APPENDIX

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APPENDIX A

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA THIRD JUDICIAL DISTRICT AT HOMER

[Case No. 3HO- 13-213 CI]

Filed – July 12, 2016

THOMAS MICHAEL TAFFE	)
DEVONY LOUISE LEHNER	)
v.	)
FIRST NATIONAL BANK OF ALASKA.	)
	)

ORDER ON MOTION FOR SUMMARY JUDGMENT

I. BACKGROUND

Beginning in 2006, Plaintiffs Taffe and Lehner borrowed a large sum of money from Defendant First National Bank of Alaska ("FNBA") to finance a housing development in Homer called Spring Hill

Park. The parties had several negotiations resulting in various loans and Deeds of Trust. In 2008, the parties renegotiated a loan in excess of $2 million and executed a new Deed of Trust which covered most of the land in the proposed housing development. Defendants properly recorded the Deed of Trust ("DOT") covering this loan on May 21, 2008. This Deed of Trust referenced Plat 2006-54. A few months later, Plaintiffs recorded a replat of the housing development that divided and relabeled some of the tracts. This replat was not included in the legal description found in the 2008 Deed of Trust. Eventually, Plaintiffs defaulted on the loan and Defendant went through non-judicial foreclosure proceedings culminating in the sale of the property. Plaintiffs then sued FNBA on several theories arising out of the foreclosure.

Defendant filed a motion for summary judgment on Plaintiffs' claim that the 2008 Deed of Trust was an adhesion contract and was ambiguous about which property it secured. Defendant also moved for summary judgment on Plaintiffs' claims for misrepresentation.

STANDARD OF REVIEW

In order to prevail on summary judgment under Alaska Rule of Civil Procedure 56(c), the moving party must show "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In accordance with Civil Rule 56, the adverse party may then set forth "all material facts as to which it is contended there exists a genuine issue necessary to be litigated, and any other memorandum in opposition to the motion." All facts are viewed in a light most favorable to the nonmoving party.[1]

II. DISCUSSION

A. THE 2008 DEED OF TRUST IS NOT AN ADHESION CONTRACT

Plaintiffs claim the 2008 DOT is an adhesion contract. The formative case on what constitutes an adhesion contract in Alaska is *Burgess Const. Co. v. Alaska.*[2] The court found that "judicial recognition of adhesion contracts has generally been limited to consumer transactions in which form contracts are

1 *City of Kodiak v. Samaniego,* 83 P .3d 1077,1082 (Alaska 2004).
2 614 P.2d 1380 (Alaska 1980).

offered to the public on a mass basis,"[3] and described them as:

"a handy shorthand descriptive of standard form printed contracts prepared by one party and submitted to the other on a "take-it-or-leave-it" basis. The law has recognized there is often no true equality of bargaining power in such contracts and has accommodated that reality in construing them. Other authorities have emphasized that not only must the contract be offered on a "take-it-or-leave-it" basis, the party with the weaker bargaining power must also have little choice but to take it. In other words, the transaction should be one which as a practical matter is essential, or nearly so, from the standpoint of the weaker party."[4]

Ultimately, the court rejected Burgess's argument that the contract at issue was adhesive because it found the contract was a commercial contract, as opposed to a consumer agreement, was for a large amount of money, was freely negotiated, and was between two relatively sophisticated parties who had the advice of attorneys.[5] The court reasoned Burgess was not without options in the face of the contract and could have simply refused to bid.[6]

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3 *Id* at 1384
4 *Id.*
5 *Id.*
6 *Id.*

Similar to the contractual relationship in *Burgess,* the relationship between the Plaintiffs and FNBA is commercial and involves a large sum of money. The 2008 DOT is a commercial contract securing a real estate development loan of over $2 million. In addition, Plaintiffs are sophisticated parties and were supported by a team of experts. Taffe has a law degree and prior real estate development experience.[7] Plaintiffs relied on a team of experts, including an engineer, surveyor, and contractor, that assisted with construction and infrastructure.[8] The 2008 DOT was also not a take-it-or-leave-it contract. Unlike a mandatory insurance policy, Plaintiffs were not obligated to construct a real estate subdivision project. While it is true that the overall form of the DOT is standardized, there is no evidence suggesting that Plaintiffs sought to negotiate or change any legal descriptions or provisions contained within it. Moreover, Plaintiffs signed similar deeds of trust in connection with other loans from FNBA.

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7 Taffe Deposition, at 12-13.

8 Taffe Depo, at 11-15

Plaintiffs argue that whether the DOT was an adhesion contract is a question of fact because the court should determine whether the contract between the parties was the product of reasonably balanced bargaining power and whether the contractor could have withdrawn his bid without significant harm to himself.[9] In support of their equality of bargaining power argument, Plaintiffs make the claims that "FNBA drafted an extremely one-sided deed of trust contract favoring itself' and that "a negotiation between a husband and wife acting as individuals and a rich and powerful bank is not a bargain between equals."[10] These mere assumptions and speculations are not facts and are insufficient to overcome Defendant's motion for summary judgment on this issue.

Plaintiffs also claim that there were no practicable other financing options in May of 2008 due to the global recession. Plaintiffs point out that

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9 Plaintiff's Second "OPPOSITION TO MOTION FOR SUMMARY JUDGEMENT DETERMINING THAT THE MAY 20, 2008, DEED OF TRUST IS NOT AMBIGUOUS OR ADHESIVE, at 8.

10 Plaintiff's Second "OPPOSITION TO MOTION FOR SUMMARY JUDGEMENT DETERMINING THAT THE MAY 20, 2008, DEED OF TRUST JS NOT AMBIGUOUS OR ADHESIVE, at 9.

the recession of 2008 was characterized by the following: "[g]lobal credit markets were increasingly frozen;" "[r]eal estate financing in the United States came to a standstill;" "[t]he catastrophic decline of the DOW from over 13,000...to a low of under 6,500...was largely a collapse of US home prices;" and "the collapse of the domestic and international markets for credit default swaps related to the bundling of US residential mortgages, and the resulting credit freeze."[11] Understandably, the ensuing financial climate put Plaintiffs under economic pressure, but the above mentioned market dynamics that affected millions of people in various ways did not, standing alone, create an adhesion contract. Accordingly, the court grants Defendant's motion for summary judgment that the 2008 DOT was not an adhesion contract.

