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

REPLY BRIEF OF THE APPELLANT

/s/ S.P. DeVolder
S.P. DeVolder AT0001876
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

/s/ William W. Graham
William W. Graham AT0002953
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

ATTORNEYS FOR THE APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY AGRUMENT

THE DISTRICT COURT ERRED IN DISMISSING COUNTS I TO IV OF THE AMENDED PETITION ON THE GROUND OF THE RUNNING OF THE STATUTE OF LIMITATIONS, AND FURTHER ERRED IN DISMISSING COUNT V ON THE GROUND OF LACK OF PROOF OF THE ELEMENT OF PUBLICATION.

1. The District Court Erred In Granting The Dismissal Motion On The Ground Of The Running Of The Statute Of Limitations Respecting Counts I To III Of The Amended Petition (The Breach Of Contracts And Breach Of Duty Of Good Faith And Fair Dealing Claims).

A. Error Preservation on the Meaning of the Statue.

The bank first claims Benskin failed to preserve error on the meaning of the well-known legal phrase that appears in Iowa Code § 524.221(2)—that phrase limiting the application of this special banking limitations statute to only those contractual based claims that are consistent with entries in a state bank's records entered or made "in the regular course of business". (Bank's brief, at pp. 15-17.) Benskin showed in his principal brief that under the established meaning of this phrase the statute does not apply to contract based claims where the bank's records respecting the particular transaction at issue were not made in the regular course of business; that is, where the bank has cooked its books. *State v. Fisher,* 178 N.W.2d 380, 382 (Iowa 1970) (business entries are not "made in the regular course of business" where the entries are suspect or fraudulent—i.e., not trustworthy and lacking honest appearance); *see also Louisiana Business College v. Crump,* 474 So.2d 1366, 1371 (La. App. 1985) (same); *Strand v. Great N. Ry. Co.,* 101 Minn.

85, 111 N.W. 958, 961 (1907) ("In view of the complicated and extensive business transactions of modern times, it seems to be the tendency of the courts to treat as original evidence such entries and reports as are made in the regular course of business, provided they appear free from the charge of fraud, mistake, or self-interest.").

Even the bank acknowledges that it would be hard pressed to disagree with this accepted interpretation; so it instead opts to travel the lack of error preservation route—that Benskin supposedly did not raise this issue before the district court. But that's not the case—in its statement of facts set forth in its principal brief (basically ignored by the bank in its response brief), Benskin points out in explicit detail where he averred that the bank altered its records concerning the transactional facts (Benskin's principal brief, at p. 18):

> Why the bank ultimately did not do so [release the mortgages involving the 2007 line of credit transaction], and why it lied to Benskin concerning its avowed intention to do so, were not discovered by Benskin until on and after July 22, 2016. (Amend. Pet., at ¶ 13; App. 27.) Benskin's discovery was made as the result of information disclosed in other litigation involving these parties. (Amend. Pet., at ¶ 13; App. 27.) During the course of that litigation, Benskin obtained information that indicated at some time after the execution of the 2007 Line of Credit Agreement, West Bank internally altered its transactional or business records so as to purport to show an advance was obtained under that credit line to pay off, and before it was even due, the 2006 Promissory Note (the earlier transaction that was unrelated to the later line of credit transaction). (Amend. Pet., at ¶ 13; App. 27.) Benskin did not authorize

> that advance, nor did he even otherwise know about it, when it occurred and as subsequently reflected in the bank's altered records. (Amend. Pet., at ¶ 13; App. 27.) The bank's wrongfully tapping into the credit line was actively and affirmatively concealed from Benskin by the bank; the money was taken by West Bank without Benskin's agreement, consent, or knowledge and was not discovered by Benskin until after July 22, 2016. (Amend. Pet., at ¶¶ 10-14; App. 26-27.)

