IN THE SUPREME COURT OF
IOWA No. 18-1966
Polk County No. LACL141251

BENSKIN, INC.,

Plaintiff-Appellant,

v.

WEST BANK,

Defendant-Appellee.

ON APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY, HONORABLE SAMANTHA GRONEWALD, PRESIDING

BRIEF OF THE APPELLEE

/s/ Dennis P. Ogden
Thomas L. Flynn AT0002596
Dennis P. Ogden AT0005838
BRICK GENTRY, P.C.
6701 Westown Pkwy, Ste. 100
West Des Moines, IA 50266
Telephone: (515) 271-5912
Facsimile: (515) 274-1488
E-mail: tom.flynn@brickgentrylaw.com
E-mail: dennis.ogden@brickgentrylaw.com

ATTORNEYS FOR THE APPELLEE

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ROUTING STATEMENT

Appellee, West Bank ("West Bank"), requests the court to retain the case under Iowa Rule of Appellate Procedure 6.1101(2)(c) (raises substantial issues of first impression) and/or 6.1101(2)(f) (presents substantial questions of enunciating legal principles). The case deals particularly with issues relating to the application of Iowa Code § 524.221(2) and the element of publication under a claim of slander of title that have not been ruled on by this Court.

STATEMENT OF THE CASE

Benskin filed its petition in the underlying action on May 18, 2018. (App. 10). The original petition was in three counts and included only breach of contract claims. (App. 10-13). On June 7, 2018, West Bank moved to dismiss the petition in its entirety for failure to state a claim upon which relief can be granted, arguing that Benskin's claims were not timely and were barred by the statute of limitations set forth in Iowa Code §524.221(2). (App. 15-17).

In an effort to salvage its action, on July 2, 2018, Benskin filed an Amended and Substituted Petition ("A&S Petition") that restated the factual allegations of the original petition, added legal conclusions to Counts I-III of the petition and added additional claims, set forth in Counts IV (Fraud) and V

(Slander of Title). (App. 25-31). Due to the filing of the A&S Petition, on July 6, 2018, West Bank withdrew its original motion to dismiss. (App. 33). On July 16, 2018, West Bank moved to dismiss the A&S Petition. (App. 35-37).

Benskin's effort to revise its petition to survive a motion to dismiss was unavailing. (App. 71-81). Benskin's claims brought forward from its original petition still were barred by the applicable statute of limitations and it is obvious from a review of the allegations of the A&S Petition, accepted as true, that Benskin's claims are either barred by the applicable statute of limitations or deficient on the alleged facts. Benskin's A&S Petition, on its face, shows no right of recovery against West Bank under any conceivable set of facts pertaining to Benskin's claims. The trial court properly dismissed Benskin's A&S Petition.

STATEMENT OF THE FACTS

The facts, taken from Benskin's A&S Petition, are as follows:

First Breach – Failure to Release Mortgages

The A&S Petition alleges that Benskin entered into a written line of credit with West Bank on or about October 24, 2007. (App. 26 ¶ 6). Benskin states that the 2007 line of credit was set forth in a written promissory note dated October 24, 2007 and was secured by loan guarantees and real estate mortgages covering properties owned by Benskin in Dickinson County and Polk County, Iowa.

(App. 26 ¶ 7). Benskin states that the 2007 promissory note and 2007 mortgages matured on May 30, 2008 and, as of that date, West Bank was obligated to release the 2007 mortgages. (App. 26 ¶ 9). Benskin alleges that West Bank failed and refused to release the 2007 mortgages despite its obligation to do so as of May 30, 2008. (App. 26-27 ¶ 11).

Second Breach – Unauthorized Advance

Benskin also claims that West Bank "altered its records" to show an "unauthorized advance" under the 2007 line of credit to pay off a separate loan to Benskin. (App. 27 ¶ 13). Benskin claims that the separate loan was made pursuant to a promissory note dated October 6, 2006, which note matured on August 1, 2008. (App. 25 ¶ 3; 26 ¶ 5). Benskin alleges that because of the refusal by West Bank to release the 2007 mortgages and the unauthorized advance paying off the October 6, 2006 promissory note, its properties wrongfully remained encumbered by the mortgages in favor of West Bank and that West Bank would not release the mortgages. (App. 27 ¶ 15). The above described actions are the basis for Benskin's claims against West Bank as set forth in each of the counts of the A&S Petition. (App. 28-31).

