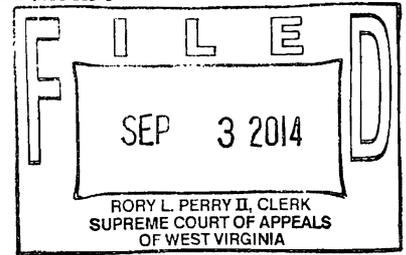


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-0291



CHARLES J. EVANS,
CYNTHIA B. EVANS and
OBIE WOODS, and WAYNE
CLIBURN, LUCY CLIBURN,
and SERGIO BAEZ and
PETER CALDERON and
MIKE HOLLANDSWORTH,
VIVIAN HOLLANDSWORTH,
and JAN JERGE and JAMES
CARROLL, JR. and FRED A
LIVESAY and JIM MACKEY,
SHAYNA MACKEY,
and PETER DEL CIOPPA
and JEAN MILLARD,
MICHELLE MILLARD and
STEPHEN RICE, LAUREEN
RICE and LON FOUNTAIN,
LOUISE FOUNTAIN and
MICHAEL ROBEY, LORRI
ROBEY, ROBERT
SCHLOSSBERG, HELENE
SCHLOSSBERG,
SALVATORE ZAMBRI,
MARY ZAMBRI, JOSEPH
ZAMBRI, ANTHONY ZAMBRI,
and ZAMBRI ENTERPRISES,
LLC, a Maryland limited
liability company, and
ROBERT AMICO, BEVERLY
AMICO, and JOSEPH KIM,
PETITIONERS,

vs.

Appeal from a Final Order of the Circuit
Court of Monroe County (09-C-94)

UNITED BANK, INC., a .
West Virginia corporation,
STAN MCQUADE, individually,
and d/b/a MCQUADE
APPRAISAL SERVICES,
RESPONDENTS

PETITIONERS' REPLY BRIEF

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLES J. EVANS,
CYNTHIA B. EVANS, et al,
PETITIONERS,

vs. No. 14-0291

UNITED BANK, INC., a
West Virginia corporation,
STAN MCQUADE, individually,
and d/b/a MCQUADE
APPRAISAL SERVICES,
RESPONDENTS.

PETITIONERS' REPLY BRIEF

Comes now your Petitioners, by and through counsel, John H. Bryan and for their Petitioners' Reply Brief respectfully submits the following.

ARGUMENT

I. REPLY TO UNITED BANK, INC.'S RESPONSE BRIEF

The Response Brief of Respondent United Bank, Inc., ("United") fails to establish that the Circuit Court properly dismissed Petitioners' claims under Rule 12(b)(6). The Respondents, and the Court below, characterize the Second Amended Complaint as pertaining to a dispute over property values, when in fact the Petitioners seek justice for having been defrauded in a real estate investment scam - a scam known only by the developers, United Bank and the appraiser, McQuade. There was an inflation of value. However, those allegations pertain to the damages suffered by the Petitioners rather than the sole basis for the claims.

Respondent United represents that the Petitioners did not address claims for negligence, intentional or negligent infliction of emotional distress/tort of outrage, breach

of fiduciary duty, civil conspiracy and respondeat superior, or the claim for punitive damages, and that therefore these claims should be deemed waived for purposes of this appeal. (United's Brief at 4.) However, United qualified their argument by noting that "Petitioners present no *independent* argument . . ." and that they did not "*substantively address*" the said claims. *Id* (emphasis added). The Petitioners challenged the Circuit Court's dismissal of all the tort claims which were dismissed on statute of limitations grounds. The argument is the same and there was no reason to duplicate identical arguments for all alternatively pled tort claims. The Petitioners' addressed and challenged the Circuit Court's ruling and are seeking a reversal of that ruling, in its entirety.

Respondent United maintains that it was proper for the Circuit Court to decide, as a matter of law, that the statute of limitations began to run in February of 2007, and no later, since at that time the Petitioners knew or had the means to know (a) what they paid for their properties; (b) what information they relied on in purchasing their properties, and (c) the identity of the persons who supplied that information. (United's Brief at 5-7.) However, to take this position, one has to ignore, or to discount, allegations included in the Second Amended Complaint.

Respondent United admits in their brief that "the resolution of steps two through five [of the five step test] will **generally** involve questions of material fact that will need to be resolved by the trier of fact (emphasis original.) (United's Brief at 13.) They argue that "[u]se of the term "generally" clearly indicates that there are occasions where there is no material fact to be addressed at trial . . ." and that therefore this must be one of

them. (*Id.*) There are numerous issues of fact which preclude this case from being an exception to the general rule.

