Circuit Court for Montgomery County
Case No. 401247-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1483

September Term 2016

BARBARA ANN KELLY ET AL.

v.

JPMORGAN CHASE BANK, N.A.

Meredith,
Leahy,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: December 5, 2017

In 2007, Barbara Ann Kelly borrowed $1,775,000.00 from Washington Mutual Bank. The loan was evidenced by an adjustable rate note (hereafter "the Note"), which Ms. Kelly signed. To secure repayment of the loan, a deed of trust was signed that encumbered property located at 4505 Wetherill Road, Bethesda, Maryland ("the Property"). Because the Property was owned by Ms. Kelly and her husband, Gregory Myer, as tenants by the entirety, both Mr. Myers and Ms. Kelly signed the deed of trust.

On August 29, 2014, the trustees appointed pursuant to the deed of trust, filed in the Circuit Court for Montgomery County, an order to docket foreclosure. Approximately six months later, on February 13, 2015, Ms. Kelly and Mr. Myers filed a third-party complaint in the foreclosure action, in which they named JPMorgan Chase Bank, N.A. (hereafter "Chase") as the sole defendant. At the time Chase was the servicer of the loan made to Ms. Kelly. The third-party complaint alleged that Chase had orally modified the terms of the loan on July 10, 2010 and that Chase later breached the modified terms of the loan by failing to acknowledge that the loan had been modified. The third-party complaint contained two counts, each alleging breach of contract based on Chase's failure to honor the alleged oral agreement to modify the terms of the loan. The third-party complaint was severed from the underlying foreclosure proceeding pursuant to the Circuit Court for Montgomery County's standing administrative order and was assigned a new case number. Chase filed a motion to dismiss the third-party complaint on the ground that the causes of action set forth in the complaint were barred by Maryland's three-year statute of limitations.

On June 21, 2016, the parties filed a joint stipulation in which they set forth their agreement that the third-party plaintiffs would have until June 27, 2016 to file a response to Chase's motion to dismiss.

On June 27, 2016, the third-party plaintiffs filed an opposition to the motion to dismiss in which they argued that Chase's motion was now moot because they had, on June 27, 2016, filed an amended third-party complaint. That amended third-party complaint closely tracked the language in the original complaint but added an allegation supported by an exhibit that will be discussed *infra.*

On June 28, 2016, the circuit court filed an order granting Chase's motion to dismiss the original third-party complaint. The order stated that the original third-party complaint was dismissed with prejudice. Ten days later, on July 8, 2016, the third-party plaintiffs filed a motion to reconsider and to vacate the order dismissing their original third-party complaint. Movants argued that the circuit court's dismissal, after the filing of the amended complaint, was improper and, therefore, should be vacated. The circuit court, on August 10, 2016, entered an order denying the motion for reconsideration. This timely appeal followed.

Ms. Kelly and Mr. Myers (hereafter "the appellants") contend in this appeal that the circuit court, when it granted the motion to dismiss, either ignored, or was unaware of the fact, that the parties to the suit had filed a stipulation extending the time to answer the dismissal motion. Appellants argue that the amended third-party complaint, as a matter of

law, superseded the original third-party complaint and therefore, according to appellants, the motion to dismiss filed by Chase was moot at the time it was granted.

In its brief, Chase admits, at least tacitly, that the trial judge erred when he granted the original motion to dismiss, without considering the amended third-party complaint filed by appellants. This implied concession is well-taken. It is black letter law in this state that an amended complaint supersedes any prior complaint. *Asphalt & Concrete Services, Inc. v. Perry*, 221 Md. App. 235, 267 (2015), *aff'd.*, 447 Md. 31 (2016). Nevertheless, according to Chase, the failure to consider the third-party complaint was harmless error because it, like the original third-party complaint, showed that any claim or claims that the appellants had against Chase were barred by the three-year statute of limitations. Therefore, the argument goes, if the court had reviewed the amended third-party complaint, it too would have been dismissed with prejudice because the causes of action alleged therein were barred by limitations. To resolve the harmless error contention raised by Chase, we must first examine the amended third-party complaint and decide whether, as a matter of law, that complaint is barred by the three-year statute of limitations.

I.