Dates of Wrongful Acts

1. Breaches of Contracts

As alleged in the A&S Petition, West Bank's breach of the 2007 contracts by its failure to release the 2007 mortgages took place on May 30, 2008. (App. 26-27 ¶ 9, 11). The unauthorized advance which Benskin claims also breached the 2007 contracts and the 2006 promissory note must have taken place on or before August 1, 2008, because the advance was used to pay off a loan which matured on that date, before it was due. (App. 26 ¶ 5; 27 ¶ 13).

2. Fraud

Benskin's count for fraud in the A&S Petition asserts that West Bank knowingly and intentionally made "false representations" to Benskin and "concealed important information" from Benskin. (App. 30 ¶ 31). Benskin provides no further detail in Count IV as to what representations or information to which it refers, but makes reference to the previous paragraphs of the A&S Petition. (App. 30 ¶ 31). Thus, the "false representations" set forth in the A&S Petition must be the "multiple representations" referred to in paragraph 10, that West Bank "would take the steps necessary to release the 2007 Mortgages." (App. 26 ¶ 10). Benskin further alleges in the A&S Petition that these representations "now known to have been false" continued until "at least as late

as June 27, 2011." (App. 26 ¶ 10; 27 ¶ 14). On that date, Benskin asserts that West Bank's "first express statement" to Benskin refusing to release the 2007 mortgages was made. (App. 27 ¶ 12). The information "concealed" is apparently the alleged unauthorized advance made under the 2007 line of credit to pay off the 2006 promissory note alleged to have occurred sometime prior to August 1, 2008 as set forth in earlier paragraphs of the A&S Petition. (App. 26 ¶ 5; 27 ¶ 13-14).

3. Slander of Title

For purposes of the slander of title claim, again, the A&S Petition is not specific as to the date on which Benskin alleges conduct "wrongfully encumbering the Des Moines Properties with the debt represented by the 2006 Promissory Note" occurred, however that conduct must have occurred before August 1, 2008 since the 2006 promissory note "carried a maturity date of August 1, 2008" and, according to Benskin's allegations, the unauthorized advance paid the note "before it was due." (App. 26 ¶ 5; 27 ¶ 13-14). These facts, set forth in the A&S Petition and accepted as true for purposes of this motion, show without question that Benskin's claims are barred under the applicable statute of limitations and/or that Benskin has no conceivable set of facts entitling it to relief on its claims.

ARGUMENT

THE DISTRICT COURT CORRECTLY DISMISSED COUNTS I TO IV OF THE AMENDED PETITION DUE TO THE RUNNING OF THE STATUTE OF LIMITATIONS, AND COUNT V FOR FAILURE OF THE ELEMENT OF PUBLICATION.

A. Error Preservation

West Bank disagrees that Benskin preserved error on all of its appeal issues. Generally, this court will not decide an issue presented to it on appeal that was not presented to and decided by the district court. See, *DuTrac Credit Union v. Hefel*, 893 N.W.2d 282, 293 (Iowa 2017). For error to be preserved on an issue, it must be both raised and decided by the district court. *Id*. If a party raises an issue and the court does not rule on it, the party must file a motion to request a ruling on the issue. See, *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

1. "Relevant Entries not made in Regular Course of Business" Argument not Preserved

In part 1.A. of the Argument section of its brief (See, Appellant's Brief, pp. 28-30), Benskin asserts that Iowa Code § 524.221(2) does not apply to the claims set forth in Counts I–III of the A&S Petition because "Relevant Entries Were Not Made In The Regular Course Of Business." See, Appellant's Brief, at 28. This claim was never raised in the trial court and the trial court did not rule on the claim.

A review of Benskin's resistance and brief to West Bank's motion to dismiss the A&S Petition shows that, on page 4 of the resistance, Benskin did raise a claim that Iowa Code § 524.221(2) applied only to claims based on *contracts* "made in the regular course of business." (App. 54). However, Benskin's argument in the trial court was that West Bank's loan contracts with Benskin were "complicated multi-million dollar commercial loan transactions" not "routine and ordinary" contracts, meaning that the contracts between the parties were not "made in the regular course of business" as set forth in the statute. (App. 54). The only authority relied on by Benskin in its argument to the trial court was the case of *Legg v. West Bank*, 873 N.W.2d 763 (Iowa 2016) in which Iowa Code § 524.221(2) was not specifically discussed, but the Iowa Supreme Court held that a different statute of limitations applied to the claims. (App. 54).

