IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 20-0418

WADE AYALA,

Plaintiff, Counterclaim-Defendant and Appellee,

v.

GAIL STAFFORD,

Defendant, Counterclaimant, Third-Party Plaintiff, Appellant, and Cross-Appellee,

v.

RECONTRUST COMPANY, N.A.: BANK OF AMERICA, N.A.; EQUITY PROCESS MANAGEMENT, INC.; FEDERAL NATIONAL MORTGAGE ASSOCIATION;

Third-Party Defendants, Appellees, and Cross-Appellants.

APPELLEE/CROSS-APPELLANT EQUITY PROCESS MANAGEMENT, INC.'S REPLY BRIEF

On Appeal from the Second Judicial District
Butte-Silver Bow County, Montana
Case No. DV-18-267
Honorable Ray J. Dayton

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STATEMENT OF THE FACTS

The factual background of this matter has been set forth in the numerous briefs to this Court and will not be repeated here. The factual assertions made in Stafford's combined Answer and Reply Brief ("Stafford's Brief"), are primarily directed to arguments made by Plaintiff/Appellee Wade Ayala ("Ayala") and the Third-Party Defendants/Cross Appellants BANA, Fannie Mae, and ReconTrust ("TP Defendants"). Appellee/Cross-Appellant Equity Process Management's ("Equity") involvement in the first action was simply as a witness to the Trustee Sale on December 14, 2012, because Joseph Nowakowski, an Equity employee, cried the sale.

However, Stafford conflates Equity's minimal involvement in this matter as being the same as Fannie Mae and the TP Defendants. She then, without any support, asserts that Equity and TP Defendants' fraudulently concealed "the cause of action." Stafford's Brief at p. 5. This baseless assertion is completely contradicted by the record before the Court. Stafford's multiple affidavits submitted shows she was fully aware of all the information needed to make any claims against Equity by December 27, 2012. The first time she filed a claim against Equity was not until December 4, 2018. As discussed below and in Equity's principal brief, Stafford's claims against Equity fail as a matter of law and equitable tolling does not apply to claims against Equity.

ARGUMENT

Stafford's argument that the statutes of limitations for all of her claims against Equity were equitably tolled is based on unsupported assertions of fraudulent concealment and a complete disregard of the factual record that shows she had all the information by December 27, 2012. Equity was hired to cry the trustee sale on December 14, 2012. Joseph Nowakowski cried the sale as set forth in Equity's principal brief. Subsequently, Fannie Mae filed a wrongful detainer action on January 27, 2013. Stafford filed a counterclaim on August 26, 2013 asserting she had a leasehold interest for one-year. Equity was not a party to that litigation (DV-13-204). Equity's involvement was limited to providing Joseph Nowakowski's affidavit concerning the sale for that case. That was the extent, and it bears repeating that Stafford's counsel acknowledged she was not claiming fee ownership of the property during the course of that litigation.

1. Stafford's Claim That She Entered into a Written Contract to Purchase the Property is Baseless.

Stafford attempts to avoid a statute of limitations defense by arguing she had a written, not oral, contract. However, she has failed to offer any evidence of a claimed written contract, because one simply does not exist. The only breach of contract claim she could make is for an oral contract. The statute of limitations for that claim is five years and expired on December 27, 2017. Mont. Code Ann. § 27-2-202(2). On that basis alone, her breach of contract claim fails as a matter of law.

But moreover, her claim that a contract ever formed at all is unfounded and counter to the established facts.

2. Stafford's Argument She Entered into A Contract to Buy the Property is Unsupported by The Facts and The Law.

Stafford's positions here are completely contrary to the evidence. The evidence is clear. The extensive discussions of "with reserve" and "without reserve" auctions, while clearly demonstrating the subject auction was indeed a "with reserve" auction, can obscure the fact that Joseph Nowakowski did not accept any alleged bid she made. That is fatal to any claim of a breach of contract.

