Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: November 5, 2018
Certiorari to Court of Appeals, 2017CA288 District Court, San Miguel County, 2016CV6	
Petitioner: Mark Halper, **v.** **Respondent:** Gladys Passes.	Supreme Court Case No: 2018SC353
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, NOVEMBER 5, 2018.

Appendix B

17CA0288 Halper v Passes 03-08-2018

DATE FILED: March 8, 2018

COLORADO COURT OF APPEALS

Court of Appeals No. 17CA0288
San Miguel County District Court No. 16CV6
Honorable Mary E. Deganhart, Judge

Mark Halper,

Plaintiff-Appellant,

v.

Gladys Passes,

Defendant-Appellee.

ORDER AFFIRMED

Division V
Opinion by JUDGE ROMÁN
Dunn and Welling, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced March 8, 2018

Mark Halper, Pro Se

Tueller & Gibbs, LLP, Andrew J. Gibbs, Victoria Elena Edwards, Denver, Colorado, for Defendant-Appellee

¶ 1 Mark Halper appeals the district court's order dismissing his amended complaint for failure to state a claim and for lack of standing. We affirm.

I. Background

¶ 2 In 1995, Halper entered into a promissory note and deed of trust with his mother Gladys Passes. Halper borrowed $220,000 and agreed to pay it back with interest. He also provided security for the debt through a deed of trust for his property in Telluride, Colorado.

¶ 3 In 2007, Halper quitclaimed the Telluride property to Sunshine Mesa, LLC.

¶ 4 Halper never began repayment of the debt. For years Passes, and others acting on her behalf, asked Halper to repay the amount due on the promissory note and deed of trust. The total amount of debt, including interest, allegedly exceeds $1,000,000.

¶ 5 In 2016, Halper sued Passes alleging "conspiracy to commit extortion." The gist of Halper's complaint was that his mother and others had improperly applied "psychological pressure and written correspondence" in seeking repayment of the promissory note and deed of trust.

¶ 6 Passes filed a motion to dismiss under C.R.C.P. 12(b)(5) for failure to state a claim.

¶ 7 The district court granted the motion; however, in a companion order, it gave Halper leave to file a declaratory judgment action. Halper, who has proceeded pro se, filed an amended complaint seeking "a ruling to extinguish" the promissory note and deed of trust. He also reasserted the previously dismissed claim for conspiracy to commit civil extortion.

¶ 8 Passes again filed a motion to dismiss, this time arguing (1) that under C.R.C.P. 12(b)(5) the amended complaint failed to state a claim for relief; and (2) that under C.R.C.P. 17(a) Halper was not a real party in interest with standing to bring part of the amended complaint.

¶ 9 The district court granted the motion and dismissed the amended complaint, on the grounds that (1) there was no legal basis to have the promissory note declared "null and void"; (2) Halper lacked standing to have the deed of trust invalidated; and (3) Halper's civil conspiracy claim was frivolous.

¶ 10 This appeal followed.

II. Dismissal for Failure to State a Claim

¶ 11 Halper argues that the district court erred in dismissing his amended complaint. We perceive no error.

¶ 12 After addressing the standard of review, we will analyze the applicable law with regard to promissory notes, and then deeds of trust.[1]

A. Standard of Review

¶ 13 A motion to dismiss under C.R.C.P. 12(b)(5) for failure to state a claim tests the formal sufficiency of a plaintiff's complaint. *Dwyer v. State*, 2015 CO 58, ¶ 43. To survive summary dismissal under C.R.C.P. 12(b)(5), a party must plead sufficient facts that, if taken as true, suggest plausible grounds to support a claim for relief. *Warne v. Hall*, 2016 CO 50, ¶ 24.

¶ 14 We review de novo a district court's ruling on a motion to dismiss. *Yadon v. Lowry*, 126 P.3d 332, 335 (Colo. App. 2005). In reviewing a district court's ruling on a C.R.C.P. 12(b)(5) motion, we

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[1] Halper did not raise the dismissal of the civil conspiracy claim on appeal, and we therefore deem that issue abandoned. *See Armed Forces Bank, N.A. v. Hicks*, 2014 COA 74, ¶ 38.

accept all factual allegations in the complaint as true and view the allegations in the light most favorable to the nonmoving party. *Id.*

B. Promissory Note

¶ 15 Halper's amended complaint asked for a declaratory judgment ruling "to extinguish" the promissory note, alleging that the statute of limitations had run on any action to enforce it. We conclude that there was no error in dismissing this portion of the complaint for failure to state a claim because the debt is not extinguished by the statute of limitations.

¶ 16 Deeds of trust "tie a given debt to a given parcel of property" and are "security for a debt." 59 C.J.S. *Mortgages* § 16 (2018). By contrast, a "'promissory note' is merely a promise to pay — it is not security; a 'deed of trust' however, provides the security to back the promise to pay." *Id.*

¶ 17 True, there is a six year statute of limitations for "all actions for the enforcement of rights set forth in any instrument securing the payment of or evidencing any debt." § 13-80-103.5(1)(a), C.R.S.

2017. And, under Colorado statute, liens[2] created by an instrument are extinguished at the same time that the statute of limitations bars actions to enforce that instrument. *See* § 38-39-207, C.R.S. 2017.