Benskin has abandoned that argument on appeal. In its brief on appeal, Benskin transforms its argument to a claim concerning alleged fraudulent entries by West Bank in its records. Benskin asserts that West Bank's efforts to "cook the books" were *entries* that were not made in the regular course of business and somehow converted the contracts between the parties to dealings outside the regular course of business removing them from the limitations period set forth in

Iowa Code § 524.221(2). Benskin cites authorities for its new claim that were not cited in its resistance and brief in the district court. See, Appellant's Brief, at 29; Cf. (App. 54). Nowhere in the court's ruling on the "Breach Claims" set forth in Benskin's A&S Petition does the court make a ruling on Benskin's "fraudulent entries" claim. Because the claim was not presented to the district court, and was not ruled on by the district court, error was not preserved on the claim. See, *DuTrac Credit Union*, at 293.

2. Discovery Rule Argument not Preserved

Similarly, the argument made by Benskin in part 1.B. of its brief, see, Appellant's Brief pp. 30–32, that the discovery rule applies to the "breach-based" claims and extends the accrual dates was an argument not presented to the trial court and not ruled on by the district court. See, *DuTrac Credit Union v. Hefel*, 893 N.W.2d 282, 293 (Iowa 2017).

In its A&S Petition, Benskin added legal conclusions to Counts I–III of its original petition asserting that West Bank was barred "by equitable estoppel" from asserting that the contract claims accrued before certain dates favorable Benskin. (App. 28 ¶ 18, 19; 29 ¶ 23, 28). The A&S Petition, however, made no mention of the discovery rule as barring the claim set forth in Counts I–III. In fact, Benskin asserted that the discovery rule applied to the claims set forth in

Counts IV and V of the A&S Petition, which were new claims not made in Benskin's original petition. (App. 30 ¶ 35; 31 ¶ 40).

In its motion to dismiss the A&S Petition, West Bank argued that the defense of equitable estoppel is not available in claims based on contracts. (App. 45). West Bank also argued that the discovery rule was inapplicable to fraud claims such as the one in Count IV of Plaintiff's A&S Petition. (App. 47). In its resistance to the motion to dismiss, Benskin then made an effort to apply the defenses of equitable estoppel and the discovery rule to all of its claims despite the fact that Benskin had only pled the defense of equitable estoppel in the contract claim counts (Counts I–III) and asserted the discovery rule defense in the other counts (Counts IV–V). (App. 52-53; 55-56).

In her ruling, the court discussed the defense of equitable estoppel, but only in connection with Counts I–III of the A&S Petition, Benskin's contract claims. (App. 75-76). The court did not discuss or rule on Benskin's assertion in its resistance that equitable estoppel could be applicable to the fraud or slander of title claims in Counts IV and V. (App. 77-80). The court made no mention of equitable estoppel in her ruling on those claims, but did discuss Benskin's discovery rule defense to those claims. (App. 77). The court made no ruling on the question whether the discovery rule could be applied to, or prevented the

statute of limitations from running on the contract claims set forth in Counts I–III of the A&S Petition.

As can be seen from the foregoing, Benskin's assertion that the discovery rule extends the accrual dates of the breach based claims set forth in Counts I–III of the A&S Petition was not preserved. While the defenses were arguably raised with respect to each of the counts of Benskin's A&S Petition, the district court only decided the discovery rule claim with respect to Counts IV and V where the defense was raised in the A&S Petition. The court did not decide whether the discovery rule was applicable to or prevented the statute of limitations from running with respect to the claims set forth in Counts I–III, Benskin's contract claims. Benskin did not request a ruling on the issue following the district court's order dismissing Benskin's A&S Petition. Under the standards applied by this Court, therefore, error was not preserved. See, *DuTrac Credit Union*, at 293; see also, *Meier*, at 537.

