IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

JIM CARTER,	)	
	)	
Plaintiff/Appellant,	)	**Shelby Circuit No. 57796 T.D.**
	)	
VS.	)	**Appeal No. 02A01-9407-CV-00161**
	)	
JOE McILVAIN, ET AL,	)	
	)	
Defendants/Appellees.	)	

APPEAL FROM THE CIRCUIT COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE
THE HONORABLE JAMES E. SWEARENGEN, JUDGE

MELVIN FLEISCHER
Memphis, Tennessee
Attorney for Appellant

RICHARD GLASSMAN
GLASSMAN, JETER, EDWARDS & WADE, P.C.
Memphis, Tennessee
Attorney for Appellee McIlvain

JOSEPH MICHAEL COOK
Memphis, Tennessee
Attorney for Appellee Lumberman's Investment
Corporation of Texas

AFFIRMED & REMANDED

ALAN E. HIGHERS, JUDGE

CONCUR:

W. FRANK CRAWFORD, JUDGE

DAVID R. FARMER, JUDGE

This case is an appeal from the trial court's grant of summary judgment to the defendants, Joe McIlvain, Jr., Substitute Trustee, and Lumberman's Investment Corporation of Texas. We affirm the judgment of the trial court.

The facts of this case are not in dispute. Plaintiff filed a lawsuit against McIlvain for failure to notify the Tennessee Commissioner of Revenue of a foreclosure sale of property located at 410 Sullivan which is subject to a tax lien of the state, as required by T.C.A. § 67-1-1433(b). Because McIlvain failed to notify the state of the foreclosure sale, the property was sold to Plaintiff, Jim Carter, subject to a tax lien in the amount of $13,000. Mr. Carter was unaware of the lien's existence at the time of the sale. McIlvain stated in his deposition that he overlooked the state tax lien when he reviewed the title abstract.

The Trustee's Deed conveying the property to Appellant provided:

> Said Deed of Trust recites title as unencumbered, but sale was advertised and made as Trustee only with covenants of seizin and warranties of title subject to any unpaid taxes or assessment owing on said property and this conveyance is made accordingly.

The foreclosure sale took place on January 24, 1989. Although the tax lien was properly recorded at the time of the sale, Plaintiff first discovered the lien on September 8, 1989, when he sold the property to a subsequent purchaser. Plaintiff filed this lawsuit on November 16, 1993 seeking compensatory and punitive damages.

This court will affirm a trial court's grant of a motion for summary judgment where the moving party has demonstrated that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.03; Byrd v. Hall, 847 S.W.2d 208, 210 (Tenn. 1993). On a motion for summary judgment, the trial court and the appellate court must consider the matter in the same manner as a motion for directed verdict made at the close of plaintiff's proof; that is, the trial court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party and discard all countervailing evidence. Byrd, 847 S.W.2d at 210-11.

Looking at the facts of this case in the light most favorable to the Appellant, we find that there is no genuine issue as to any material fact and that the Appellees are entitled to judgment as a matter of law. Appellant presents four issues for our consideration; however, we decline to reach the merits of this case because Appellant's cause of action is time-barred by T.C.A. § 28-3-105(1) (Michie 1980 & Supp. 1994), which provides in pertinent part:

> Property Tort Actions - The following actions shall be commenced within three (3) years from the occurring of the cause of action:
>
> > (1) Actions for injuries to personal or real property . . .

In Vance v. Schulder, 547 S.W.2d 927, 931 (Tenn. 1977), our supreme court stated that "[t]he applicable statute of limitations in a particular cause will be determined according to the gravamen of the complaint." In Vance, the plaintiff's property was "injured" when a director fraudulently induced plaintiff to sell his stock for approximately one-half of its value. The supreme court affirmed the court of appeals in holding that the three year statute of limitations had run. The plaintiff in Vance argued that "injury to property," as stated in T.C.A. § 28-3-105, referred only to physical injury. The court refused to adopt a restrictive definition of "injury," stating: "the loss in value sustained by plaintiff from the alleged tort of fraud and deceit is included within the phrase, 'injury to personal property.'" Id. at 932. We find that Vance is controlling in the case at bar. The supreme court's interpretation of "injury" in Vance is equally applicable in the present case, where the injury was to real, rather than personal, property. See, e.g. Wilkins v. Third National Bank in Nashville, 01A01-9308-CV-00363 (Tenn. Ct. App. June 24, 1993) (holding that three year statute of limitations set forth in T.C.A. § 28-3-105 applied to injuries suffered by restauranteur due to bank's alleged failure to provide financing).