And in its resistance to the bank's motion to dismiss, Benskin made clear reference to these allegations in the amended petition when Benskin noted "it is sufficient to point out that there is nothing in the Amended Petition that states the contracts referred to in Counts I and II were made in the regular course of business"; and, further directly contrary to the bank's claim that Benskin singularly referenced "complex and large commercial transactions" to define the statutory phrase at issue, what Benskin actually said in its resistance is "Plaintiff expects to show the Court that the phrase in question is intended only to describe transactions which are routine and ordinary in the course of both parties' business[es]"—i.e., that the transactions are recorded in the books in regular course and not as the result of fraud, wrongdoing, mistake or the like. (Resistance to Motion to Dismiss, at p. 4; App. 54.) Benskin raised the argument he repeats on appeal, and the district court rejected Benskin's position by ruling the contract claims were time barred by the statute. (Ruling, at 5-6; App. 75-76.) Error was preserved.

B. Error Preservation on the Accrual Date.

The bank next asserts that Benskin did not preserve his accrual date—also known as the discovery rule—argument against the running of the statute of limitations (as opposed to the equitable estoppel argument, on which even the bank agrees error was preserved). (Bank's brief, at pp. 17-19.) But the bank again is mistaken. Benskin pled the discovery rule as a defense to the running of the limitations period in his amended petition (and as pointed out at pages 19-20 of his principal brief). (Amend. Pet., at ¶¶ 18-19, 23, 28, 35 and 40; App. 28-31.) Further, Benskin argued the discovery rule tolled the limitations for all of its claims, including the contract-based ones, and in support Benskin cited in his resistance contractual based warranty cases where the courts have applied the discovery doctrine to toll the accrual date for contract-based claims, including *Brown v. Ellison,* 304 N.W.2d 197, 201 (Iowa 1981). (Resistance to Motion to Dismiss, at pp. 5-6; App. 55-56.) And the district court ruled on Benskin's argument, ultimately concluding the discovery rule did not apply, and the district court specifically discussed Benskin's cited contractual warranty cases. (Ruling, at p. 8 and ft. 28; App. 78.) What the district court did in its ruling, as Benskin had done in its resistance, was to discuss the discovery rule in a section involving all of the claims—both contract and fraud based—subject to a limitations attack (for Benskin argued in a single section of its resistance that this rule extended the accrual date for both

the contract and fraud-based claims raised). Benskin raised the issue, and the district court ruled on it; error was preserved. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (error is preserved where the issues raised on appeal were first raised before the district court and ruled upon by that court).

C. The Banking Contractual Statute of Limitations does not apply to the Contract Claims.

The bank posits a two-fold argument; that the phrase "in the regular course of business" applies not to contract claims but only to claims based on entries contained in the bank's records, and in any case Benskin's contract-based claims are not related to entries in the bank's records. (Bank's brief, at pp. 20-24.) The bank's compound argument is unfounded.

First, the bank misconstrues the statute and the nature of Benskin's contract-based claims. It is obviously true there was a contractual relationship between the parties—and two separate ones at that. First, there was the 2006 loan collateralized by real estate located in Dickinson County; second, the 2007 line of credit collateralized by additional real estate (situated in Polk County). These were separate, unrelated transactions and were pled as such by Benskin. Nonetheless, through making false entries in its records—and beginning with the bank's improperly accessing the line of credit without Benskin's knowledge or authorization—the bank falsified its books to conflate the transactions, obtain additional real estate collateral for the 2006 loan, and obligate Benskin on a line of

credit transaction that it (Benskin) had never accessed in the first place. (See quotation from page 18 of Benskin's original brief in above subsection A.) The bank cannot ignore, under the dismissal for failure to state a claim review standard, these allegations. Under this review standard (extensively discussed by Benskin in his first brief), these allegations are sufficient to have removed Benskin's breach-based claims from the limitations period set forth in § 524.221(2). Further, the bank's implied assertion that claims involving phony business record entries are not contractually-based under the statute does not hold water—tort-based and non-contractual claims are specifically excluded from the statute's reach (that is, the statute by its terms applies singularly to contract based claims). Accordingly, as it respects the written contracts (counts I and II of the petition), the applicable limitations period is the ten years' period for breach of written contracts provided in for Iowa Code § 614.1(5). Even taking the district court's conclusion that the claims accrued in the summer of 2009, the breach-based claims were timely filed in 2018. The contract-based claims are not time barred.