B. The Standard of Review

West Bank agrees generally with Benskin's statements as to the standard of review on appeal. An appeals court reviews the district court's order granting the motion to dismiss for the correction of errors at law. See, *Mlynarik v. Bergantzel*, 675 N.W.2d 584, 589 (Iowa 2004). West Bank also agrees that a motion to

dismiss may be granted based on the statute of limitations. See, e.g., *Clark v. Miller*, 503 N.W.2d 422, 424 (Iowa 1993).

However, there are comments in Benskin's six-page dissertation on the standard of review with which West Bank disagrees. First, the district court did not err in granting the bank's dismissal motion in this case. See, Appellant's Brief, at 27. Also, West Bank disagrees with Benskin's claim that the district court failed to faithfully follow the dismissal review standard. Id. In fact, the district court specifically noted the standard of review in her opinion, stating among other things that motions to dismiss are generally disfavored, that a motion should only be granted if the petition on its face showed no right of recovery under any state of facts and that a court will rarely dismiss a petition for failure to state a claim upon which any relief may be granted because the threshold to survive a motion to dismiss is so low. (App. 73). It is apparent from the court's comments on the standard of review in her ruling that she fully understands the standard, and applied it.

1. The District Court Properly Granted the Motion to Dismiss Counts I-III of the A&S Petition Due to the Running of the Statute of Limitations

The district court correctly applied Iowa Code §524.221(2) to Benskin's breach of contract claims. The district court also correctly found that Benskin's claim in Count III of the A&S Petition for breach of implied duties of good faith

and fair dealing should be dismissed on statute of limitations grounds as well. In its brief on appeal, Benskin asserts new arguments that were not presented to the trial court and for which there was error was not preserved. See, Appellee's Brief, pp. 14–18. Even if the court finds that all of Benskin's arguments were preserved, the court properly rejected them.

A. Benskin Misreads the Provisions of Iowa Code §524.221(2) in its "Relevant Entries" Argument Even if the Argument was Preserved.

For the first time on appeal, Benskin argues that Iowa Code §524.221(2) is not applicable to the circumstances alleged in its A&S Petition because of entries by the bank in its records that Benskin asserts were "fraudulent" and therefore were not made in the regular course of business. See, Appellant's Brief, at 28-30. A simple reading of the statute shows that Benskin is incorrect.

1. West Bank's Contracts with Benskin were Made in the Regular Course of Business

The provision to which Benskin refers reads as follows:

> "All causes of action,…against a state bank based upon a claim or claims founded on a written contract, *or a claim or claims inconsistent with an entry or entries in state bank record, made in the regular course of business*, shall be deemed to have accrued, and shall accrue for the purpose of the statute of limitations one year after the breach or failure of performance of a written contract, or one year after the date of such entry or entries…." See, Iowa Code §524.221(2)(2019).

Benskin reads the phrase "made in the regular course of business" to modify both the term "written contract" and the term "entry or entries in a state bank record." See, Appellant's Brief, at 28. Benskin is incorrect. It is clear from a simple reading of the statute that the phase "made in the regular course of business" modifies only the term "entry or entries in a state bank record." It certainly makes sense to distinguish between entries in a bank record that are made in the regular course of business and entries that are not. However, it makes no sense to distinguish between a written contract made by a state bank in the regular course of business and such contracts which are not. Since the legislature did not intend the modifier to apply to the "written contract" part of the section, it is not required for Benskin to have alleged that the written contracts were made in the regular course of business to assert the statute of limitations argument.

Even if it could be said that the statute makes a distinction between written contracts made in the regular course of business and those that are not, it is obvious that the contracts at issue in this case are contracts that were made by West Bank in the regular course of its business. As Benskin's A&S Petition alleges, West Bank is a state bank. (App. 25 ¶ 2). The agreements on which Benskin relies are loan agreements including promissory notes and mortgages. It

is painfully obvious that such documents are contracts made in the regular course of business of a bank. The Legislature does not define the term in the statute and, therefore, the court should apply its ordinary and common meaning. See, *Christiansen v. Iowa Bd. of Educ. Examiners*, 831 N.W.2d 179, 188 (Iowa 2013)("Absent a statutory definition or established meaning in the law, words in the statute are given their ordinary and common meaning by considering the context within which they are used.").

There can be no question that most people would see the making of loan contracts and mortgages as part of the regular business of a bank. Benskin certainly does not allege to the contrary in the A&S Petition. Moreover, Benskin provides the court with no authority suggesting that loan agreement and loan documents or mortgages made between a bank and its customer are somehow written contracts made outside of the regular course of business of a bank. Benskin's argument in this regard is without any basis in fact or law, and should ignored.