B. INTERPRETATION OF CONTRACT

In Alaska, there are two possible rules of interpretation that apply to the ambiguity of a

11 Plaintiff's Second "OPPOSITION TO MOTION FOR SUMMARY JUDGEMENT DETERMINING THAT THE MAY 20, 2008, DEED OF TRUST JS NOT AMBIGUOUS OR ADHESIVE, at 10.

written document: the deed interpretation rule and the contract interpretation rule.[12] Whether a deed is ambiguous is question of law.[13] First the court looks to the four comers of the documents to see if the parties' intent is unambiguous.[14] Only if the words are capable of more than one interpretation can the court go further.[15] Rules governing the interpretation of a contract, however, are more flexible and often focus on whether the contract is a fully or partially integrated document.[16]

Although titled as a "deed," a deed of trust is essentially a mortgage, which allows the trustee to have an interest in the subject property until a loan or promissory note involving the property has been paid.[17] Mortgages are interpreted the same way as other contracts.[18] Accordingly, the court will construe the 2008 DOT under rules governing the

12 *Estate a/Smith v. Spinelli,* 216 P.3d 524, 530 (Alaska 2009).
13 *Norken Corp. v. McGahan,* 823 P.2d 622, 626 (Alaska 1991).
14 *Id.*
15 *Id.*
16 *Alaska Diversified Contractors, Inc. v lower Kuskokwim Sch Dist.,* 778 P.2d 581,583 (Alaska 1989).
17 AS 34.20.110 provides that a deed of trust shall be treated as a mortgage.
18 *Bank ofNew York Mellon v, Nunez,* 180 So.3d 160 (Fla.3d. DCA I025); *Green Tree Service v. Milam,* 177 So.3d 7 (Fla.3d DCA 2015).

interpretation of contracts rather than deeds.

Plaintiffs claim the 2008 DOT is not a fully integrated document because the term "Related Documents" envisioned the parties' intent to include a new replat and a renegotiated DOT.

Plaintiffs' original briefing on this issue was somewhat confusing. However, at oral argument, Plaintiffs were able to explain their position more clearly. Plaintiffs contend the 2008 DOT was a "bait and switch" scheme. Their position is the 2008 DOT, like the previous DOT executed by the parties, envisioned a new DOT being executed once the Plaintiffs filed a new replat, approved by the Borough, which delineated Lots 31-50, and excluded other tracts, including Tract J.

Plaintiffs maintain this unusual arrangement was occasioned by the peculiarities created by the City of Homer's method of approving subdivisions. Unlike other municipalities in the Kenai Borough, the City of Homer would not sign off on a subdivision until the developer could prove it had financing for the project. Because the Borough would not approve

the plat until the City of Homer had signed off on the subdivision, the Plaintiffs had no way to go forward with the project unless the Defendant provided financing before the plat was completed.

Once Plaintiffs had the loan, they were able to obtain the City of Homer's approval for the subdivision and then submit the plat for approval by the Borough. Plaintiffs contend this is why plat B-2-A only lists lots 1-30 and why the Partial Release provision on page 6 of the DOT refers to Lots 32-50 even though those lots are not listed on plat B-2-A. As such, Plaintiffs claim the 2008 DOT is not a fully integrated agreement and the court should allow the introduction of extrinsic evidence to explain these terms.

A writing that expresses *part* of the parties' agreement is considered to be a partially integrated agreement whereas a writing that sets out the parties' *complete* agreement is deemed a fully integrated agreement.[19] The parol evidence rule does

19 *Froines v. Valdez Fisheries Development Association, Inc.*, 75 P3d 83, 86 (Alaska 2003); RESTATEMENT (SECOND) OF CONTRACTS, Section 210.

not allow the terms of a fully integrated contract to be varied by additional terms, but does allow extrinsic evidence to be introduced to explain terms in a partially integrated contract.[20]

There is a three step process to resolving parol evidence issues. This process requires the court to consider: 1) whether the contract is integrated, 2) what the contract means, and 3) whether the prior agreement conflicts with the integrated agreement.[21] Although extrinsic evidence may not be used if the court determines that the document is fully integrated, extrinsic evidence may be introduced to assist the court in resolving the first two inquiries, that is, whether the contract was fully integrated and its meaning.[22]

Because this is a factual determination that must be resolved by the court, this issue is not ripe for summary judgment and Defendant's motion for summary judgment is denied. This does not mean the court has found the DOT was not an integrated

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20 *Id.*
21 *Id.*
22 *Id.*

document, only that Plaintiffs have the right to present additional factual evidence on the issue of whether 2008 DOT is a fully or partially integrated contract.

C. CLAIMS OF FRAUD AND MISREPRESENTATION.

Defendant also moved for summary judgment on Plaintiffs' claims for fraud and intentional misrepresentation in connection with the execution of the 2008 DOT. As previously discussed, Plaintiffs' position is that the Defendant did a "bait and switch" in connection with the execution of the 2008 DOT because the 2008 DOT was supposed to be replaced with a new DOT that was not as expansive and did not include Tract J. Plaintiffs argue that the course of dealings between the parties with respect to an earlier DOT support their argument as to what was intended with the 2008 DOT.[23] As the court indicated at earlier proceedings, allegations of fraud or misrepresentation are almost always a question of fact to be resolved at trial. Because the court finds

23 Plaintiffs rely on the commercial lending documents, various emails, and a memo from Erik Niebuhr as factual support for this claim.

that Plaintiffs' allegations of fraud and misrepresentation with respect to the 2008 DOT are questions of fact, the court denies Defendant's motion for summary judgment on this issue.

Plaintiffs also claim Defendant made misrepresentations to the bankruptcy court that are actionable. The court cannot discern how any conduct by the Defendant at a subsequent bankruptcy hearing is actionable in this case. At a prior hearing, the Plaintiffs agreed they were not challenging the trustee's sale and were only seeking damages for the loss of their property as a result of the foreclosure. In their opposition to the motion for summary judgment, they admit they are not bringing a claim for defamation. Thus, it is unclear how any representations made by the Defendant's attorney at a bankruptcy hearing several years after the execution of the 2008 DOT amounts to a separate claim for fraud or misrepresentation. Plaintiffs have not submitted any documents or other evidence to support this claim.[24] Therefore, the court grants

24 Plaintiffs may be requesting the court to consider the statements at the bankruptcy hearing as evidence in support of their claim for fraud.

Defendant's motion for summary judgment on Plaintiffs' claim that statements made at a subsequent bankruptcy proceeding constitute fraud or misrepresentation in this case, or were relied upon by the Plaintiffs at the time they signed the DOT in 2008.

CONCLUSION

The 2008 Deed of Trust is not an adhesion contract or ambiguous. THEREFORE, IT IS HEREBY ORDERED Defendant's motion for summary judgment on whether the 2008 Deed of Trust is an adhesion contract is GRANTED.