D. The Discovery Rule.

The bank bases its entire argument on presumed factual premises (and directly contrary to the motion to dismiss review standard). (Bank's brief, at pp. 24-26.) It simply repeats—and in the face of directly counter allegations in the amended petition—that the line of credit breach had to occur in May 2008 (when the credit

line matured) and the 2006 loan agreement in August 2008 (when that loan matured); the bank then flatly mischaracterizes what Benskin alleges in the amended petition—that Benskin's "further claims of misrepresentation by the bank with respect to the release of the mortgages *are irrelevant*." (Bank's brief, at p. 25; emphasis added.) Relevancy itself is not an issue at the motion to dismiss stage (again, the factual averments must be taken as true, and these allegations can't be attacked at the pre-answer stage as false or irrelevant or otherwise in some regard ultimately inadmissible; those are evidentiary issues unresolvable at the motion to dismiss stage (which is not meant to be a mini-trial or otherwise a screening of the merits of the claims)).

In any case, the misrepresentations concerning the release of the mortgages are highly relevant—first, the bank's misrepresentations hid the breaches from Benskin (Benskin was affirmatively misled that the mortgages securing the line of credit would be released, and given that Benskin had not even tapped into the credit line it was justified in believing the bank's representations); second, the bank's lies were made to conceal its falsifying the books (its own act of improperly accessing the credit line, using that line to pay off the 2006 loan that hadn't even matured at that time, and wrongly obtaining the additional real estate collateralizing the line of credit to do so). And the soonest Benskin learned that the bank would not release the mortgages collateralizing the credit line was June 27, 2011 (when the bank first

stated, and directly contrary to all of its prior representations, that it would not release the Polk County situated mortgages). (Amend Pet., at ¶¶ 7-14 and 21-29, 35 and 40; App. 26-27, 28-30, 31.) Even if the special banking limitations statute applies, Benskin's contract claims were not barred as each was brought within six years of the pleaded and applicable discovery dates. *Chrischilles v. Griswold,* 260 Iowa 453, 462, 150 N.W.2d 94, 100 (1967) (the discovery rule delays the date of accrual to "the later of the date of discovery [of the facts constituting each element of the cause of action] or the date when, by the exercise of reasonable diligence, the plaintiff should have discovered" the necessary facts that constitute the complete cause of action). And the bank itself does not distinguish *Brown v. Ellison,* cited and discussed by Benskin in its principal brief, where the Iowa supreme court recognized the discovery rule would apply to general contract breach claims where the plaintiff's unawareness of the facts constituting a complete cause of action for a breach is "due to fraudulent concealment by the defendant." 304 N.W.2d at 201 (citation omitted). That is exactly what occurred here.

E. The Duty of Good Faith and Fair Dealing.

The bank again just barrenly states, and contrary to the facts pled in the amended petition, that the contract-based claims accrued on August 1, 2008—and even for the breach of good faith and fair dealing claim. (Bank's brief, at pp. 26-28.) But under the dismissal standard, the bank just can't ignore the pleaded factual

allegations concerning the accrual date of the breach of this claim—which is on and after July 22, 2106. (Amend Pet., at ¶ 13; App. 27.) Benskin filed well within five years of that date. Iowa Code § 614.1(4). The bank simply takes a maturity date, then assumes (contrary to the dismissal review standard) that the maturity date must be the breach date for this claim even through that is not pled in the amended petition and other dates are so pled specifying when the breach accrued.

Throughout its brief, the bank—like the district court before it—simply turns the dismissal rule on its head. And this criticism is important. The bank either states or implies that the district court at least adequately set forth in its ruling the dismissal for failure to state a claim review standard. But the bank, like the district court, improperly conflates two aspects of the dismissal review standard—first, adequately stating that standard, and second, actually applying the standard to the particular petition at hand. A district court's correctly completing the first step does not mean it also did the same with regards to the second step—and appellate courts reverse district court rulings when the second step is not taken.