2. Fraudulent Entries Do Not Salvage the Claim

To the extent that Benskin relies on appeal on the claim that the bank made fraudulent entries not in the regular course of business and that, somehow, its claim is based on the entries, the claim still fails. The claims made are for

breach of contracts between Benskin and West Bank. The contracts were made in the regular course of business, or at least there is no allegation that they were not. The alleged breach of the 2007 contracts—a failure to release the 2007 mortgages—took place on May 30, 2008. The unauthorized advance which Benskin claims breached the 2007 contracts and the 2006 promissory note took place before August 1, 2008. Because the claim is based on breach of the contracts and the contract were made in the regular course of business, the court correctly applied Iowa Code §524.221(2) and not the ten-year period found in Iowa Code §614.1(5). See, Iowa Code §524.221(2) (2019). Benskin's statute of limitations for its breach of contract claims ran, at the latest, in 2015 and the lawsuit in May 2018 was three years too late.

B. Benskin's Discovery Rule Argument was Not Preserved as to its Breach of Contract Claims but Even if it was, the Argument Has No Merit

As argued in part A.2. of the Argument section above, Benskin's discovery rule argument was not preserved as to Benskin's contract claims. See, Appellee's Brief, pp. 16-18. However, even if preserved, the argument has no merit. Benskin asserts that its claim for breach of the 2006 loan agreement "did not accrued" [sic] until on or after July 22, 2016 because Benskin only then learned of improper activity by the bank. Benskin further asserts that its claim relating to

the 2007 line of credit contract did not accrue until on or after June 27, 2011 when the bank informed Benskin that it would not release mortgages encumbering Benskin's Polk County real estate. These assertions are not accurate.

Benskin's A&S Petition alleges that the 2007 promissory note and 2007 mortgages matured on May 30, 2008 and alleges, unequivocally, that West Bank was obligated to release the 2007 mortgages on that date. (App. 26 ¶ 9). Based on this allegation, there can be no question that West Bank was in breach of the 2007 promissory note on May 30, 2008. Benskin's further claims of representations made by the bank with respect to release of the mortgages are irrelevant. According to the A&S Petition, West Bank had a duty to release the 2007 mortgages as of that date and according to the statute, Iowa Code §524.221(2) the breach is deemed to accrue one year after that date. See, Iowa Code §524.221(2) (2019).

With respect to the 2006 loan agreement, Benskin's allegations are clear that the breach of that agreement must have occurred no later than August 1, 2008. (App. 26 ¶ 5). Under the statute, it is not relevant that Benskin was not informed of the specific activity that resulted in the breach until later. The breach occurred by no later than August 1, 2008 and therefore the breach is deemed to

have accrued within a year thereafter.

C. The District Court Properly Dismissed Benskin's Breach of Implied Duty of Good Faith and Fair Dealing Claim Due to the Running of the Statute of Limitations.

As to Count III of the A&S Petition, Benskin tries to change the nature of the claim in an effort to avoid the statute of limitations. Benskin asserts that Count III of the A&S Petition states a claim for "Breach of Implied Duties of Good Faith and Fair Dealing." See, Appellant's Brief, at 32. Benskin cites the case of *Legg v. West Bank*, 873 N.W.2d 763 (Iowa 2016) to assert that such claims, based on implied duties only, are treated by Iowa courts as based on an unwritten contract. This is not clearly the nature of Benskin's claims as alleged in the A&S Petition.

The *Legg* case dealt with claims that the bank violated duties of good faith in connection with contracts with its customers relating to the bank's procedure for overdrafts. See, *Legg v. West Bank*, 873 N.W.2d 763, 763 (Iowa 2016). West Bank raised certain statute of limitations defenses in the case and the court discussed what statute of limitations should apply to duties of good faith. See, *Legg v. West Bank*, 873 N.W.2d 763, 774 (Iowa 2016). The Iowa Supreme Court found two possible statutes of limitations to be applicable to duties of good faith. *Id.* The Court found that express duties of good faith were contractual claims to

which it applied the statute of limitations for written contracts set forth in §614.1(5). *Id*. For claims based "solely" on the breach of the implied covenant of good faith, the court applied a five-year statute of limitations based on an unwritten contract as set forth in Iowa Code §614.1(4). *Id.*