The court finds it is a question of fact whether the 2008 Deed of Trust was a fully integrated contract. THEREFORE, IT IS HEREBY ORDERED Defendant's motion for summary judgment on this issue is DENIED.

It is a question of fact whether the Defendant committed fraud or intentional misrepresentation in connection with execution of the 2008 Deed o f Trust.

The admissibility of a statement made by a party opponent is governed by the Rules of Evidence but does not create a separate claim for damages.

THEREFORE, IT IS HEREBY ORDERED Defendant's motion for summary judgement on this issue is DENIED. However, the court finds there no question of fact that the alleged representations made at the bankruptcy hearing do not constitute a claim of fraud in connection with the 2008 Deed of Trust. THEREFORE, IT IS HEREBY ORDERED Defendant's motion for summary judgment on this issue is GRANTED.

DATED in Kenai, Alaska, this 12 day of July 2016.

Anna M. Moran
Superior Court Judge

APPENDIX B

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA THIRD JUDICIAL DISTRICT AT HOMER

[Case No. 3HO- 13-213 CI]

Filed – September 13, 2017

THOMAS MICHAEL TAFFE	)
DEVONY LOUISE LEHNER	)
v.	)
FIRST NATIONAL BANK OF ALASKA.	)
	)

MOTION FOR SUMMARY JUDGMENT RE: STATUTE OF LIMITATIONS

This case came before the court on July 18, 2017 for an evidentiary hearing regarding Defendant First National Bank of Alaska's (FNBA) Motion for Summary Judgment Re: Statute of Limitations. For the foregoing reasons, FNBA's Motion for Summary Judgment Re: Statute of Limitations is **GRANTED**.

I. BACKGROUND

Plaintiffs Thomas Taffe and Devony Lehner borrowed money from FNBA in order to finance a housing development in Homer, Alaska, called Spring Hill Park. The parties negotiated and agreed to various loans and Deeds of Trust to finance the development. In 2008, the parties agreed to a loan in excess of $2,000,000 and executed a new Deed of Trust. The loan covered most of the land in the proposed housing development. The Deed of Trust described the property as follows:

> "Lots One (1) through Four (4), Nine (9), Twelve (12) through Twenty (20) and twenty two (22) and Tract B-Two A (B-2-A), SPRING HILL PARK , UNIT 1, ACCORDING TO Plat No. 2006-54, in the Homer Recording District, Third Judicial District, State of Alaska."

The 2008 Deed of Trust provided for the partial release of various lots if sold for agreed upon minimum prices. Tract B-2-A included a large undeveloped area, including a valuable parcel later designated as Tract J. The 2008 Deed of Trust referenced Plat 2006-54 and was recorded on May 8, 2008.

On August 5, 2008, Plaintiffs recorded a re-plat of the housing development that divided and relabeled some of the tracts. The legal description in the 2008 Deed of Trust did not match the re-plat of the development No.2008-48. Both parties knew that the plaintiffs had recorded the 2008 plat.

Plaintiffs allege fraud, misrepresentation and fraud-in-factum based upon FNBA's failure to reissue a new Deed of Trust once the re-plat of the property had been recorded. Plaintiffs contend they had an agreement with FNBA that it would execute a new Deed of Trust once Plaintiffs filed an updated plat which delineated Lots 31-50 and excluded other tracts, including Tract J.

According to Plaintiffs, this was the practice the parties had to follow because the City of Homer would not sign off on a subdivision until the developer could prove it had financing for the project. Once plaintiffs could prove they have the loan, the City of Homer would approve the subdivision and Plaintiffs would submit a plat for approval by the borough. Once the plat was approved, the Plaintiffs would record the plat and FNBA would execute a

new Deed of Trust that covered the new lots while releasing the other property in Tract B-2-A. This was the procedure the parties utilized with the prior Deed of Trust.

Plaintiffs allege FNBA did not follow this practice with the 2008 Deed of Trust even though Plaintiffs filed the re-plat on August 5, 2008. Following a significant downturn in the economy, Plaintiffs defaulted on some of the loan payments. The parties went through a non-judicial foreclosure culminating in the sale of the property.

Following the foreclosure, Plaintiffs sued FNBA on several theories. The gravaman of Plaintiffs' complaint is that FNBA fraudulently induced them to sign loan documents when FNBA knew it was not going to follow the agreed-upon practice of executing a new Deed of Trust after Plaintiffs recorded the re-plat. Plaintiffs allege that when they fell behind on their payments, FNBA foreclosed on all the property, including Tract J, which was not supposed to be included in the deed of trust. FNBA denies these allegations.

Plaintiffs filed their initial complaint in this

case on November 13, 2013. After years of litigation, Defendant filed a motion for summary judgment on December 30, 2016. The court held an evidentiary area hearing on July 18, 2017, in order to determine the date on which the statute of limitations began to run.

STANDARD OF REVIEW

Under Alaska Rules of Civil Procedure 56(c), the moving party must show "That there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The adverse party may then set forth "All material facts as to which it is contended that there exists a genuine issue necessary to be litigated, and any other memorandum in opposition to the motion."[25] The Alaska Supreme Court has advised that the preferred memo of resolving factual issues governing effective date of the applicable statute of limitations is to hold an evidentiary area hearing.[26] The court held that hearing on July 18, 2017.

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25 *City of Kodiak v. Samaniego*, 83 P.3d 1077, 1082 (Alaska 2004).

26 *Reasner v. State Dep't of Health & Soc. Servs*, 394 P.3d 610, 615 (Alaska 2017), as amended (May 19, 2017) *citing Catholic Bishop of N. Alaska v. Does* 1-6, 141 P.3d 719, 725 (Alaska 2006).

II. DISCUSSION

A. THE CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

Plaintiffs have alleged fraud, misrepresentation, and fraud-in-factum as potential causes of action in this case. Plaintiffs' claims for fraud and misrepresentation are tort claims and subject to the two-year statute of limitations. Plaintiffs claim for fraud-in-factum is subject to the three-year statute of limitations for contracts.[27] [28] Whenever two different statutes of limitation apply, preference is given to the longer statute of limitations.[29] Thus, the court finds the three-year statute of limitations applies in this case.