Electric Power Board of Chattanooga v. Monsanto Co., 879 F.2d 1368 (6th Cir. 1989), is also instructive. In that case, the Sixth Circuit, construing Tennessee law, concluded that T.C.A. § 28-5-103 is the applicable statute of limitations for damages to real property:

> In Tennessee, the applicable statute of limitations is determined by the type of injuries claimed and the damages sought. The gravamen of most of the claims is injury to property. Actions for injuries to real or personal property must be commenced within three years of the date on which the action accrues. Tenn. Code Ann. § 28-3-105. This would apply to actions in negligence, strict liability, fraud and misrepresentation as they affect the real property of the [plaintiff].

Id. at 1375.

Appellant contends that the ten year statute of limitations set forth in T.C.A. § 28-3-110, rather than the three year statute of limitations, should apply to the present case. That section provides:

> Actions on Public Officers' and fiduciary bonds -- Actions not otherwise covered. The following actions shall be commenced within ten (10) years after the cause of action accrued:
>
> (3) All other cases not expressly provided for.

Appellant cites Doty v. Federal Land Bank of Louisville, 173 Tenn. 140, 114 S.W.2d 953 (Tenn. 1938) in support of his argument. In Doty, the court held that Code § 8595 (current version at T.C.A. § 28-3-104, Michie 1980 & Supp. 1994), a one year statute of limitations that applies to actions for statutory penalties, did not apply in a suit against a trustee for failure to sell land at a foreclosure sale according to a plan of division furnished him by the plaintiff, as permitted by Code § 7802 (current version at T.C.A. § 35-5-108, Michie 1991). The court found that the plaintiff was not seeking to enforce a *statutory penalty* against the trustee; rather, Code § 7802 gave the plaintiff a *cause of action* against the trustee. Id. at 142, 954. The Doty court held that since the plaintiff was enforcing a statutory liability, rather than a statutory penalty, the plaintiff's cause of action was governed by Code § 8601 (current version at T.C.A. § 28-3-110, Michie 1980), a ten year statute of limitations for "all other cases not expressly provided for," rather than Code § 8595 Id. at 142, 955. _

_____We find that Vance, rather than Doty, is controlling in the case at bar. Doty is distinguishable because neither the court nor the parties in Doty addressed the application of the three year statute of limitations, Code § 8598, to that case (current version at T.C.A. § 28-3-105, Michie 1980 & Supp. 1994). Conversely, the Appellees in the present case have

argued that the three year statute of limitations is applicable. Based on the facts before us, we do not disagree. The parties do not dispute that Appellant's injury was caused by McIlvain's failure to inform either the State of Tennessee or Appellant of the state's tax lien on the property located at 410 Sullivan, thereby encumbering Appellant's title to the property. This encumbrance was undoubtedly an injury to Appellant's property. Thus, the applicable statute of limitations is three years. T.C.A. § 28-3-105(1).

The statute of limitations began to run in this case no later than September 8, 1989, the date Appellant sold the property subject to the state tax lien. At that time, Appellant put $13,000 in escrow with the title company which was providing title insurance on the property, in the event that the state should require satisfaction of the tax lien. Appellant's failure to bring this suit until November of 1993, over four years later, is a complete bar to his cause of action. T.C.A. § 28-3-105(1).

Finally, we address Lumberman's Investment Corporation's ("Lumberman's") contention that it should be awarded frivolous appeal damages pursuant to T.C.A. § 27-1-122 (Michie 1991). That section provides:

> When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

We find that this appeal is frivolous as it pertains to Lumberman's. The record is clear that Lumberman's did not own the mortgage in question; rather, Lumberman's serviced the mortgage on behalf of Federal National Mortgage Association (commonly known as "Fannie Mae"). McIlvain was appointed Substitute Trustee by Fannie Mae, not Lumberman's. Although McIlvain had limited contact with Lumberman's concerning the details of the foreclosure procedure, McIlvain did not, by virtue of those contacts, become an agent of Lumberman's. Although we do not reach the issue of McIlvain's alleged negligence, it is clear that any fault he may have had would be imputed to Federal National Mortgage Association, the disclosed principal, not Lumberman's.

For the reasons stated herein, the judgment of the trial court is affirmed. The case is remanded to the trial court to fix damages pursuant to T.C.A. § 27-1-122. Costs are taxed to the Appellant.

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HIGHERS, J.

CONCUR:

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CRAWFORD, J.

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FARMER, J.