

IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-1966

BENSKIN, INC.,

Plaintiff-Appellant,

v.

WEST BANK,

Defendant-Appellee.

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

APPLICATION FOR FURTHER REVIEW
(Iowa Court of Appeals Decision: March 4, 2020)

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QUESTIONS PRESENTED FOR REVIEW

- (1) Whether Benskin, Inc.'s amended and substituted petition failed to adequately allege the doctrine of equitable estoppel as a response to West Bank's statute of limitations defense making dismissal of its claims of breach of contract proper?;**

- (2) Whether Benskin, Inc.'s amended and substituted petition failed to adequately allege the doctrine of equitable estoppel as a response to West Bank's statute of limitation defense making dismissal of its claim for fraud proper?;**

- (3) Whether Benskin, Inc.'s amended and substituted petition failed to give fair notice of its claim for slander of title making dismissal of Count V of the petition proper?**

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STATEMENT SUPPORTING FURTHER REVIEW

On March 4, 2020, the Court of Appeals reversed the district court's decision dismissing Benskin, Inc.'s action against West Bank. See, *Benskin, Inc. v. West Bank*, No. 18–1966, 2020 WL 1049835 (Iowa Ct. App. March 4, 2020). Judge Schumacher's opinion held that the district court's decision dismissing Benskin's claims for breach of contract and fraud on statute of limitations grounds, and Benskin's claim of slander of title for failure to state a claim upon which relief can be granted, was improper. This Court should grant further review because the Court of Appeals entered a decision in conflict with the principles set forth by this Court for adequacy of the defense of equitable estoppel in *Christy v. Miulli*, 692 N.W.2d 694 (Iowa 2005) and because, as to Benskin's slander of title claim, the Court of Appeals entered a decision in conflict with the principles set forth in *Davitt v. Smart*, 449 N.W.2d 378 (Iowa 1989) and *Belcher v. Little*, 315 N.W.2d 734 (Iowa 1982). See, Ia. R. App. P. 6.1103(1)(b)(1).

Benskin's original petition was filed May 18, 2018. The original petition asserted breach of contract claims based on conduct by West Bank alleged to have occurred in 2008, roughly ten (10) years before the petition was filed. Under the

applicable statute of limitations (which no one disputes), Iowa Code § 524.221(2), Benskin's claims accrued in 2009 and must have been brought to within six (6) years from the date of the accrual or by 2015. West Bank moved to dismiss the petition on statute of limitations grounds.

Thereafter, Benskin, Inc. filed an amended and substituted petition ("A&S Petition") asserting the applicability of the doctrine of equitable estoppel with respect to the contract claims and adding claims for fraud and slander of title. Benskin did not assert equitable estoppel with respect to the fraud or slander of title claims in the A&S Petition. In the new petition, Benskin alleged that it did not discover West Bank's fraudulent conduct until June 2011 and that West Bank wrongfully concealed conduct from 2008 that was later discovered in litigation.

However, the statute of limitations had run on Benskin's fraud claim, as alleged, because Benskin had not filed an action within five (5) years of June 2011 when the fraud was discovered. See, Iowa Code § 614.1(4). Benskin's newly alleged slander of title claim asserted that West Bank's actions affecting the title of its Polk County properties had been "wrongfully concealed" and were not known to Benskin (or anyone else) for more than eight (8) years after they happened. Benskin's slander of title claim was deficient because the wrongful

claim to title could not have been public to a third person since it had been concealed for many years. The trial court correctly determined that each of Benskin claims in the A&S Petition was deficient, and should be dismissed. Despite clear law to the contrary, as noted above, the Court of Appeals reversed the district court's decision dismissing Benskin's action. Further review is warranted because the Court of Appeals decision is in conflict with the cases noted above decided by the Iowa Supreme Court.

STATEMENT OF THE CASE

West Bank seeks further review of the Iowa Court of Appeals opinion reversing the dismissal of Benskin, Inc.'s amended and substituted petition on statute of limitations grounds and for failure to state a claim. The Court of Appeals held the dismissal improper because of allegations of equitable estoppel by Benskin and because the petition gave fair notice of a slander of title claim.

Course of Proceedings & Facts

Benskin, Inc. ("Benskin") filed its petition in this action on May 18, 2018. Appendix on Appeal ("App." 10). 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 plaintiff'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 the 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 (contract claims) and added additional claims set forth in Counts IV (Fraud) and V (Slander of Title) of the A&S Petition. (App. 25-31).

In the A&S Petition, Benskin amended each of the first three counts, its contract claims, to assert that West Bank was 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. 28-29).

The A&S Petition alleges that Benskin entered into a written line of credit with West Bank on about on October 24, 2007. (App. 26 ¶ 6). Benskin alleges 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 ¶ 10). Benskin claims 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). Accepting Benskin's allegations as true, therefore, whatever West Bank's employees may have said to Benskin, West Bank was in breach of its obligations by no later than May 30, 2008 on the 2007 contracts.