Benskin's allegations in Count III are not clear with respect to which duty of good faith and fair dealing it alleges West Bank breached. For example, in paragraph 26 of Benskin's A&S Petition on page 5, Benskin alleges that "*as part of its agreements with Plaintiff*" West Bank owed implied duties of good faith and fair dealing. (App. 29 ¶ 26). West Bank notes that Benskin, in paragraph 25 of the A&S Petition refers back to the first 24 allegations of the A&S Petition which detail alleged breaches of the *written contracts*. (App. 29 ¶ 25). Paragraph 27 of the A&S Petition asserts that West Bank's acts and omissions "as described above" (presumably including all 26 paragraphs of the A&S Petition) breached the "*duties* of good faith and fair dealing it owed to Plaintiff." (App. 29 ¶ 27). As can be seen from the foregoing, it is not clear whether Benskin is asserting that there were express duties of good faith that were violated, or implied duties of good faith, or both in the Count.

However, either way, Benskin's claims are precluded by the statute of limitations. With respect to any express duties of good faith on which Benskin

relies in its allegations, the statute of limitations set forth in Iowa Code §524.221(2) precludes those claims. See, Iowa Code §524.221(2) (2019). As to any claims made by Benskin which are based "solely" on the breach of the implied covenant of good faith and fair dealing applicable to Iowa contracts, the five-year statute of limitations set forth in Iowa Code §614.1(4) applies and the claims are precluded. See, *Legg v. West Bank*, at 774.

To reiterate, none of the breaches of duties alleged by Benskin happened after August 1, 2008 and, if the five-year statute for unwritten contracts applies, the claims set forth in Count III are precluded by that statute of limitations. Therefore, the claim set forth in Count III was properly dismissed.

D. The Trial Court Correctly Rejected Benskin's Claim that Equitable Estoppel Precludes West Bank from Raising the Statute of Limitations as a Defense.

Recognizing that the statute of limitations would preclude it from bringing its claims in Counts I-III of the original petition Benskin, in the A&S Petition, amended each of the first three counts to assert that West Bank is barred by equitable estoppel from relying on the statutory accrual date for each of Benskin's claims to allow Benskin to avoid the statute of limitations. (App. 28 ¶ 19; 29 ¶ 23, 28). First, the allegations could be ignored by the trial court because they are not well-pleaded facts, but legal conclusions set forth in the petition

which the court need not accept for purposes of deciding a motion to dismiss. See, e.g., *Shumate v. Drake University*, 846 N.W.2d 503, 507 (Iowa 2014); *see also, Kingsway Cathedral v. Iowa Department of Transportation*, 711 N.W.2d 6, 8 (Iowa 2006).

Even if considered, it is clear from the facts alleged in the A&S Petition that equitable estoppel cannot be a bar to accrual of the claims based on breaches of written contracts. Benskin alleges, with respect to the 2007 contracts, that those contracts matured on May 30, 2008 and that "on and after that date" West Bank was obligated to release the 2007 mortgages. (App. 26 ¶ 9). Accepting Benskin's allegation as true, therefore, whatever West Bank's employees may have said to Benskin's representatives, West Bank was in breach of its obligations by no later than May 30, 2008 on the 2007 contracts.

Similarly, Benskin alleges in the A&S Petition that the 2006 loan agreement carried a maturity date of August 1, 2008. (App. 26 ¶ 5). Benskin states that West Bank internally altered its records to show an unauthorized advance to pay off the 2006 promissory note "before it was due." (App. 27 ¶ 13). Therefore, to the extent that West Bank's conduct somehow breached the 2006 promissory note, the conduct had to have occurred before the note was due on August 1, 2008.

Equitable estoppel is not applicable in either situation because Benskin alleges no affirmative act taken by West Bank to conceal Benskin's cause of action independent and subsequent to the liability-producing conduct. See, *Christy v. Miuli*, 692 N.W.2d 694, 702 (Iowa 2005). The trial court was correct to find that "Benskin cites no specific statement or action as the basis of its equitable estoppel claims." (App. 77). The A&S Petition is devoid of any allegation as to the actions taken by West Bank to conceal Benskin's claim. Again, accepting Benskin's allegations as true, they do not state a claim on which relief can be granted under any of Counts I, II, or III and those claims should be dismissed.