Stafford's attacks on Equity's arguments are dishonest. Stafford argues that "EPM persistently and dubiously claims FNMA's bid was 'the only bid at the sale'… and which the Trustee's Deed fraudulently states was the highest bid." Stafford's Brief at p. 18. There is nothing dubious in stating the truth. Stafford was not a qualified bidder, period, according to Equity's instructions from FEI. *See* Equity's principal brief at 7-8. Additionally, on page 20 of Stafford's Brief, in a footnote she implies Equity was inconsistent with respect to a "reserve price." The difference between the amounts ($233,729.41 when the notice of trustee sale was published vs. $238,564.88 on the day of the sale on December 14, 2012) is simply a function of costs and interest increasing with time. Finally, Stafford argues that Equity "then bizarrely suggests that 'maximum amount' really means 'minimum amount.' It does not." Stafford Brief at p. 20. Equity is confused by

Stafford's interpretation of Equity's argument on this issue. However, there is nothing confusing about what the rules required with respect to qualifying a bidder. To qualify as a bidder, Stafford had to contemplate bidding $238,565.88, and have those funds with her. She did not and therefore could not bid at the sale. The District Court correctly granted Equity's motion for summary judgment that no contract existed.

3. Equitable Tolling Does Not Apply for Untimely Claims Against Equity.

The District Court did, however, err in denying Equity's motion for summary judgment for negligence with respect to the trustee sale and violation of the Montana Unfair Trade Practices Act. The first time that any legal remedy was sought against EPM was well beyond the time limits of the longest statute of limitations. The three-part test used by this Court as set forth in *Lozeau v. GEICO Indem. Co*., 2009 MT 136, ¶ 14 demonstrates that equitable tolling does not apply to claims against Equity.

The first action had just two parties, Stafford and Fannie Mae. The only legal remedy sought by Stafford was for a declaratory judgment "quieting title in her name as to a leasehold interest in the property for a period of one year," which was filed on August 29, 2013. (District Court Case Register Document (hereafter "Doc.") 10, Exhibit K.

Equity was not a party. While fictitious John Does were named, they were identified as those unknown parties that claim or may claim some interest in the property. *Id.* Equity's role was to cry the sale. Equity never claimed an interest in the property.

Stafford cites to *Hopkins v. Kedzierski*, 225 Cal. App. 4th 736, 170 Cal. Rptr. 3d 551 (2014) for the proposition that Equity's knowledge of DV-13-204 presents a question of fact on whether equitable tolling can apply to claims against Equity. *Hopkins* is readily distinguishable from the facts here. Hopkins fell from a second story balcony of the office building where she worked. *Id.* at 741. The owners of her employer also owned the office building. *Id.* Her employer's human resource manager filed a workers' compensation claim on her behalf shortly after the accident. Later Hopkins filed tort claim based on premises liability. *Id.* at 743. The district court determined that equitable tolling did not apply to the later claims because her workers' compensation remedy was still pending. *Id.* at 748. The California appellate court found that particular reasoning was insufficient and remanded to permit the trial court to make factual determinations as to whether Hopkins demonstrated the three required elements of equitable tolling. *Id*. at 755.

While the District Court did not specifically articulate the reasoning for finding statutes of limitations were equitably tolled, this Court can directly determine that Montana's three-part equitable tolling test does not provide Stafford

relief against Equity pursuant to its *de novo* review. Equity was never put on notice of any alleged liability arising from the trustee sale until after the limitations period expired. Stafford completely changed course on the remedies she was seeking after the expiration of the pertinent statutes of limitations. In addition to the passage of time, a key witness has passed away, and therefore Equity has been prejudiced. The three-part test simply cannot be met.