For purposes of this discussion let's not pick a bone with the bank as to whether the district court at least "adequately" summarized the dismissal review standard in the challenged dismissal ruling. But that's only the first step of the analysis; the district court then must *actually apply the standard set forth*—and for the reasons and authorities cited in Benskin's briefs the district court here came up

short in taking this necessary second step; that is, the district court may have adequately stated the standard but it failed to faithfully apply that standard in light of the allegations raised in Benskin's amended petition. A federal appeals court recently reversed a district court's dismissal ruling for this exact type of error.

In *Simon v. Republic of Hungary,* 911 F.3d. 1172, No. 17-7146 (D.C. Cir. 12-28-2018) (hereafter *slip op.*), the court held the district court adequately had set forth a description of the applicable dismissal standard for failure to state a claim (what the *Simon* court referred to as "box checking") but then the district court failed to faithfully and rigorously apply that standard when it dismissed the complaint. *Simon, slip op.* at 21 ("But applying the correct burden of proof [the dismissal standard] is not a box-checking exercise [of simply stating the standard]. What matters is whether the [district] court's analysis fit those later words.") And as for whether the district court actually applied the standard after first "checking the box" of stating the standard, the *Simon* court curtly observed that "[t]he proof is in the pudding"—i.e., in analyzing the district court's merits discussion as applied against the review standard. *Id.* at p. 22. And the federal dismissal for failure to state a claim review standard, like the Iowa standard, is demanding—for a lawsuit to be dismissed on the grounds of the running of the statute of limitations, the complaint itself must *on its face* conclusively show that the claims are time-barred. *Kelly v. Nichjamoff,* 868 F.3d 371, 374 (5th Cir. 2017) ("Although dismissal under rule

12(b)(6) [the federal dismissal for failure to state a claim rule] may be appropriate based on a successful affirmative defense, that defense must appear on the face of the complaint.") (citation omitted).

The bank in its brief, like the district court in its ruling, just doesn't correctly apply the demanding dismissal for failure to state a claim standard to the actual allegations set forth in Benskin's amended petition. While the bank and district court may have passed the "box checking step" of formalistically stating the standard, each of them falters in taking the application step of rigorously applying the standard to the allegations set forth in the amended petition (the point where the proof indeed is in the pudding). And this observation applies to each of the arguments raised by the bank in its brief.

F. Equitable Estoppel.

The bank basically asserts there were insufficient factual allegations to apply equitable estoppel. (Bank's brief, at pp. 28-30.) But that conclusory argument ignores the facts plead in the amended petition, the dismissal review standard, and the case law on estoppel cited in Benskin's principal brief.

The pleaded facts have been extensively discussed by Benskin in his briefs. In summary, Benskin alleges that the bank made false representations and concealed important facts that affirmatively misled Benskin and prevented it from knowing about any of its available legal claims. Specifically, Benskin alleges that "[a]t

various times after May 30, 2008, West Bank, through its officers and employees, made multiple representations, now known to have been false, that it would take the steps necessary to release the 2007 Mortgage," yet failed to do so and it was not until June 27, 2011 that the bank first expressly stated to Benskin that it was now refusing to release the mortgage. (Amend. Pet., at ¶¶ 10-12; App. 26-27.) Benskin further alleges that the bank concealed that it had made an unauthorized advance under the 2007 line of credit to pay off the 2006 loan, in breach of its terms, and the bank's affirmative concealment (including falsifying its books) were not discovered until on or after July 22, 2016. (Amend. Pet., at ¶¶ 13-14; App. 27.) These are factual allegations concerning the bank's conduct. These allegations must be taken as established under the relevant dismissal review standard.

The bank finally repeats the district court's mistake—myopically focusing on a one sentence line from the district court's ruling that the allegations of fraud could have been set out in even yet more detail. Well, that's not the question—the question on dismissal is were facts set forth, even however minimally, to support the application of estoppel. Benskin cited two cases in his brief where, with considerably less facts of fraud pled, the Iowa supreme court reversed district court rulings on tolling the statute of limitations on the basis of fraud/estoppel—and the bank just ignores these relevant citations. *See Pride v. Peterson*, 173 N.W.2d 549, 554 (Iowa 1970) (when the defendant raises the affirmative defense of the running

of the statute of limitations in a pre-answer motion to dismiss, it must be "obvious from the uncontroverted facts appearing on the face of the assailed pleading not only that the claim for relief may be barred but that it is *necessarily* so barred when the action is commenced.") (emphasis added); *Rieff v. Evans*, 630 N.W.2d 278, 291 (Iowa 2001) ("With these [basic] facts of inability for discovery pled, coupled with allegations of fraud, the [plaintiffs] have sufficiently placed the onset of the statute of limitations in dispute. When such is the case, a dismissal of the petition based on statute of limitations grounds is not appropriate.") (citing *Pride*, 173 N.W.2d at 554.).