2. The District Court Correctly Dismissed Count IV of the Amended Petition (Fraud Claim) Due to the Running of the Statute of Limitations.

A. Benskin's Fraud Claim

The claim set forth in Count IV of Benskin's A&S Petition is denominated "**FRAUD**." The claim asserts that West Bank "knowingly and intentionally made false representations to Plaintiff and concealed important information from Plaintiff." (App. 30 ¶ 31). Count IV is not specific as to the false representations that were made or the important information that was concealed, however, the allegation does say that these actions were "As set forth above." (App. 30 ¶ 31). Thus, taking the factual allegations of Benskin's A&S Petition, Benskin can only

be referring to the false representations it asserts were made to it by West Bank concerning the release of mortgages from May 30, 2008 to June 27, 2011, and the alleged wrongful concealment of the unauthorized advance that occurred sometime before August 1, 2008. Under the allegations of Benskin's A&S Petition, the latest these actions could have taken place is June 27, 2011.

In paragraph 35 of Count IV on page six of the A&S Petition, Benskin makes a specific allegation with respect to the "defense based on any statute of limitations." (App. 30 ¶ 35). In the allegation, Benskin asserts the applicability of the discovery rule and further asserts that it did not discover West Bank's misrepresentations and concealment until after July 22, 2016. The allegation is a legal conclusion which the court need not accept, and further contradicts the facts set forth earlier in the A&S Petition.

For example, with respect to the alleged misrepresentations concerning release of the mortgages, Benskin earlier alleges that it became aware of these false representations on June 27, 2011. (App. 27 ¶ 12). Since Benskin's A&S Petition says that West Bank had the obligation to release the mortgages as of May 30, 2008, it is impossible that it would take an additional three years for the Benskin to discover that West Bank's representations were false, however, assuming those allegations to be true, certainly Benskin knew of the false

representations by June 27, 2011 as stated in paragraph 12 on page 3 of the A&S Petition. (App. 27 ¶ 12). Given these allegations, Benskin's fraud claim was brought too late.

B. Benskin's Claim is Barred by the Statute of Limitations

Iowa Code §614.1(4) provides a five year period for relief based on fraud. See, *Bob McKiness Excavating & Grating, Inc. v. Morton Buildings, Inc*., 507 N.W.2d 405, 410 (Iowa 1993); see also, Iowa Code §614.1(4) (2019). Iowa Code §614.4 provides that a fraud action is not deemed to have accrued until the fraud has been discovered. *See, Bob McKiness*, at 411; see also, Iowa Code §614.4 (2019). All of the fraudulent actions asserted by Benskin occurred on or before June 27, 2011. Iowa Code §614.1(4) provides a five-year period to bring a claim for relief on the ground of fraud. Benskin's action, which was not brought until May 18, 2018, is too late under the five-year statute of limitations provided in Iowa Code §614.1(4).

C. The Court Correctly Rejected the Application of the Discovery Rule

The trial court found that the A&S Petition contained no fact allegations that would support the application of the discovery rule to toll the statute of limitation for Benskin's fraud claim. (App. 79). A simple reading of the A&S Petition shows that the court is correct. According to the allegations of the

petition, Benskin was told by June 27, 2011 that West Bank would not release mortgages that it had an obligation to release on or before May 30, 2008. The A&S Petition further alleges that Benskin received this information after three years of statements to the contrary by West Bank. (App. 26-27 ¶ 10-12). Also, according to the A&S Petition, the mortgages remained an encumbrance on Benskin's property that was wrongful and was preventing him from pursuing investment and financial opportunities that require the properties not to be encumbered. (App. 31 ¶ 38, 39). Benskin further alleges that he was not made aware of the bank's allegedly bogus justification for wrongfully encumbering his properties until after July 2016. (App. 27 ¶ 13, 14). This means, of course, that West Bank provided no justification for refusing to release mortgages on the properties in June 2011 that were supposed to been released by May 30, 2008.

