IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ROBERT R. MITCHELL; LISA TALLMAN,; MITCHELL FAMILY LIVING TRUST; GARY GRENDAHL; JOANN GRENDAHL; OLYMPIC CASCADE TIMBER, INC., a Washington corporation; GM JOINT VENTURE, a Washington Joint Venture Partnership; ROBERT MITCHELL, INC., a Washington corporation, Appellants, v. MICHAEL A. PRICE and "JANE DOE" PRICE, husband and wife; THOMAS W. PRICE and "JANE DOE" PRICE, husband and wife; JAMES REID and SONJA REID, husband and wife; KEVIN BYRNE and MARY BYRNE, husband and wife; ROBERT COLEMAN and "JANE DOE" COLEMAN, husband and wife; and NW, LLC, a Washington limited liability company, Respondents, THOMAS H. OLDFIELD and "JANE DOE" OLDFIELD, husband and wife, Defendants.	No. 35291-5-II Consolidated with No. 36361-5-II UNPUBLISHED OPINION

Bridgewater, J. — In this consolidated appeal, Robert R. Mitchell, Lisa Tallman, the Mitchell Family Living Trust, Gary Grendahl, Joann Grendahl, Olympic Cascade Timber, Inc., Robert R. Mitchell, Inc. (collectively "the Mitchells") appeal the Pierce County Superior Court's summary judgment dismissal

of their claims against Michael A. Price, Jane Doe Price, Thomas W. Price, Jane Doe Price, James Reid, Sonja Reid, Kevin M. Byrne, Mary Byrne, Thomas H. Oldfield, Jane Doe Oldfield, and NW, LLC. The Mitchells also challenge the trial court's decision on several other issues but, due to our decision on the preliminary issues, we do not reach them. We reverse the summary judgment dismissal because genuine issues of material fact still exist and we reverse the trial court's award of attorney fees.

On July 30, 2004, the Mitchells filed their complaint. Each of the eight plaintiffs was an investor in and a member of NWCLF.[1] The Mitchells sued on their own claims and by way of assignment on behalf of NWCLF's claims. The named defendants were the five members of NW, LLC (NW)—Byrne, Reid, Coleman, and the Prices—, Oldfield, and NW. Essentially, the Mitchells alleged that the defendants violated the NWCLF operating agreement when NWCLF invested significant resources in one particular property, for which it held subordinate loan positions. They allege that the defendants misrepresented the status of the NWCLF portfolio, breached contracts, and committed fraud, resulting in significant pecuniary loss to the Mitchells.

On July 15, 2005, Byrne and Reid filed a motion for partial summary judgment, claiming that the alleged assignment of NWCLF's claims to the Mitchells was null and void. The trial court granted partial summary judgment dismissing all claims NWCLF assigned to the Mitchells.

On April 14, 2006, Byrne and Reid filed another motion for summary judgment, asking the trial court to dismiss the Mitchells' remaining claims on the theory that the applicable statute of limitations had expired. Specifically, they argued that the Mitchells knew or should have known of the breach of their investment agreement before July 30, 2001. The trial court granted summary judgment dismissing Byrne,

[1] NW, LLC provided loan securitization, a complex series of transactions that resulted in the sales of large numbers of loans to groups of investors. NW formed NW Commercial Loan Fund, LLC (NWCLF) in 1998, to hold loans that did not qualify for securitization and to provide a vehicle for NWCLF investors to earn interest from loans that NW assigned to NWCLF.

Reid, and the Prices based on the statute of limitations.

On May 4, 2006, the Mitchells moved to strike a memorandum from one of the NWCLF attorneys that they inadvertently produced (the Yanick memorandum) and moved to file a third amended complaint to add NWCLF as plaintiff. The trial court denied both motions. Byrne, Reid, and the Prices requested attorney fees and costs on the theory that the action was frivolous. The trial court granted the motions and awarded attorney fees and costs of $250,270.40.