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. 25-27). 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). Therefore, to the extent that West Bank's conduct breached the 2006 promissory note, the conduct had to have occurred before the note was due on August 1, 2008.

ARGUMENT

I. The Court of Appeals Erred in Reversing the Trial Court's Decision Dismissing Benskin's Contract Claims.

Equitable estoppel is not applicable to the contract claims because Benskin alleges no affirmative act taken by West Bank to conceal plaintiff's cause of action independent and subsequent to the liability-producing conduct. See, *Christy v. Miulli*, 692 N.W.2d 694, 702 (Iowa 2005). In fact, based on Benskin's allegations, West Bank could not have taken any action that would conceal Benskin's cause of action because West Bank's breaches of its obligations under the contract were

obvious when they happened. First, West Bank failed to release the 2007 mortgages on or before May 30, 2008. Second, West Bank utilized an unauthorized advance to pay off Benskin's 2006 promissory note "before it was due." (App. 27 ¶ 13). The note was due on August 1, 2008 and Benskin had to know that the note had been paid off before that date.

Given the allegations, the Court of Appeals erred in overturning the trial court's decision by finding that equitable estoppel prevented dismissal of the contract claims in Counts I – III of the A&S Petition because that ruling is in conflict with the Iowa Supreme Court's decision in *Christy*. Equitable estoppel cannot be applicable because West Bank could not have taken an affirmative action to conceal the plaintiff's claims that was independent of, and subsequent to, the liability-producing conduct. See, *Christy v. Miulli*, 692 N.W.2d 694, 702 (Iowa 2005). Certainly, no such conduct was alleged in the A&S Petition.

II. The Court of Appeals Erred in Reversing the Trial Court's Decision Dismissing the Fraud Claim.

The Court of Appeals also erred in overturning the trial court's decision on the fraud claim in Count IV on the basis of equitable estoppel for at least two reasons. First, Benskin did not plead the applicability of equitable estoppel in

Count IV of the A&S Petition and it failed to assert that equitable estoppel was even applicable to preclude dismissal of the fraud claim at the trial court level. (App. 30). Second, even if it could be said that equitable estoppel was in some fashion raised in connection with Count IV, the facts alleged by Benskin in that count do not permit the fraud claim to survive dismissal.

The A&S Petition 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.” (Id.) Thus, taking the factual allegations of Benskin’s A&S Petition, Benskin must 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 because on that date Benskin claims it became aware that West Bank’s representations were false. (App. 27 ¶ 12).

Even if it could be said that it is reasonable for Benskin to have accepted

false representations with respect to the release of West Bank’s mortgages and the payment of its 2006 promissory note for a period of nearly three (3) years, from May 2008 to June 2011, it cannot be said that West Bank’s fraud was unknown to Benskin after June 27, 2011 under the allegations of Benskin’s A&S Petition. (App. 27 ¶ 12). Equitable estoppel, therefore, cannot save the fraud claim because by May 18, 2018 it was too late to bring the claim. *See, Iowa Code § 614.1(4)* (fraud claims must be brought within five (5) years of actionable conduct).

III. The Trial Court Erred in Reversing the Trial Court’s Decision Dismissing the Slander of Title Claim.

Finally, the Court of Appeals erred in reversing by the trial court’s decision dismissing Count V of Benskin’s A&S Petition, its slander of title claim, for failure of the element of publication. As the Court of Appeals correctly points out in its opinion, the element of publication is essential to a claim of slander of title. *See, Belcher v. Little*, 315 N.W.2d 734, 737 (Iowa 1982). The Court of Appeals also correctly noted that the petition did not allege publication. In fact, a simple reading Benskin’s A&S Petition shows that Benskin alleged the opposite. Benskin claims that West Bank “internally altered” its records so as to show an unauthorized advance to pay off the 2006 promissory note, and that the unauthorized advanced

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 conduct taken by West Bank until after July 22, 2016. (App. 27 ¶ 13). The A&S Petition has no allegation 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 concealed conduct for more than eight (8) years. Since the element of publication is essential to a claim of slander of title, the trial court correctly dismissed the claim and the Court of Appeals erred in its reversal. See, *Davitt v. Smart*, 449 N.W.2d 378, 379 (Iowa 1989); see also, *Belcher v. Little*, 315 N.W.2d 734, 737 (Iowa 1982). The Court of Appeals’ decision is in clear conflict with the Iowa Supreme Court’s requirement of the element of publication in a slander of title claim.

CONCLUSION

For the foregoing reasons, this court should grant the application, vacate the decision of the Court of Appeals and affirm the district court decision dismissing

Benskin's A&S Petition, and all counts thereof, with prejudice.

REQUEST FOR ORAL SUBMISSION

West Bank requests to be heard in oral argument on this application.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This application complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.1103(4) because:

- This brief has been prepared in a proportionally spaced typeface using Times New Roman in size 14 and contains **2,087** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: March 24, 2020

/s/ Dennis P. Ogden
Dennis P. Ogden

March 24, 2020
Date