2. The District Court Erred In Granting The Dismissal Motion On The Ground Of The Running Of The Statute Of Limitations Respecting Count IV Of The Amended Petition (The Fraud Claim).

The bank again minimizes or ignores the allegations in Benskin's amended petition, as well as the arguments in Benskin's principal brief, and simply opines that the district court's conclusory statement concerning the purported insufficiency of the fraud allegations is sufficient to uphold the ruling. (Bank's brief, at pp. 30-34.) But this again ignores the allegations of the petition, the dismissal standard of review rule, and the relevant case law. And all of this is discussed in the immediately preceding section of this reply brief. The bank's brief remains devoid of a full discussion of the alleged facts set forth in Benskin's petition, the dismissal review standard exhaustively set forth in Benskin's principal brief, and the case law cited

by Benskin that shows the Iowa supreme court has reversed district court rulings dismissing on statute of limitations grounds petitions that had set forth considerably fewer specific allegations of fraud than are set forth in Benskin's amended petition. *See Pride*, 173 N.W.2d at 554; *Rieff*, 630 N.W.2d 291.

3. The District Court Erred In Granting The Dismissal Motion On The Ground Of Failure Of Proof Of The Publication Element Respecting Count V Of The Amended Petition (The Slander Of Title Claim).

The bank finally argues the district court correctly dismissed on the merits (as opposed to statute of limitations grounds) Benskin's slander of title claim. (Bank's brief, at pp. 34-36.) This claim is based on the bank's filing the mortgages on the Polk County located real estate (as well as its failure to release those mortgages) despite Benskin's never having tapped into the credit line secured by those mortgages. The bank parrots the district court's observation that Benskin for pleading purposes was required to identify a specific—by name, not category or type—third-party to whom this title slander was communicated. As Benskin explained in his principal brief, the response to this position is an easy one—the improperly recorded and non-released mortgages were communicated *to the public at large* (and not just to a single individual) as the result of the bank's wrongly accessing the credit line and refusing to release the recorded mortgages. Again, the bank does not even attempt to distinguish the authorities cited by Benskin—such as *Monroe v. Bank of America Corp.*, 2018 WL 1875294, at *4-5 (N.D. Okla. 04-19-

2018) and *Nelson v. Bayview Loan Servicing, L.L.C.*, 2014 WL 4629382, at ¶¶ 86-87 (Ill. App. 2014)—that sensibly indicate a recorded mortgage is publication to the public at large that the mortgagee claims a lien interest in the realty described in the mortgages. Indeed, that is the purpose of the recordation statutes—to publish notice to the public, including interested third-persons, of a lienholder's claim against the real estate and its priority. Benskin sufficiently alleged a slander of title claim, particularly under the applicable dismissal review standard.

CONCLUSION

For the reasons stated and authorities cited in Benskin's briefs, the court should reverse the district court's dismissal ruling, and as it respects each and all of the five claims asserted by Benskin in his amended petition.

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)(1) or (2) because this brief contains 3,808 words, excluding parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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/ S.P. DeVolder
S.P. DeVolder

March 11, 2019
Date

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on March 11, 2019, a copy of this Reply Brief of the Appellant was filed electronically with the Clerk of the Iowa Supreme Court through EDMS, and which system further will provide access to and service of the Brief on that same date to:

Dennis P. Ogden, Esq.
BRICK GENTRY, P.C.
6700 Westown Parkway, Suite 100
West Des Moines, IA 50266

/s/ S.P. DeVolder
S.P. DeVolder