PERTINENT ALLEGATIONS IN THE AMENDED THIRD-PARTY COMPLAINT

Sometime in 2010, appellants wanted to modify the terms of the Note due to "changed financial conditions and various other reasons." Chase also wanted to modify the terms of the Note "through a so-called mortgage modification." Paragraphs 11, 12, 13, 17 and 18 of the amended third-party complaint allege what happened next:

> 11. On or about July 21, 2010, Steve Stein, an employee of [Chase], wrote to Ms. Kelly, acknowledging Ms. Kelly "for making your payments during your trial mortgage modification period," and promising that the modification of her Note would not be in jeopardy and would become permanent if she would cause to be delivered to [Chase], at a designated time and place, a "Properly completed Hardship Affidavit."
>
> 12. On July 30, 2010, Ms. Kelly, through Mr. Myers, did deliver to [Chase]– specifically to Patricia O'Donnell, an individual then employed by [Chase] as a Homeownership Manager, at the designated time and place, a "Properly completed Hardship Affidavit."
>
> 13. Ms. O'Donnell expressed and represented to Mr. Myers and, through him, Ms. Kelly, that (a) [Chase] had accepted Ms. Kelly's "Hardship Affidavit" as properly completed, and (b) [Chase] would reduce the principal balance then outstanding under the Note to an amount equal to the then tax-assessed value of the property securing the Note through the Deed of Trust, keeping the interest rate and loan term static.
>
> * * *
>
> 17. [Chase] did thereafter refuse to acknowledge the modification of the Note and Deed of Trust it had entered into with Ms. Kelly, ultimately conveying its interests in the Note and Deed of Trust, *vel non*, to US Bank, NA which, in turn, has appointed the trustee plaintiffs in this case for the purpose of foreclosing upon the Deed of Trust.
>
> 18. [Chase's] correspondence to Ms. Kelly dated July 15, 2013, provided notice to Ms. Kelly and Mr. Myers that [Chase] had not received documents it requested, a fact that is disputed by Ms. Kelly and Mr. Myers, and that the Modification was cancelled as of that date, July 15, 2013. A copy of the notice of cancellation of the Modification is attached hereto as "Exhibit A."

Exhibit A read, in material part, as follows:

> Modification cancelled
>
> Account: 3012394254
> Property Address: 4505 Wetherill Road
> Bethesda, MD 20816-0000

> Dear Barbara A. Kelly:
>
> As of the date of this letter, we have not received the documents required to evaluate your request for a modification of the above-referenced account. Therefore, your request has been cancelled.
>
> If this account remains delinquent, all collection and/or foreclosure action will continue.
>
> We will consider future requests for a modification of the above-referenced account, however, you must reapply. . . .

Precisely what Chase did to breach the contract and how Ms. Kelly and Mr. Myers were damaged by the breach were alleged as follows:

> 20. The agreement between Ms. Kelly and [Chase] to reduce the princip[al] balance then outstanding under the Note to an amount equal to the then tax-assessed value of the Property securing the Note through the Deed of Trust, keeping the interest rate and loan term static, in consideration of Ms. Kelly's payment during the "trial mortgage modification period," constitutes a valid contract (the "Contract").
>
> 21. Specifically, Ms. Kelly is required, under the Contract, to make payment during the "trial mortgage modification period," and, by so doing, conferred consideration upon [Chase].
>
> 22. Specifically, [Chase] is required, under the Contract, to reduce the princip[al] balance on Ms. Kelly's Note to an amount equal to the then tax-assessed value of the Property securing the Note through the Deed of Trust, keeping the interest rate and loan term static, in exchange for Ms. Kelly making the aforementioned payment during the "trial mortgage modification period."
>
> 23. Ms. Kelly fully performed under the Contract, making each and every "trial mortgage modification period" payment in full, on time.
>
> 24. [Chase] breached its obligation under the Contract, refusing to reduce the princip[al] balance of Ms. Kelly's Note.
>
> 25. This breach has caused Ms. Kelly to be damaged, inasmuch as she now owes more than she otherwise would under the Note, has a larger monthly

> payment obligation than she otherwise would, and has been unable to make payments that she might otherwise be able to tender.
>
> 26. This breach has actually and proximately caused Ms. Kelly to incur damages, in the form of a greater aggregate debt under the Note, a greater aggregate debt owing to her inability to make monthly payments on the Note, and the various costs, fees, and damages associated with her being forced to defend this proceeding.
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> 27. Mr. Myers has, too, been damaged, also incurring the various costs, fees, and damages associated with his being forced to defend this proceeding.