ANALYSIS

We review an order of summary judgment de novo. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is valid if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Jones*, 146 Wn.2d at 300-01. We engage in the same inquiry as the trial court, viewing all inferences from the evidence in the light most favorable to the Mitchells as the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). We affirm a grant of summary judgment where reasonable minds can reach only one conclusion regarding claims of disputed facts. *Christiano v. Spokane County Health Dist.*, 93 Wn. App. 90, 93, 969 P.2d 1078 (1998), *review denied*, 1999 Wash. LEXIS 382 (Wash. June 1, 1999).

I. Assignment

The Mitchells argue that the trial court erred by finding the assignments invalid. Without holding whether the assignments were valid, we hold that there is no substantial prejudice imposed by allowing the Mitchells to add NWCLF as a plaintiff in this case.

The Mitchells contend that the trial court should have allowed them to amend their complaint to add NWCLF as a plaintiff and to allow them to attempt to pierce the corporate veil. The decision to grant a motion to amend pleadings is within the trial court's discretion. *Wilson v. Horsley*, 137 Wn.2d 500, 505,

974 P.2d 316 (1999). We apply a manifest abuse of discretion test. *Wilson*, 137 Wn.2d at 505. We will not disturb the trial court's decision unless it was manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

"The touchstone for the denial of a motion to amend is the prejudice such an amendment would cause to the nonmoving party." *Wilson*, 137 Wn.2d at 505. Prejudice occurs if the amendment would cause undue delay, unfair surprise, or jury confusion. *Wilson*, 137 Wn.2d at 505-06. We hold that there is no prejudice to the nonmoving party by the addition. Thus, we hold that the trial court abused its discretion because where there is no prejudice by the addition, there is no tangible ground to support the trial court's decision.

II. Statute of Limitations

The Mitchells argue next that the trial court erred by granting summary judgment dismissal on their remaining claims based on the statute of limitations. Specifically, they contend that genuine issues of material fact remain as to when Mitchell and Grendahl learned the elements of their claims, suffered damage, and whether they exercised due diligence. We agree.

The statute of limitations is an affirmative defense and the burden is on the moving party to prove the violation. *Haslund v. City of Seattle*, 86 Wn.2d 607, 620-21, 547 P.2d 1221 (1976). As a preliminary matter, we note that Byrne and Reid presented no evidence as to this defense for any plaintiff other than Mitchell and Grendahl and, thus, the summary judgment did not apply to Tallman, Jacobson, Grenville, and the Mitchell Family Trust.

Byrne and Reid offered the following reasons to support their statute of limitations defense: (1) Mitchell and Grendahl knew or should have known of the facts underlying their claims because the deeds were part of the public record, (2) they had notice when they had problems withdrawing funds, (3)

Grendahl listed all of his future claims in the Woodell letter, and (4) the Yanick memorandum showed that they had considered the statutory deadline for filing.

A. Public Record

Byrne and Reid claim that the Mitchells knew or should have known of the facts underlying their subsequent claims more than three years before they filed their complaint. They argue that NW assigned each of the three Graham Square deeds of trust to NWCLF in 1999, five years before the Mitchells initiated their lawsuit. NW recorded these assignments with the Pierce County Auditor in 1999, and they became part of the public record. Byrne and Reid contend that these documents revealed, in 1999, that the NWCLF loans were not in a first position on their respective mortgages.

That the deeds were part of the public record is not dispositive here. Recording an instrument affecting real property provides constructive notice only to a party that has "*reason to refer to the record in which the document is recorded*." *Aberdeen Fed. Sav. & Loan Ass'n v. Hanson*, 58 Wn. App. 773, 777, 794 P.2d 1322 (1990). Further, we construe constructive notice only if "'ordinary prudence and business judgment'" required examining the record. *Aberdeen*, 58 Wn. App. at 777 (quoting *Irwin v. Holbrook*, 32 Wash. 349, 357, 73 Pac. 360 (1903)). We hold that ordinary prudence and business judgment did not require NWCLF to continually check the assigned deeds.