The statute of limitations begins to run "When a reasonable person in like circumstances would have enough information to alert that person that he or she has a potential cause of action or should begin

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27 *Bauman v. Day*, 892, P.2d 817, 825 (Alaska 1995); AS 09.10.070.
28 See AS 09.10.053.
29 *City of Fairbanks v. Amoco Chemical Co.*, 952 P2d 1173, 1181 (Alaska 1998), *Fernandes v. Portwine*, 56 P.3d 1, 6 (Alaska 2002).

an inquiry to protect his or her rights."[30] The standard does not require that a plaintiff note each element of a cause of action; rather it focuses on when a plaintiff has sufficient information to prompt an inquiry.[31] [32]

Some inquiries are considered productive while others are not.If an unproductive inquiry has been made, the analysis changes and the question is whether the plaintiffs inquiry was reasonable. If the inquiry was not reasonable, then the cause of action accrues at the inquiry notice date unless a reasonable inquiry would not have been productive within the statutory period.[33] If a reasonable inquiry was made, the limitations period is told until plaintiff either received actual knowledge of the facts giving rise to the cause of action or received new information which would prompt a reasonable person to inquire further.[34] In order to determine this date, the court uses a fact intensive analysis.[35] The Alaska

30 *Gefrs v. Davis Wright Tremaine*, 306 P.3d 1264, 1275 (Alaska 2013).
31 *Cameron v. Slate*, 822 P.2d 1362, 1366 (Alaska 1991).
32 *Gefre at 1275, citing Pedersen v. Zielski*, 822 P.2d 903 (Alaska 1991)
33 *Id*
34 *Id*
35 *Ranes & Shine, LLC v. MacDonald Miller Alaska, Inc.*, 355 P3d 503, 509 (Alaska 2015), *reh'g denied (imt* 25. 2015).

Supreme Court has advised that trial courts should hold evidentiary hearings to resolve disputes regarding accrual dates..[36]

The issue in this case is at what point did Plaintiffs have enough information to alert them that they had a possible cause of action or that they should begin an inquiry to protect their rights, that is, when should Plaintiffs have reasonably known FNBA misrepresented that it was not going to issue a new Deed of Trust releasing the other property covered by B-to-A, including Tract J, after Plaintiffs filed the re-plat on August 5, 2008.

FNBA argues that Plaintiffs' claim accrued in 2009 after the FNBA did not execute a new Deed of Trust following Plaintiffs recording of the re-plat, Plat No. 2008-48. FNBA argues that Plaintiffs' claims are barred because they had enough information to inform them of their potential cause of action by either 2009 or 2010. Plaintiffs argue that it was not until after the bankruptcy proceedings that they could have discovered their cause of action.

FNBA argues Plaintiffs were put on notice of

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36 *Reasner* at 615.

their claims in early 2009, when they realized FNBA had not executed a new Deed of Trust consistent with the prior practice, and again in late 2009, when Plaintiffs sold tract F to Michael Hough and had to obtain a release from FNBA before the sale could be completed. FNBA further argues there was no question that Plaintiffs reasonably should have known that FNBA was not going to execute a new Deed of Trust by February 1, 2010, when the parties signed a Change in Terms Agreement extending the loan deadline since the Change in Terms Agreement stated it covered 28 lots plus various tracts in an un-subdivided remainder.

The court agrees. Mr. Taffe testified that by early 2009 he was getting concerned about FNBA not executing the new Deed of Trust as previously planned. Plaintiffs were expecting FNBA to execute a new Deed of Trust providing a lien covering only the 15 remaining lots in Phase 1 and all of the lots in Phase 2 but releasing the park tracts, Tract F and Tract J.[37] Although it could sometimes take several weeks for FNBA to issue a new Deed of Trust, by

37 Exhibit C, Taffe Deposition (December 9, 2016) at pages 213-214.

early 2009, Taffe started asking FNBA "Why isn't this getting done?"[38]

Taffe further testified everything came to a head during the sale of Tract F to Michael Hough later in 2009. Plaintiffs needed to sell Tract F to pay property taxes and their contractors. They were also going to use part of the proceeds to pay the interest on their loan to FNBA.[39] At some point during dependency of the sale, Taffe had an exchange with Eric from FNBA regarding Tract F. Taffe told Eric that it was his position that Tract F was not part of the collateral for the loan. Eric responded by telling Taffe to "read your Deed of Trust." It is clear at this point, Plaintiffs new FNBA was looking at the collateral as encompassing all of B-2-A, including Tract F.

On December 22, 2009, FNBA issued a partial deed of conveyance, releasing only Tract F from the lien created by the 2008 Deed of Trust, but not releasing any of the other properties, including Tracts A, B, C, D, H, and J. By this date, based upon

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38 *Id.*
39 *Id* 226-227.

Taffe's prior conversations with FNBA and FNBA's response to the sale of Tract F, the Plaintiffs should have reasonably been put on notice that FNBA was not intending to execute a new Deed of Trust releasing the other tracts consistent their prior practice.

Plaintiffs claim this series of events did not put them on notice regarding the alleged misrepresentation because they did not consider Tract F as part of the collateral for the loan. They contend that it was reasonable for them to believe that FNBA also did not look at Tract F as collateral because otherwise FNBA would have required Plaintiffs pay 85% of the sale proceeds to FNBA as per the Deed of Trust. Instead, FNBA allowed Plaintiffs to use a portion of those funds to pay the interest Plaintiffs owed on the loan as well as other debts.[40] However, as Plaintiffs pointed out repeatedly during the course of this case, these were difficult economic times. By October 2009, they had asked for but had not received a new Deed of Trust as per their expectations. Instead they were advised to "look at

40 Taffe affidavit, filed March 17, 2017.

your Deed of Trust." They also knew FNBA had only released Tract F following sale of that property to Michael Hough.

In his affidavit, Mr. Taffe stated although he had "concerns" in 2009 about FNBA not filing a new Deed of Trust, this was not the same as knowing FNBA was engaging in fraudulent activities. However, the test for determining the start of the statute of limitations is not whether Plaintiffs knew each and every element of their cause of action but whether they had information that should have prompted an inquiry regarding their claim.

Here, Plaintiffs knew by early 2009 that FNBA had not executed a new Deed of Trust consistent with past practices. By the October 2009 2009 sale to Michael Hough, Plaintiffs also knew FNBA was treating Tract F as if it was collateral for the loan. In 2009, when Taffe had a conversation with Eric from FNBA about Tract F not being collateral, Eric told him to read the Deed of Trust. Thus, at this point, Plaintiff's knew FNBA had a different view of what constituted the collateral under the Deed of Trust. On December 21, 2009, when FNBA executed a

partial release that only released Tract F from the Deed of Trust, Plaintiffs unquestionably should have known that FNBA was not acting in conformance with its prior practice of issuing a new Deed of Trust.

By February 10, 2010, the parties entered into a Change in Terms Agreement, extending the loan deadline. The Change of Terms Agreement described the property as "28 LOTS PLUS VARIOUS TRACTS IN UNSUBDIVIDED REMAINDER." Taffe testified at a related bankruptcy proceeding that: "...what I interpreted that to mean was Tract J is already preliminarily approved for 22 additional residential lots. That's why even you'll see when you look at these documents, it's – the wording is ambiguous, but I always assumed that when they said 'unsubdivided remainder,' they were talking about the only portion that was left of tract B2 that could be developed, which was Tract J..."