Count II contains other allegations but none that have any relation to the statute of limitations issue here presented.

II.

STANDARD OF REVIEW

The standard of review from a grant of a motion to dismiss, is whether the decision was "legally correct." *Heavenly Days Crematorium, LLC v. Harris, Smariga and Associates, Inc*., 433 Md. 558, 568 (2013); *Fioretti v. Md. State Bd. Of Dental Examiners*, 351 Md. 66, 71 (1998) (citations omitted). In reviewing the grant of a motion to dismiss, "we must determine whether the complaint, on its face, discloses a legally sufficient cause of action." *Fioretti*, 351 Md. at 72 (citations omitted). In reviewing the complaint, we must "presume the truth of all well-pleaded facts in the complaint, along with any reasonable inferences derived therefrom." *Id.* (citations omitted).

III.

DISCUSSION

As mentioned, the appellants filed their original third-party complaint alleging breach of contract on February 13, 2015. The applicable statute of limitations in a contract action such as this is three years from the date that the cause of action accrued. See Md. Code (2013 Repl. Vol.), Courts and Judicial Proceedings Article, § 5-101. Therefore, if the appellants' causes of action accrued at any point prior to February 13, 2012, their claims were barred by the statute of limitations. Ordinarily, a breach of contract claim accrues for limitation purposes when the contract is breached or anticipatorily breached. *See Catholic University of America v. Bragunier Masonry Contractors, Inc.*, 139 Md. App. 277, 297 (2001), *aff'd*, 368 Md. 608 (2002). But Maryland also recognizes the "discovery" rule in contract actions. The limitations period for an action sounding in contract commences under the discovery rule "on the date when the plaintiff knew or, with due diligence, reasonably should have known of the wrong." *Doe v. Archdiocese of Washington*, 114 Md. App. 169, 177 (1997). A claimant should have reasonably known of a wrong when he or she has "knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry [thus, charging the individual] with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued." *Poffenberger v. Risser*, 290 Md. 631, 637 (1981) (citation omitted). In other words, the limitations period for a breach of contract claim begins to run when "the breach was or

should have been discovered." *Jones v. Hyatt Insurance Agency, Inc.*, 356 Md. 639, 648 (1999).

In this appeal, Chase's first argument concerning the limitation issue is worded as follows:

> Appellants' Complaint provided no facts indicating when Appellants subsequently discovered any alleged breach of the July 30, 2010 oral modification. The Complaint is completely silent with regard to any activity by Appellants concerning the contractual relationship between the parties, simply fast-forwarding more than four and one-half years from the formation of the alleged oral modification to the filing of the Complaint. Based upon the failure to plead any fact that could support an accrual date within three years preceding the date of filing, the Circuit Court was legally correct in dismissing the Complaint.

The above argument overlooks the legal principle that the bar of the statute of limitations is an affirmative defense, which the defendant must prove. *See* Md. Rule 2-323(g)(15). A plaintiff, or a third-party plaintiff, is under no obligation to set forth in his or her pleading facts showing when a cause of action accrued. All that is required is simple, concise and direct averments of facts sufficient to show entitlement to relief. *See* Md. Rule 2-303(b).

From the four corners of the amended third-party complaint, one cannot determine when Chase first breached the contract alleged in the amended third-party complaint much less when appellants knew, or reasonably should have known, that they were harmed by the breach. At this point, all we can determine is that sometime between July 2010 and July 15, 2013, Chase decided that it was not going to go through with the modification to which it had allegedly agreed.

In a closely related argument to the one just discussed, Chase contends:

> The plain language of the Denial Letter establishes that it is nothing more than a form denial issued in response to an unidentified modification request from Ms. Kelly, not a refusal to honor the terms of the Loan as modified by the alleged 2010 oral modification. Appellants' contrary contention is simply a contrivance to divert the court and prolong litigation.

We will assume, arguendo, that the denial letter dated July 15, 2013 cannot be construed as a refusal to honor the terms of the loan as purportedly modified by the 2010 agreement. But that still leaves us with no facts to decide when the contract to orally modify the Note was breached or when appellants first received notice of the breach.