¶ 18 However, "[w]hile the statute of limitations may cause the remedy on a debt to be lost, it does not extinguish the debt." *Estate of Ramsey v. State Dep't of Revenue*, 42 Colo. App. 163, 167, 591 P.2d 591, 595 (1979).

¶ 19 Therefore, even assuming that the amended complaint sufficiently alleged that the statute of limitations has run on the promissory note, the complaint still does not suggest plausible grounds for relief. Halper seeks to extinguish the debt, but the running of the statute of limitations does not provide such a remedy — it merely allows Halper to raise the issue as a defense in any future action brought by Passes to enforce payment of the promissory note. *See, e.g., id.* at 167-68, 591 P.2d at 595 ("Because the statute of limitations is a personal bar which may be raised or waived by the debtor, . . . [the creditor] might have successfully

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[2] "A 'lien' is a security interest in property." 51 Am. Jur. 2d *Liens* § 1 (2018).

sued to collect the debt from her son if he had chosen not to interpose the bar as a defense."); *see also Guild v. Meredith Vill. Sav. Bank*, 639 F.2d 25, 27 (1st Cir. 1980) ("[T]he statute of limitations is a shield, not a sword . . . it has long been established that the statute is available only as a defense and not as a cause of action.").

¶ 20 Nor are we persuaded by Halper's references to *Mortgage Investments Corp. v. Battle Mountain Corp.*, 70 P.3d 1176 (Colo. 2003). That case concerns the extinguishing of liens, not debts. Indeed, in *Battle Mountain Corp.* the supreme court discussed promissory notes and reaffirmed that "[t]he running of the statute of limitations . . . does not extinguish the debt." *Id.* at 1186 (citing *Estate of Ramsey*, 42 Colo. App. at 167-68, 591 P.2d at 595). In contrast, while discussing liens the supreme court held that

> [i]f a party does not commence suit on a promissory note within six years of default, *the deed of trust is extinguished* because the six-year limitations period in section 13-80-103.5(1)(a) . . . would bar enforcement of the promissory note; therefore, *the lien would be extinguished* under section 38-39-207 . . . .

Id. (emphasis added). And here, because the promissory note is merely evidence of a debt, and not, itself, a lien securing that debt, it cannot be extinguished by the statute of limitations.

¶ 21 Finally, Halper argues that the promissory note was null and void because the money Passes gave him was a gift and not a loan. But these assertions only appear in his briefing on the motion to dismiss and on appeal, not within the complaint itself. Thus, we will not consider them. *See Kratzer v. Colo. Intergovernmental Risk Share Agency*, 18 P.3d 766, 770 (Colo. App. 2000) ("To the extent plaintiff has attempted to assert a claim under 42 U.S.C. § 1983 in the briefs she filed with the trial court, we note that the trial court should and did consider only matters stated within the four corners of the complaint.").

C. Deed of Trust

¶ 22 Halper's amended complaint asked for a declaratory judgment ruling that the deed of trust was "null and void." Specifically, he alleges that the statute of limitations had run on the promissory note thereby extinguishing the deed of trust. In this case, however, there was no error in dismissing the claim because Halper was not the real party in interest regarding the deed of trust.

¶ 23 Standing is a jurisdictional prerequisite to every case. *Espinosa v. Perez*, 165 P.3d 770, 772 (Colo. App. 2006). In order for a party to have standing, that party must be a real party in interest,

or a party who, by virtue of substantive law, has a right to invoke the aid of the courts to vindicate a legal interest. C.R.C.P. 17(a); *Ewy v. Sturtevant*, 962 P.2d 991, 995 (Colo. App. 1998).

¶ 24 One who holds the legal title is the real party in interest. *Koch v. Story*, 47 Colo. 335, 338, 107 P. 1093, 1095 (1910); *Platte Valley Sav. by Resolution Tr. Corp. v. Crall*, 821 P.2d 305, 307 (Colo. App. 1991).

¶ 25 Here, there is no dispute that Halper no longer owns the property and does not hold legal title to it. Nor does the amended complaint allege that he has any other legal interest in the property. Therefore, he is not the real party in interest.[3] Because the amended complaint does not allege facts that meet the standing requirements of C.R.C.P. 17(a), the district court correctly dismissed it for failure to state a claim.

¶ 26 We find unpersuasive Halper's arguments to the contrary. Halper asserts that the deed of trust was never assigned by Halper

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[3] Because standing is a jurisdictional prerequisite to every case, we need not address the merits of Halper's claim that section 38-39-207, C.R.S. 2017, extinguishes the deed of trust, or the issue of whether Sunshine Mesa, LLC, as owners of the property, could successfully bring such a claim.

and never assumed by Sunshine Mesa, LLC, and therefore he is the real party in interest. Once again, these assertions do not appear within the complaint itself, and we will not consider them.[4] *See Kratzer*, 18 P.3d at 770.

III. Conclusion

The order is affirmed.

JUDGE DUNN and JUDGE WELLING concur.

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[4] We further note that these assertions are called into question by the deed of trust. *Stauffer v. Stegemann*, 165 P.3d 713, 716 (Colo. App. 2006) ("[A] trial court is not required to accept legal conclusions or factual claims at variance with the express terms of documents attached to the complaint."). The deed of trust provides that in the event of "a transfer of conveyance of title . . . [that] Transferee shall be deemed to have assumed all of the obligations of [Halper] under this Deed of Trust including all sums secured hereby."