Thus, by 2010, Plaintiffs knew FNBA had extended their loan to cover 28 residential lots as well as other property, including Tract J, which, according to Plaintiffs, was supposed to have been excluded from the 2008 Deed of Trust. This

information, coupled with the fact that for almost two years FNBA had not filed a new Deed of Trust but had instead treated Tract F as part of its collateral when it signed a partial release in December 2009, was sufficient to put Plaintiffs on notice that FNBA as not acting in accordance with its usual practice and a new Deed of Trust was not forthcoming. This series of events would have put a reasonable person on notice to make a further inquiry or make a demand to protect their rights. Accordingly, the court finds the Plaintiffs' claims are barred by the applicable three year statute of limitations because their claim was not filed until November 13, 2013, and the Plaintiffs had all the information they needed to move forward with the claim from December 21, 2009 through February 2, 2010.

Plaintiffs' conclusion that they did not need to inquire further simply does not align with the discovery rule and subsequent inquiry notice standard. Taffe claims in his affidavit that the Plaintiffs were reasonable in believing FNBA did not consider Tract F as part of the collateral for the Deed

of Trust. Taffe cites a statement in FNBA's motion for summary judgment where FNBA stated: "Because Tract F was never intended to be a source of the loan's repayment but would ensure interest payments could be made through 2009, FNBA agreed to the deal."[41] First, his statement is not supported by affidavit or other documents. But even assuming it is true it would not change Plaintiffs' duty to inquire why they were not receiving the expected Deed of Trust releasing the other tracts after FNBA released Tract F in December 2009. Nor does it explain why Plaintiffs did not take further action after they executed the Change of Terms Agreement.

Mr. Taffe testified that he has a law degree and experience as a real estate developer. Taffe admitted he had concerns in early 2009 when he did not receive a new Deed of Trust within a reasonable time consistent with past practices. Mr Taffe testified about his concern when FNBA only provided a partial release of Tract F following its sale to Michael Hough. None of the other lots were released consistent with Plaintiffs' expectations.

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41 Taffe affidavit, March 21, 2017.

By Taffe's own admission, Plaintiffs signed the Change of Terms Agreement under protest.[42] Taffe contends in his affidavit that the term "various tracts in unsubdivided remainder" did not describe any part of the subdivision B-2-A. This assertion is in direct conflict with Taffe's more believable statement under oath at the bankruptcy hearing, that he understood the unsubdivided remainder description in the Change of Terms Agreement included Tract J.

The court specifically finds Mr. Taffe's testimony at his depositions and the bankruptcy proceedings to be credible and a more accurate representation of the Plaintiff's beliefs regarding the action and non-actions of FNBA.

III. CONCLUSION

In light of the testimony presented at the Evidentiary Hearing and the previously submitted affidavits and depositions, the court finds that the statute of limitations began to run on February 1, 2010, if not before, based upon a series of events leading up to the filing of a partial Deed of

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42 *Id.*

Reconveyance by FNBA on December 21, 2009, which covered only Tract F but released no other tract. This conduct was confirmed by the Change in Agreement dated February 1, 2010 that included an "unsubdivided remainder" which Plaintiffs knew was intended to cover Tract J and would have confirmed that FNBA was not issuing a Deed of Trust consistent with prior representations and promises. Accordingly the court finds Plaintiffs' tort and contract claims are barred by the statute of limitations.

DATED at Kenai, Alaska, this 13th day of September 2017.

Anna M. Moran
Superior Court Judge

APPENDIX C

THE SUPREME COURT
OF THE STATE OF ALASKA

THOMAS TAFFE and DEVONY LEHNER,
Appellants
v.
FIRST NATIONAL BANK OF ALASKA
Appellee
Superior Court No. 3HO-13-00213 CI
Supreme Court No. S-16854
OPINION
No. 7411 – September 27, 2019

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Homer, Anna Moran, Judge.

Appearances: Thomas Taffe and Devony Lehner, pro se, Homer, Appellants. Bruce A. Moore and Andrew B. Erickson, Landye Bennett Blumstein LLP, Anchorage, for Appellee.

Before: Bolger, Chief Justice, Winfree,

Stowers, Maassen, and Carney, Justices.

WINFREE, Justice.

I. INTRODUCTION

Borrowers brought suit alleging that their lending bank had engaged in fraudulent real estate lending practices. The bank responded that statutes of limitations barred the borrowers' fraud claims. Following an evidentiary hearing to establish relevant dates for the statutes of limitations inquiry, the superior court entered judgment and awarded attorney's fees in the bank's favor. The borrowers appeal, arguing that the superior court erred in its factual and legal determinations and otherwise violated their due process rights. Seeing no error or due process violation in the superior court's rulings, we affirm its decisions.

II. FACTS AND PROCEEDINGS

Thomas Taffe and Devony Lehner borrowed money from First National Bank of Alaska to develop a Homer planned community subdivision, with some tracts reserved for conservation and outdoor

activities.[43] This 2006 loan was secured by a deed of trust covering the entire property. Taffe and Lehner first subdivided the land into a group of lots with a single remainder tract. Once they recorded the subdivision plat, First National recorded a new deed of trust covering only the subdivided lots, releasing its security interest in the remainder tract.

In 2008 Taffe and Lehner obtained a second loan from First National, using it to retire the first loan and develop additional lots. They recorded a second plat subdividing the remainder tract into additional lots and several new tracts. First National recorded a deed of trust — signed by Taffe and Lehner — covering the entirety of the subdivision except lots already sold.

By early 2009 Taffe and Lehner became concerned, expecting First National to have released its security interest in the unsubdivided tracts as it had done in the first transaction. Late in 2009 Taffe and Lehner wanted to sell one tract to raise money for loan payments and other expenses. Taffe and Lehner had to negotiate the tract's release from First

43 See AS 34.08.030 (providing for planned community declaration).

National's deed of trust security interest; First National's release terms included restrictions on Taffe and Lehner's use of the sale proceeds.

Taffe and Lehner struggled to meet the loan's repayment terms and requested an extension, ultimately executing a change in terms agreement with First National in February 2010; despite Taffe and Lehner's continued objection that First National's deed of trust was not intended to cover the unsubdivided tracts, the collateral expressly remained the same. Following an additional extension, in November 2012 First National sent a default notice stating its intent to foreclose on unsold subdivided lots and two unsubdivided tracts. An amended foreclosure notice in January 2013 stated that First National also intended to foreclose on the additional unsubdivided tracts still covered by the 2008 deed of trust. When Taffe and Lehner ultimately were unable to pay the loan, First National foreclosed and acquired the unsold land by offset bid at auction in April 2013.