Chase contends that based on the facts alleged in the amended third-party complaint, one can infer that the appellants knew, or reasonably should have known, of the breach at some point prior to February 13, 2012. Chase's argument in this regard is as follows:

> Appellants allege that Chase agreed to reduce the principal balance of the Loan while keeping the interest rate and term of the Loan static. Simple math requires that such a modification would have lowered the monthly payments of Ms. Kelly. Indeed, Appellants expressly cite the higher monthly payment as part of Appellants' damages. Further, if there was any such modification, Ms. Kelly would have started making the lower monthly payments, at the latest, in September of 2010. Of course, the Amended Complaint makes no reference to whether Ms. Kelley's payments changed, whether Chase accepted lower payments, or whether Ms. Kelly made any payments at all during the three years prior to her receipt of the Denial Letter.

(Reference to record extract omitted.)

What Chase says in the above argument may very well turn out to be true but the fact that the argument may someday have validity has nothing to do with the issue of whether the complaint indicates when the breach of the contract occurred or when, prior to the receipt of the denial letter, the appellants actually learned of the breach. More

specifically, the fact that appellants' third-party complaint was silent as to when Ms. Kelly's payments changed or whether Chase accepted lower payments or whether Ms. Kelly made any payments at all prior to receiving the July 15, 2013 denial letter, does not advance Chase's argument. A party's silence in his or her complaint is insufficient to supply facts from which a trier of fact can infer either when the breach occurred or when appellants received notice of the breach.

In a very similar argument, Chase contends:

> [I]t is not reasonable to infer that the Denial Letter evidences the accrual date given the normal correspondence that would have occurred between Chase and Ms. Kelly during the three year gap between the alleged oral modification and the issuance of the Denial Letter. Ms. Kelly would have received plenty of written correspondence from Chase during the three years leading up to her receipt of the Denial Letter including, but not limited to, monthly mortgage statements, yearly mortgage/escrow statements, and Form 1098 mortgage interest statements. Each would have disclosed, at a minimum, the outstanding balance on the Loan, which Appellants allege Chase agreed to reduce. Each correspondence, therefore, would have provided Appellants with actual notice, or certainly, inquiry notice, that Chase was in breach of the alleged oral modification. Again, the Amended Complaint is silent on the correspondence between the parties during the three year gap, or any attempts by Appellants to obtain the benefit of the alleged modification.

A judge considering a motion to dismiss a complaint on statute of limitations grounds, is not permitted to consider what correspondence a debtor would normally receive from a servicer such as Chase. We say this, because the complaint is completely silent as to what, if any, correspondence the appellants in fact received after the loan agreement was modified. In other words, notice of a breach cannot be inferred from facts never alleged in a complaint.

For the above reasons, we reject Chase's argument that if the motions judge had read the amended third-party complaint, he would have been obliged to dismiss that complaint because it was barred by the three-year statute of limitations. It was therefore not "harmless error" for the motions judge to dismiss the original third-party complaint with prejudice without considering the amended third-party complaint.

III. Other Matters

This case presents a perfect example of when a party who, in all likelihood, has a valid ground for dismissing a complaint, should file a motion for summary judgment pursuant to Md. Rule 2-501(a), rather than a motion to dismiss. A motion for summary judgment has numerous advantages and is almost always the appropriate vehicle to be used if dismissal on limitations grounds is sought. If a motion for summary judgment had been filed, Chase would have been able, in all likelihood, to show exactly what happened after July 2010 in regard to the loan. As the servicers of the loan, Chase likely would be able to produce the documents that it mentioned in its argument, i.e., monthly mortgage statements, yearly mortgage escrow statements, and Form 1098 mortgage interest statements. If summary judgment had been requested, and if the motion was supported by the document just mentioned, it might very well have been clear as to when appellants knew, or should have known, that Chase breached the alleged contract to modify.

The judgment dismissing the third-party complaint with prejudice is vacated and the case is remanded to the Circuit Court for Montgomery County. Upon remand, Chase, if it has documents or other evidence showing that appellants' claims are barred by the statute

of limitations, might consider filing, pursuant to Md. Rule 2-501(a), a motion for summary judgment.

JUDGMENT VACATED; COSTS TO BE PAID BY APPELLEES.