B. Distributions

Byrne and Reid argue that because both Mitchell and Grendahl encountered problems when they sought withdrawals from the fund, they knew or should have known that they were suffering damages in March 2001. But viewing the facts in the light most favorable to Mitchell and Grendahl, Byrne continually reassured them that their investments were secure. This created a question of material fact for which summary judgment was not proper.

III. Woodell Letter

Byrne and Reid contend that Grendahl knew, without question, of his damages by July 9, 2001,

when Woodell wrote the letter to Loan Holdings. We hold that the Woodell letter does not show knowledge but, rather, shows due diligence at the beginning of an inquiry. The last paragraph of this letter supports our determination:

> We are so concerned *that we do not yet have all the pertinent facts*, we must demand that our accountant, William R. Stevens, be given immediate access to NW Commercial Loan Fund records.

CP at 1200 (emphasis ours).

IV. Yanick Memorandum

Finally, Byrne and Reid cite to the Yanick memorandum, a memorandum from the Mitchell's attorney to the Mitchells, as corroborative evidence that the Mitchells knew of their claims more than three years before they filed them. The memorandum stated the following:

> In about March of 2001, some of the limited members of NWCLF attempted to make withdrawals from the fund and were met with delay and evasive responses from Byrne. Gary and his attorney, Mike Woodell, asked for a meeting to discuss what was happening with the fund. Byrne showed up at the meeting with Oldfield. Gary viewed Oldfield as the attorney for NWCLF at that point, and Oldfield's presence helped to allay Gary's concern.
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> . . . .
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> The second meeting was in June 2001. By that time, the limited members had learned through their own investigation that NWCLF held only eight notes. Aside from one note for a property in Oak Harbor for approximately $200,000, the notes were all for loans to Inline LLC, Graham Square I, LLC, and Graham Square II, LLC . . . NWCLF had purchased the Graham Square notes in January 1999.
>
> The limited members got a little more information at the June meeting. They learned that NWCLF was in second position on most of the notes and that some of the notes were delinquent. They also learned that the members of the Graham Square LLCs were the members of NW, together with Al Olsen, who owned a 50 [percent] share in the LLCs.

CP at 1234-35. Further:

> The shortest statute of limitations we are likely to have is the three-year statute for most torts. RCW 4.16.080. The three years starts to run from the time the wrong was or reasonably should have been discovered. *Quinn v. Connelly*, 63 Wn. App. 733, 736[, *review denied*, 118 Wn.2d 1028] (1992). Based on what we know, there is no basis to conclude that the NWCLF members should have discovered NW's activity (and therefore

> Oldfield's failure to disclose it or withdraw if he was aware of it) before they actually did. It is our understanding that the discovery came—or began—perhaps as early as March 2001. To be safe, any action should be filed no later that February 2004.

CP at 1241.

> A January 8, 2002, letter from Will states that it was disclosed in August 2001 that distributions to limited members were not on track and that the borrowers on the notes held by NWCLF could not repay their loans unless the collateral was sold or refinanced. It was also at that time, according to the letter, that the limited members learned that the borrowers were in default on a portion of the first-position debt and that NWCLF was in second position. *We need to square these statements with the timing of events as described above. In general, the sequence of events will have to be clarified eventually. It would help to have someone review the file and make a detailed timeline.*

CP at 1236 (emphasis added). The Mitchells contend that, at best, the Yanick memorandum created an issue of fact. We agree.

This memorandum admits its own inconsistencies, including discrepancies with the timeline of the case. Further, it is inconsistent with the fact that Mitchell, Grendahl, and Stevens all stated under oath that they did not learn about the NWCLF loans until August 2001. A genuine issue of material fact exists as to when the Mitchells learned of the NWCLF loans and their status.

Because we reverse the summary judgment, we do not address the Mitchells' substantial evidence challenges. Further, we reverse the trial court's award of attorney fees, as this case was not frivolous.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.

We concur:

Van Deren, C.J.

Armstrong, J.