A. *Stafford Did Not Provide Timely Notice to Equity of Potential Claims Against It Within the Applicable Statute of Limitations.*

Despite the fact that Stafford originally sought a declaration that she was entitled to a one-year lease on the property, Stafford now claims that Equity was on notice because Fannie Mae obtained an affidavit from Mr. Nowakowski regarding the trustee sale. Without any support, she makes the leap that providing a factual affidavit in litigation is the equivalent of being on notice of claims that had never been made. Stafford provides no support for the allegation that Equity had any knowledge of the bases for the first suit, let alone anything that could indicate it was a potential liability target. This is in stark contrast to the cases that have extended equitable tolling to new defendants. For example, in *Structural Steel Fabricators, Inc. v. City of Orange* (1995) 40 Cal. App. 4th 459, the court allowed tolling against the city by a subcontractor, where at the time it sued the general contractor and surety, it also sent the city a letter informing it of the lawsuit and stating that the city might be liable. A later California case used *Structural Steel* as

an example of an exceptional circumstance to allow a claim to proceed against a different party after statutes of limitations expired and stated:

> These decisions persuade us that, absent circumstances such as those involved in *Structural Steel Fabricators, Inc. v. City of Orange, supra*, 40 Cal. App. 4th 459, and *Stalberg v. Western Title Ins. Co*., *supra*, 27 Cal. App. 4th 925, equitable tolling should not apply where the first proceeding did not involve the defendant sued in the second proceeding.

Apple Valley Unified Sch. Dist. v. Vavrinek, Trine, Day & Co. (2002), 98 Cal. App. 4th 934, 956 (emphasis added).

Apart from conclusory statements that Equity was put on notice of claims against it, Stafford offers no evidence to support the claim. With respect to defeating summary judgment, the non-moving party must set forth specific facts and cannot simply rely upon their pleadings nor upon speculation, fanciful or conclusory statements. *Thomas v. Hale* (1990), 246 Mont. 64, 67, 802 P.2d 1255, 1257.

Stafford cannot satisfy the notice requirement required by Montana Law. Therefore, the District Court erred in finding the statute of limitations equitably tolled.

B. Equity Has Been Prejudiced by Stafford's Untimely Claims.

Again, without any support in the record, Stafford makes a leap to argue that Equity is not prejudiced because it "undoubtedly knew the facts supporting Stafford's claims." Stafford's Brief at 8. She also states that "discovery in DV-13-

204 prepared them for this case." *Id.* Equity was not involved in discovery in the DV-13-204 case. It was not a party. The only involvement it had was when Mr. Nowakowski provided a short affidavit regarding the trustee sale. Mr. Nowakowski was simply a witness. Stafford's attempt to impute knowledge of the details of the DV-13-204 litigation to Equity is not supported by the record.

The record does, however, establish clear prejudice to Equity. Mr. Nowakowski passed away on August 1, 2018. This was about four years after he provided the affidavit. This was also four years after Stafford's counsel confirmed that she was not claiming any ownership of the property. As this Court observed in *Stafford I*:

> Nearly five years later, Stafford sought leave to bring additional counterclaims for fraud, negligent misrepresentation, unjust enrichment, compensatory and punitive damages, violations of the Montana Unfair Trade Practices and Consumer Protection Act, and a declaratory judgment to quiet title in Stafford's favor—all claims rooted in the belief that Stafford was entitled to rightful ownership and possession of the property. *Until that time, Stafford had explicitly represented to both the District Court and Fannie Mae that she was not asserting an ownership interest in the property*. Fannie Mae did not have notice that Stafford was claiming an ownership interest or that she was seeking to raise issues related to any other claims. Moreover, Fannie Mae did not expressly or impliedly consent to try those issues before Stafford attempted to bring her additional claims. M. R. Civ. P. 15(b)(2) is therefore inapplicable.
>
> *Fannie Mae v. Stafford*, 2019 MT 114N ¶ 17 (emphasis added).

Mr. Nowakowski's passing is the definition of prejudice in this matter. Tolling should not apply in a case such as this where a defendant's ability to gather

evidence has been critically impaired through the loss of a witness such as Mr. Nowakowski. Stafford cannot demonstrate that Equity was not prejudiced. She offers nothing but conclusory and fanciful statements that no prejudice exists.

C. Stafford Did Not Act in Good Faith.

Stafford's decisions in making claims in DV-13-204 and in the case at bar do not demonstrate good faith. Again, this Court has already noted that Stafford changed from seeking a leasehold interest to claiming full rightful ownership and possession of the property. However, she did so after pertinent statutes of limitations expired. She also did so after Ayala purchased the property through an online auction in early 2018.