Taffe and Lehner — self-represented — subsequently contested the foreclosure proceeding in

superior court. They filed a complaint for declaratory relief in November 2013, primarily seeking to set aside the foreclosure sale and subsequent title transfers. In March 2014 they amended their complaint to add fraud claims, including that First National fraudulently induced them to take the second loan. Taffe and Lehner alleged that First National had promised to execute a new deed of trust secured by only the unsold subdivision lots after they recorded the second plat and to release the unsubdivided tracts as it had done when they recorded their first plat. Taffe and Lehner alleged that the second loan's terms violated their reasonable expectations and that the deed of trust was an ambiguous adhesion contract that should be interpreted in their favor. Taffe and Lehner again amended their complaint in December 2014, seeking additional declaratory relief and stating a variety of fraud claims.

Following motion practice and discovery, Taffe and Lehner suggested their fraud claim against First National was fraud in the execution,[44] rather than

44 Fraud in the execution refers to executing a legal instrument, based on

the fraud in the inducement alleged in their complaint. In July 2015, after Taffe and Lehner apparently abandoned their claim to set aside the foreclosure, the superior court dismissed Taffe and Lehner's requests for declaratory relief regarding the foreclosure and ruled that their remedies were limited to damages. In July 2016 the court granted First National summary judgment on most of Taffe and Lehner's remaining claims. The court denied summary judgment on the contractual ambiguity claim, ruling that there was a genuine dispute whether the deed of trust was fully integrated, and on the fraud claim that First National misrepresented the terms of the 2008 deed of trust.

First National subsequently sought to extinguish the remaining claims as barred by statutes of limitations. "[T]he ordinary operation of the statute of limitations looks to 'the date on which the plaintiff incurs injury.' "[45] But under Alaska's

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the fraudulent misrepresentation of another, wholly different from the instrument a person was led to believe was being executed. 17A C.J.S. Contracts § 202 (2019).

45 *Jarvill v. Porky's Equip., Inc.*, 189 P.3d 335, 338 (Alaska 2008) (quoting *Russell v. Municipality of Anchorage*, 743 P.2d 372, 375 (Alaska 1987)).

discovery rule, the statute of limitations does not begin to run until "a reasonable person has enough information to alert that person" to a potential cause of action or to "begin an inquiry to protect his or her rights."[46]

Applying the discovery rule to the two-year statute of limitations for tort claims,[47] First National argued that Taffe and Lehner should have been prompted to inquire whether it intended to fulfill its alleged promise as early as August 2008, when First National did not execute a new deed of trust after the second plat was recorded; probably no later than February 2010, when they executed a change in terms agreement that did not alter the collateral; and certainly by October 2011, when they sent First National a memorandum apparently contending that it should release its liens to allow them to sell unsubdivided tracts. Because more than two years elapsed between these occurrences and Taffe and Lehner's November 2013 complaint, First National

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46 *Reasner v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 394 P.3d 610, 614 (Alaska 2017) (quoting *Mine Safety Appliances Co. v. Stiles*, 756 P.2d 288, 291 (Alaska 1988)).

47 AS 09.10.070(a).

contended that the statute of limitations barred the fraud in the inducement claim.

Applying the discovery rule to the three-year statute of limitations for contract claims,[48] First National argued that Taffe and Lehner should have been prompted to inquire about the terms of the 2008 deed of trust by late 2009, when they disputed the need for a release from First National to sell a tract, and no later than February 2010, when they executed a change in terms agreement that did not alter the collateral. Because more than three years elapsed between either occurrence and Taffe and Lehner's November 2013 complaint, First National contended that the statute of limitations barred their fraud in the factum claim.

Taffe and Lehner opposed, arguing that no injury occurred until November 2012, when First National sent its foreclosure notice, and that they therefore brought their claims within the statutes of limitations. Taffe and Lehner disputed several of First National's assertions, but they presented no supporting evidence.

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48 AS 09.10.053.

Following an evidentiary hearing, the superior court ruled in First National's favor on its statutes of limitations defenses. The court found that Taffe and Lehner knew enough to pursue a claim in 2009, when they questioned the need for a release from First National, and no later than February 2010, when they executed the first change in terms agreement with First National with no change in collateral. The court specifically found that by early 2009, Taffe and Lehner should have realized that First National "had a different view" of the agreement; they had questioned First National why a new deed of trust had not been issued. The court discounted as unreasonable Taffe and Lehner's arguments that they had no reason to believe First National did not intend to reduce its collateral. The court found that Taffe and Lehner "had all the information they needed to move forward with the [fraud] claim . . . [by] February 2010," and concluded that their fraud claim was barred by both the two-year statute of limitation on torts and the three-year statute of limitations on contracts.

The superior court entered final judgment in

First National's favor and awarded it attorney's fees and costs of roughly $54,000 under Alaska Civil Rules 82 and 79.[49]

Taffe and Lehner appeal, arguing that the superior court erred in both its substantive decisions and its attorney's fees award in First National's favor.

III. DISCUSSION

A. The Superior Court Did Not Err Or Violate Due Process Rights By Conducting A Pretrial Evidentiary Hearing.[50]

Taffe and Lehner argue that the superior court legally erred by resolving at a pretrial evidentiary hearing the disputed facts about when the statute of limitations for their claims began to run. But we have stated on numerous occasions that superior courts should hold pretrial evidentiary hearings to

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49 Alaska R. Civ. P. 82 (providing that "the prevailing party in a civil case shall be awarded attorney's fees"); Alaska R. Civ. P. 79 (providing that "the prevailing party is entitled to recover costs . . . necessarily incurred in the action").

50 Whether a trial court follows the correct legal framework is a question of law reviewed de novo. *Bibi v. Elfrink*, 408 P.3d 809, 815 (Alaska 2017). "We review constitutional questions de novo, adopting the most persuasive rule of law in light of precedent, reason, and policy." *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 581 (Alaska 2007).

resolve whether a statute of limitations has run.[51] The superior court therefore did not err by resolving these factual disputes at an evidentiary hearing.

Taffe and Lehner also contend that at the evidentiary hearing the superior court violated their constitutional due process rights by limiting the proceeding's length, assuming the role of fact finder, not determining incontrovertible facts, restricting the hearing to the statutes of limitations, and denying their right to a jury trial. But Taffe and Lehner offer no specific facts to suggest that the hearing's length violated their due process rights, and their other arguments stand in direct opposition to our case law.