As can be seen from the foregoing, the trial court correctly held that simply alleging the application of the discovery rule, without providing any factual allegations that would support its application is not sufficient to prevent dismissal on statute of limitations grounds. (App. 79) (citing *Benedict v. Hall*, 207 N.W. 606, 607–08 (Iowa 1926)). Surely, based on the facts alleged by Benskin, he had enough information in late June 2011 to see the need to investigate further. See, *Hallett Const. Co. v. Meister*, 713 N.W.2d 225, 231

(Iowa 2006) ("once a claimant learns information that would inform a reasonable person of the need to investigate, the person is on inquiry notice of all facts that would be disclosed by a reasonably diligent investigation"). The court's ruling on Benskin's fraud claim dismissing it due to the running of the statute of limitations is correct and should be upheld.

3. The District Court Correctly Dismissed Count V of the Amended Petition (Slander of Title Claim) for Failure to Allege Publication.

Benskin correctly sets forth the elements of a slander of title action in its brief. See, Appellant's Brief, at 39; see also, *Davitt v. Smart*, 449 N.W.2d 378, 379 (Iowa 1989). The court looked those elements in making her ruling dismissing the claim. The court correctly noted that the term publication in Iowa law referred to a communication of a statement to some third person or persons. (App. 79). The court found that Benskin's factual allegations in the A&S Petition did not include the element of publication and, in fact, ran contrary to the publication element. (App. 79-80). A review of Benskin's A&S Petition shows that court is correct.

Benskin's claim for slander of title in Count V of the A&S Petition does not allege that the "false use of words and documents" was published in any manner. In fact, Benskin's A&S Petition alleges the opposite. Benskin claims that West Bank "internally altered" its records so as to show an unauthorized advance

paying off the 2006 promissory note and that this unauthorized advance encumbered the 2007 line of credit such that West Bank refused to release mortgages pertaining to the 2007 line of credit. (App. 27 ¶ 13). Benskin alleges that the action was "wrongfully concealed" by West Bank and that even Benskin did not discover the action taken by West Bank until after July 22, 2016. (App. 27 ¶ 13, 14) (West Bank "wrongfully concealed the fact that it had made an unauthorized advance under the 2007 Line of Credit"). Nowhere in the A&S Petition does Benskin claim that West Bank's "wrongfully concealed" action was published to any third person and, in fact, that would be impossible since even Benskin did not know about the action for more than eight years. (App. 27 ¶ 13). Since a slander of title claim requires publication of the slanderous words and since West Bank is alleged to have concealed its actions (v. publishing them), Benskin's claim is deficient and was properly dismissed.

In its resistance to West Bank's motion to dismiss the A&S Petition, Benskin cited no authority of any kind for its claim that West Bank's failure to release the 2007 mortgage was a "publication" of "slanderous words" that give rise to Benskin's slander of title claim. (App. 57). Similarly, in its brief on appeal Benskin cites no Iowa authority but attempts to rely on the cases from other jurisdictions. The cases are inapposite, were not presented to or discussed by the

trial court and do not provide this Court any authority to overturn the trial court's ruling. As the trial court said, "the 'publication' Benskin alleges is no 'publication' at all, at least not in any sense Iowa courts have understood." (App. 81).

CONCLUSION

For the reasons stated above, the Court should affirm the district court's dismissal of each and all of Benskin's claims in the A&S Petition with prejudice and direct the district court to enter a judgment in favor of West Bank on the claims, and for the costs of action.

REQUEST FOR ORAL ARGUMENT

The appellee, through counsel, requests to be heard in oral argument upon the submission of this cause.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION AND TYPE AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1)(g)(l) or (2) because this brief contains 6,224 words, excluding parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(l).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word format 2010 in Times New Roman 14-point style.

/s/ Dennis P. Ogden March 14, 2019
Dennis P. Ogden Date

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on March 14, 2019, a copy of this Proof Brief of the Appellant was filed electronically with the Clerk of the Iowa Supreme Court through the EDMS system, and which system further will provide access to and service of the Brief on that same date to:

S.P. DeVolder
THE DeVOLDER LAW FIRM, P.L.L.C.
1228 Sunset Drive, Suite C Norwalk, IA 50211-2401
Tel: (515)981-5150
Fax: (515)981-5156
steven.devolder@devolderlawfirm.com

William W. Graham
DUNCAN GREEN, P.C.
400 Locust Street, Suite 380 Des Moines, IA 50309-2363 Tel: (515)288-6440
Fax: (515)288-6448
wwgraham@duncangreenlaw.com

/s/ Dennis P. Ogden