Her reliance on *Collier v. City of Pasadena*, 142 Cal. App.3d 917 (Cal. Ct. App. 1983) is misplaced. In *Collier* a firefighter timely filed a workers' compensation claim against the city and later filed a pension claim against the city. *Id*. at 920-922. The pension claim was denied as not being timely. *Id.* at 922. The California appeals court analyzed the application of equitable tolling, which demonstrated a completely different scenario than the case at bar.

> The timely notice requirement was satisfied when Collier filed his workers' compensation claim alleging employment-related disability. That claim was filed only two-and-one-half months after he suffered the injuries which are the source of both the workers' compensation claim and the disability pension claim. That is easily within the six months allowed for initiating disability pension claims.

> Only if the retirement pension board is a completely separate defendant from the City of Pasadena which was contesting the compensation claim could the filing of the first claim possibly fail as timely notice. To take that position this court would have to accept an artificial compartmentalization of a single corporate entity, the City of Pasadena, which defies common sense. The City of Pasadena operates this pension plan. The City of Pasadena is the employer involved in the workers' compensation claim. The same city attorney's office represented the city with respect to both claims. We have no difficulty holding that notice to the city in its capacity as an employer defendant in a workers' compensation case constituted timely notice to the city in its capacity as a retirement plan administrator.

Id. at 927.

The court's analysis of good faith and reasonableness in *Collier* show facts that are very different than Stafford's actions here. The court stated that one "possible indicum of reasonableness and good faith is whether the plaintiff takes affirmative actions which might mislead the defendant into believing the plaintiff was foregoing his second claim." *Id.* at 932. Here, for nearly five years in litigating DV-13-204, Stafford took the position that she was not asserting an ownership interest in the property. This fact supports a finding that Stafford was not reasonable, nor acting in good faith.

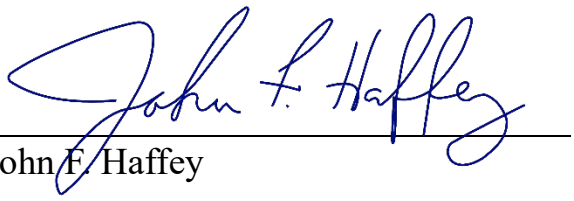
Stafford cannot satisfy any part of the *Lozeau* three-part test. Therefore, the District Court erred in finding equitable tolling applied.

CONCLUSION

As set forth in Equity's principal brief and in this reply, Equity requests the Court to affirm the District Court's order granting summary judgment to Equity for breach of contract, actual fraud, negligent misrepresentation, and constructive fraud (and declaratory judgment on STFA) and reverse the district court's denial of summary judgment on Stafford's' claims of negligent sale and violation of the UTPA.

DATED this 14th day of May, 2021.

HAFFEY VAP PLLC

By 
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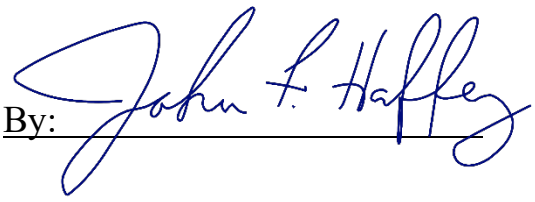
By: 

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I hereby certify that I have filed a true and accurate copy of the foregoing ***Appellee/Cross-Appellant Equity Process Management, Inc.'s Reply Brief*** with the Clerk of the Montana Supreme Court and each attorney of record by following means:

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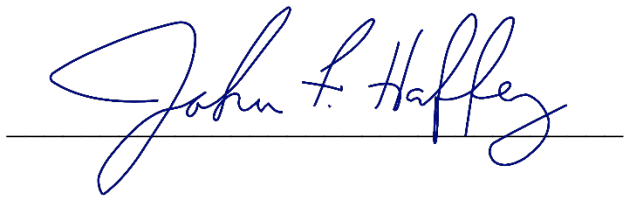

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