated December 31, 2007), that "it appears that 2017 is a typographical error [in the affidavits] and the document was executed December 31, 2007." Based on the records, the district court found that Long signed documents on both November 21, 2006 and December 31,

2007 that sufficiently notified her that she conveyed full title of the property to the Wernekes. Thus, the district court found no issues of material fact regarding Long's execution of the sale documents. The court further found that Long failed to produce contrary evidence showing the existence of a material fact which would toll the statute of limitations. The court dismissed Long's Amended Complaint.

ASSIGNMENTS OF ERROR

Restated, Long assigns that the district court erred in: (1) granting the Wernekes' motion for summary judgment; (2) determining that a provision in the written agreements of the party was a typographical error; (3) failing to consider Long's Amended Complaint; and (4) overruling Long's objection to the admission of the Wernekes' Exhibits 1 and 2.

Long only argued the first assigned error in her brief submitted to this Court and did not separately argue the three remaining assignments of error. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court. *Pierce v. Landmark Mgmt. Group, Inc.*, 293 Neb. 890, 880 N.W.2d 885 (2016); Neb. Ct. R. App. P. § 2-109(D)(1)(e). Because Long did not argue the three remaining assignments of error, we will not discuss those assigned errors further.

STANDARD OF REVIEW

An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *JB & Assocs. v. Nebraska Cancer Coalition*, 303 Neb. 855, 932 N.W.2d 71 (2019). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

The district court found that Long's claims were barred by the ten-year statute of limitations set forth in Neb. Rev. Stat. § 25-202(1) (Reissue 2008), which provides that "[a]n action for the recovery of the title or possession of lands, tenements, or hereditaments . . . can only be brought within ten years after the cause of action accrues."

The district court found that the statute of limitations began to run on November 21, 2006 when Long conveyed title to the Wernekes, without limitation. Long argues that she did not know that the Wernekes had the ability or intention to evict Long from the property until September 2018, when she received the eviction

notice from the Wernekes, and thus, the running of the statute of limitations should be tolled.

Both parties cite to case law regarding the application of the statute of limitations in actions seeking a constructive trust. In *Wait v. Cornette*, the Supreme Court of Nebraska stated that:

[i]n the case of a constructive or implied trust . . . the statute begins to run in favor of the party chargeable as trustee as soon as the trust relation is created, or from the time when the wrong is done by which the trustee becomes chargeable, or the time when the beneficiary knew or ought to have known thereof and can assert his or her rights.

259 Neb. 850, 612 N.W.2d 905 (2000). In *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002), the Court stated that "[t]he statute of limitations does not begin to run against the rights of the beneficiary of a constructive trust until he or she is apprised of the fact that the trustee does not intend to carry out the provisions of the trust." The "knew or ought to have known" exception is similar to the "discovery exception" in fraud actions, which tolls the statute of limitations to the point where the fraud was or could have been discovered. See *Kalkowski v. Nebraska Nat. Trails Museum Found.*, 20 Neb. App. 541, 826 N.W.2d 589 (2013). "The discovery of facts must be sufficient to put a person of

ordinary intelligence and prudence on inquiry which, if diligently exercised, would lead to such discovery." *Kalkowski, supra*.

The question in this case is whether the statute of limitations should have begun to run on November 21, 2006, or whether there is any evidence to support its tolling. With regard to any tolling of the statute, we must examine when Long knew or should have known that she conveyed title to the Wernekes and that they had the ability to evict her from the premises under the lease. The documents signed by both Long and the Wernekes on November 21, 2006 plainly show that the Wernekes were purchasing the property - not solely taking an interest in the property. Although Long claims that she did not receive copies of most of the documents signed on November 21, 2006, she does admit that she received a document that was titled "Seller's Closing Statement." This document clearly shows that Long was the "Seller" and that the sale price of the property was \$71,000. Even viewing the evidence in the light most favorable to Long, a person with ordinary intelligence would have likely noticed words such as "seller" and "sale," and realized that the transaction in question was not simply creating a loan or a lien on the property.

Further, Long signed the purchase documents and cannot avoid the effects of doing so. Although Long claims she did not read the documents and signed whatever the agent presented, this does not

negate the effect of Long's signature. One who signs an instrument without reading it, when one can read and has had the opportunity to do so, cannot avoid the effect of one's signature merely because one was not informed of the contents of the instrument. *Cullinane v. Beverly Enters.-Neb.*, 300 Neb. 210, 912 N.W.2d 774 (2018).

Finally, Long did not adduce any evidence to support her claim that she did not understand the documents she was executing in November 2006 or that the Wernekes took advantage of her when she was vulnerable and abused an influential and confidential relationship. And, Long did not allege or adduce evidence that she did not understand the Purchase Option Agreement executed by the parties on December 31, 2007. The party moving for summary judgment must produce evidence sufficient to demonstrate that the movant would be entitled to judgment as matter of law, if the evidence were uncontroverted at trial. *Roskop Dairy v. GEA Farm Tech.*, 292 Neb. 148, 169, 871 N.W.2d 776, 793 (2015). Once the movant has established its prima facie case, the burden shifts to the opposing party to present admissible and contradictory evidence showing an issue of material fact that prevents a judgment as a matter of law for the moving party. *Id.*

We conclude that there was no genuine issue of material fact that the statute of limitations began to run on November 21, 2006 when Long signed the documents selling and conveying the property

to the Wernekes. Long's complaint was not filed until November 6, 2018 and thus her claims are time barred pursuant to § 25-202. The district court did not err in granting summary judgment in favor of the Wernekes.

CONCLUSION

We conclude that the district court did not err in granting summary judgment in favor of the Wernekes, finding that Long's claims were time barred by the statute of limitations pursuant to Neb. Rev. Stat. § 25-202. We affirm the judgment of the district court.

AFFIRMED.