The purpose of a pretrial evidentiary hearing on a statute of limitations question is to resolve factual disputes about when a statute of limitations began to run.[52] An evidentiary hearing occurs before trial, and the superior court must act as the fact

51 *See, e.g., Reasner*, 394 P.3d at 614; *Gefre v. Davis Wright Tremaine, LLP*, 306 P.3d 1264, 1278 (Alaska 2013); *Catholic Bishop of N. Alaska v. Does* 1-6, 141 P.3d 719, 725 (Alaska 2006); *Cikan v. ARCO Alaska, Inc.*, 125 P.3d 335, 339 (Alaska 2005); *John's Heating Serv. v. Lamb*, 46 P.3d 1024, 1033 (2002); *Pedersen v. Zielski*, 822 P.2d 903, 907 n.4 (Alaska 1991).

52 *Cikan*, 125 P.3d at 342 ("[D]isputes concerning the statute of limitations raise preliminary questions of fact that should ordinarily be decided by the court after conducting an evidentiary hearing.").

finder.[53] Although considering a claim's substantive merits sometimes may be necessary, the court generally should limit its determination to the facts underlying a statute of limitations defense and not reach other issues.[54] And as long as the hearing reaches only the statute of limitations, the constitutional right to a jury trial is not violated.[55]

We therefore reject Taffe and Lehner's claims of legal error and due process violations.

B. The Superior Court Did Not Err When Applying The Statutes Of Limitations.[56]

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53 *Id.* at 339 ("[T]he task of interpreting and applying a statute of limitations traditionally falls within the province of the courts."); see also *John's Heating Serv.*, 46 P.3d at 1033 n.28 (remanding for statute of limitations decision and noting "[t]he judge becomes the factfinder for purposes of determining the applicability of the statute of limitations" (quoting *Decker v. Fink*, 422 A.2d 389, 394 (Md. 1980))).

54 See *Williams v. Williams*, 129 P.3d 428, 431 (Alaska 2006) ("[W]e also recognize that addressing the substantive merits of a case in such a preliminary hearing can create considerable tension with the procedural rights to which parties are entitled, including the right to a jury trial.").

55 *Gefre*, 306 P.3d at 1279 ("But to the extent the superior court does not address the substantive merits of a case, the use of evidentiary hearings to decide statutes-of-limitations (cont.) (continued) issues is constitutional [regarding right to a jury trial].").

56 "When the superior court holds an evidentiary hearing to resolve factual disputes about when a statute of limitations began to run, we review the resulting findings of fact for clear error." *Christianson v. Conrad-Houston Ins.*, 318 P.3d 390, 396 (Alaska 2014). "[W]e review de novo the legal standard used to determine accrual dates, and we review de novo questions regarding the applicable statute of

Taffe and Lehner challenge the superior court's application of the discovery rule on several grounds. They argue that they did not suffer an injury from First National's fraud until they were threatened with foreclosure in November 2012,[57] that the superior court did not determine the date their injury occurred, and that they made reasonable but unproductive inquiries tolling the statutes of limitations until they received actual notice in November 2012. These arguments lack merit.

1. Injury

As First National notes, Taffe and Lehner's claims proceed from their contention that First National made misrepresentations when they signed the 2008 deed of trust. But that raises the question of when Taffe and Lehner were injured by the alleged misrepresentations. Our recent *Brooks Range Petroleum Corp. v. Shearer* decision is instructive.[58]

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limitations, the interpretation of that statute, and whether that statute bars a claim." *Gefre*, 306 P.3d at 1271 (footnotes omitted).

57 See *Jarvill v. Porky's Equip., Inc.*, 189 P.3d 335, 338 (Alaska 2008) ("[T]he ordinary operation of the statute of limitations looks to 'the date on which the plaintiff incurs injury.' " (quoting *Russell v. Municipality of Anchorage*, 743 P.2d 372, 375 (Alaska 1987))).

58 425 P.3d 65 (Alaska 2018).

Brooks involved a venue dispute in a lawsuit for breach of an employment contract, in part with respect to claims of negligent and intentional misrepresentation.[59] The critical issue was determining when the employee suffered actual harm, i.e., when the tort was complete,[60] which we said "also arises in the context of statutes of limitations."[61] We then discussed two previous statutes of limitations decisions concluding that a tort is complete when the plaintiff has "an appreciable injury" arising from the tortious conduct[62] and that the statute of limitations cannot begin to run until the plaintiff suffers injury or harm.[63] On the facts of *Brooks*, we concluded that the employee's misrepresentation claim — that his employment agreement was represented to be for at least ten years, but his employment was terminated after two and a half years — did not become complete until the employee's termination, when the employee

59 *Id.* at 68, 72.
60 *Id.* at 72-73.
61 *Id.* at 73.
62 Id. (discussing and quoting Jones v. *Westbrook*, 379 P.3d 963, 967-69 (Alaska 2016)).
63 Id. (discussing Austin v. Fulton Ins. Co., 444 P.2d 536, 539-40 (Alaska 1968)).

actually suffered a pecuniary loss.[64] We stated that until the employment termination, the employee had suffered no loss despite the alleged misrepresentation two and a half years earlier.[65]

The fundamental questions in this case, then, are (1) when did Taffe and Lehner suffer an appreciable injury from First National's alleged 2008 misrepresentation and (2) when did they have inquiry notice, i.e., when should they reasonably have discovered, the appreciable injury sufficient to start the statutes of limitations? Although the superior court's ruling was focused on the discovery and inquiry notice question, in this case the appreciable injury and the discovery date are essentially the same.

The superior court found that in early 2009 Taffe and Lehner were aware of and complaining to First National that the unsubdivided tracts had not been released from the 2008 deed of trust. The failure to release the tracts meant that Taffe and Lehner's title to the tracts was clouded, arguably an

64 Id.
65 *Id.*

appreciable injury in and of itself. But the injury became more appreciable later in 2009, when, as the superior court found, Taffe and Lehner wanted to sell a tract and had to negotiate with First National for a release of that tract from the deed of trust to effectuate the sale. As part of that negotiation, Taffe and Lehner contended that the deed of trust was not supposed to cover the tract, and First National responded: "[R]ead your Deed of Trust." First National released the tract for sale after reaching an agreement with Taffe and Lehner on the disposition of the sale proceeds, but it refused to release any other tracts from the deed of trust. This meant that Taffe and Lehner's title to the tracts remained clouded. Finally, as the court found, in February 2010, Taffe and Lehner were forced, under protest, to negotiate a loan extension and change of terms agreement including leaving the unsubdivided tracts covered by the deed of trust. The February 2010 agreement meant that Taffe and Lehner's title to the unsubdivided tracts remained clouded and they would be forced to negotiate any future tract sales with First National. This is an appreciable injury.

Because Taffe and Lehner's misrepresentation claim was complete no later than February 2010 and by that same time Taffe and Lehner had notice of their alleged injury — tracts that they contended were represented in 2008 to have clear title had clouded title, and there were related restrictions on sale proceeds — the superior court correctly concluded that the applicable statutes of limitations for Taffe and Lehner's fraud claims began to run no later than February 2010.

2. Exact date of injury

Taffe and Lehner assert that the superior court erred by not determining the exact date their injury occurred. But it was unnecessary to establish an exact date because the court found that Taffe and Lehner "had all the information they needed to move forward with the claim from December 21, 2009 [when First National released a tract] through February 2, 2010 [when the first change in terms agreement was entered]." Taffe and Lehner point to no evidence that this finding was clearly erroneous, and there was no reason for more specificity in light of the timing.

3. Inquiry

Taffe and Lehner contend that the superior court, despite determining when a reasonable person should have begun inquiring into the alleged fraud, never determined whether they made such inquiries. But the court found that they started inquiring in early 2009 whether First National intended to execute a new deed of trust, when they questioned why it had not been done.

4. Equitable tolling

Taffe and Lehner argue in the alternative that the superior court applied the wrong standard when determining whether their inquiries were reasonable. They cite cases discussing the doctrine of equitable estoppel tolling the statute of limitations.[66] First National responds that Taffe and Lehner failed to present any evidence that it misrepresented or concealed the fraud claim's existence and that its

66 "[T]o establish equitable estoppel, 'a plaintiff must produce evidence of fraudulent conduct upon which it reasonably relied when forbearing from the suit.' " *Waage v. Cutter Biological Div. of Miles Labs., Inc.*, 926 P.2d 1145, 1149 (Alaska 1996) (quoting *Pedersen v. Zielski*, 822 P.2d 903, 908-09 (Alaska 1991)). "[A] party should be charged with knowledge of the fraudulent misrepresentation or concealment only when it would be utterly unreasonable for the party not to be aware of the deception." Id. (quoting *Palmer v. Borg-Warner Corp.*, 838 P.2d 1243, 1251 (Alaska 1992)).

responses to their inquiries clearly indicated it did not intend to execute a new deed of trust.

Equitable estoppel does not apply if there is no misrepresentation or concealment regarding a claim's existence. Taffe and Lehner point to no evidence of concealment, and the superior court's finding regarding their discovery of the alleged fraud by February 2010, at the latest, contradicts their assertion of further concealment.

C. The Superior Court Did Not Abuse Its Discretion By Not Ruling On Taffe And Lehner's Declaratory Judgment Request.[67]

Taffe and Lehner contend that the superior court erred by not granting their petition for declaratory judgment and request for expedited consideration. First National counters that Taffe and Lehner essentially waived the issues by incorporating the petition into an amended complaint and by not showing why expedited consideration was needed and that the issues have since been mooted.

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67 "We review a trial court's denial of . . . declaratory relief for abuse of discretion . . . ." *Smallwood v. Cent. Peninsula Gen. Hosp.*, 151 P.3d 319, 322 (Alaska 2006).

Under Alaska's Declaratory Judgment Act, in "an actual controversy in the state, the superior court . . . may declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is or could be sought."[68] There was no requirement that the court make a declaratory judgment ruling. "[D]eclaratory relief is generally used to settle a controversy that has yet to 'ripen into violations of law,' or 'to afford one threatened with liability an early adjudication without waiting until an adversary should see fit to begin an action after the damage has accrued.' "[69] "[D]eclaratory judgments are rendered to clarify and settle legal relations, and to 'terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.' A court should decline to render declaratory relief when neither of these results can

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68 AS 22.10.020(g) (emphasis added); see also *Brause v. State, Dep't of Health & Soc. Servs.*, 21 P.3d 357, 358 (Alaska 2001) ("The language of the [Declaratory Judgment Act] makes it explicit that whether to issue a declaration is a discretionary decision committed to the superior court.").

69 *Lowell v. Hayes*, 117 P.3d 745, 755-56 (Alaska 2005) (quoting CHARLES ALAN WRIGHT ET AL., FED. PRAC. & PROC.: CIV. § 2751 (3d ed. 1998)).

be accomplished."[70]

Taffe and Lehner petitioned for declaratory judgment at the same time they were litigating their fraud and contract claims. The issues raised in their petition overlapped with — and in some part were identical to — the fraud and contract claims stated in their complaint. The superior court ultimately dismissed the fraud and contract claims, and we are affirming that dismissal. Taffe and Lehner have made no showing that, absent a viable fraud or contract claim, their claims for declaratory relief raised different issues that could be addressed. We therefore reject their argument; we cannot conclude that the superior court abused its discretion, and there is no need to reach the question whether expedited consideration should have been granted.

D. The Superior Court Did Not Abuse Its Discretion By Awarding Attorney's Fees To First National.[71]

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70 *Id.* at 755 (quoting *Jefferson v. Asplund*, 458 P.2d 995, 997-98 (Alaska 1969)

71 We review the amount of an attorney's fees award for abuse of discretion. Williams v. GEICO Cas. Co., 301 P.3d 1220, 1225 (Alaska 2013).

Taffe and Lehner assert that the superior court erred by awarding attorney's fees to First National, based on arguments about the length of its various filings and unspecified errors it made during litigation. First National sought final judgment and attorney's fees of roughly $54,000, equal to 20% of its "reasonable and necessary attorney's fees," under Alaska Civil Rule 82(b)(2), and the court granted First National's motion. Because Taffe and Lehner point to no evidence whatsoever demonstrating that the superior court abused its discretion by following Rule 82, we affirm the attorney's fees award.

IV. CONCLUSION

The superior court's decision is AFFIRMED.

APPENDIX D

In the Supreme Court of the State of Alaska

Thomas M. Taffe and Devony L. Lehner, Appellants,

v.

First National Bank of Alaska, Appellee

Trial Court Case No. **3HO-13-00213CI**

Supreme Court No. **S-16854**

Order Petition for Rehearing

Date of Order: **10/29/19**

Before: Bolger, Chief Justice, Winfree, Stowers Maassen, and Carney, Justices

On consideration of the Petition for Rehearing filed on 10/7/19, and the response filed on 10/16/19,

IT IS ORDERED: The Petition for Rehearing is DENIED.

Entered by the direction of the court.

Clerk of Appellate Courts

_____

Meridith Montgomery

cc: Supreme Court Justices
Judge Gist
Trail Court Clerk – Homer
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