In the Second Amended Complaint, the Petitioners allege facts which show that genuine issues of fact exist with regard to whether the discovery rule applies. Each of the respective plaintiffs allege within the Complaint that they were unaware until the initiation of this litigation that the fraud had occurred, and that with regard to the Defendants' appraisals, that the "appraisals contained information which was camouflaged and nearly devoid of identifying information . . ." and that "[o]nly the bank, the appraisers, and Walnut Springs Mountain Reserve ("WSMR") could have known of the fraud and misconduct which occurred." See, *e.g.*, Second Amended Complaint (Appendix at 68) at paragraphs 60, 63, 69-70, 75-76, 83, 85-87, 92-93, 97-98, 102-103, 108-109, 112, 115-117, 119-123, 125-126, 128-129, 131-132.

Petitioners each expressly alleged in the Second Amended Complaint that they were unaware of the fraud until the litigation *sub judice* began, and that the reason they were unaware is because the Defendants attempted to conceal the fraud which took place. The fraud was only discovered when Petitioners' counsel came into possession of copies of all the Walnut Springs appraisals submitted by Respondent McQuade, and that the details were first learned by the Petitioners when they actually read the Amended Complaint.

To conclude that this case is one of the cases in which there are no factual issues pertaining to the discovery rule is to either ignore the allegations in the Second Amended Complaint, or to discount those allegations - neither of which are a proper basis for dismissal under Rule 12(b)(6).

II. REPLY TO MCQUADE RESPONSE BRIEF

The Response Brief of Stan McQuade and McQuade Appraisal Services (“McQuade”) fails to establish that the Circuit Court acted properly in dismissing the Petitioners’ claims under Rule 12(b)(6). Respondent McQuade claims that he acted appropriately and that the Petitioners have not alleged otherwise. However, the Second Amended Complaint shows this argument to be false.

Respondent McQuade represented in his brief that the Petitioners “admit” in the Second Amended Complaint that his appraisal of the 5.88 Schonberger property turned out to be accurate. The basis for this statement is paragraph 72 of the Second Amended Complaint, where it is noted that in 2009, over four years after the Schonberger fraud occurred, McQuade admitted in an appraisal that none of the lot sales, prior to 2009, were arm’s length transactions. (Appendix at 90.) Respondent McQuade completely misses the significance of his statement. McQuade admitted that of the dozens of appraisals he had completed in the WSMR development, that none of the sales were legitimate “comparables”. The culpability of his conduct is that he had personally drafted each of the prior appraisals using those sales as comparables, including one which was not even a lot in WSMR - the Schonberger property.

In order to enable a \$300,000.00 construction loan, Respondent McQuade appraised a 5.88 acre lot in WSMR based on alleged sale of that lot for \$294,000.00, giving a final estimate of value at \$656,900.00. (Appendix at 50.) However, he included false information in the appraisal, such as disguising the real source of the property, which was Chaya Shonberger, who was alleged to be the arm’s length purchaser. The

5.88 acres never belonged to WSMR and never came out of the deed cited in the appraisal. (Appendix at 51.)

McQuade claimed to have appraised the property, yet his appraisal contains false information. His only defense to being a participant in the fraud is to admit that he never performed an appraisal of the 5.88 acre property. One cannot appraise real estate by reviewing a real estate purchase agreement alone. McQuade represented that he examined and appraised the actual property. Indeed, each appraisal of the Petitioners' properties included the following assurances from McQuade: "that all state and federal laws, as well as professional appraisal regulations and rules were complied with." (Second Amended Complaint at paragraph 201 (Appendix at 132).)

Either McQuade appraised the property, or he lied about appraising the property. Either way he engaged in fraudulent misrepresentations. Then he used his fraudulent appraisal as a comparable in most of the subsequent WSMR appraisals - an appraisal which concealed the actual property information and which claimed an arm's length purchase price which was actually the construction loan proceeds. This was a completely manufactured comparable which McQuade either knew about, or didn't know about because he wasn't actually performing any appraisals. That manufactured appraisal directly supported the financing of the Petitioners' loans.

Respondent McQuade claims to be justified in relying solely on a real estate purchase agreement provided by the WSMR developers. However, he ignores the fact that he continued to use the "fraudulent Schonberger transaction" over and over again in his subsequent appraisals. The Petitioners allege that he did so due to the fact that this "comparable" pumped up the per acreage value to \$50,000.00 per acre.

Respondent McQuade failed to explain how he included the Schonberger “sale” as a comparable in most of his subsequent appraisals with no proof that the sale occurred. No deed could be cited evidencing the sale/conveyance - because it didn’t exist. McQuade’s appraisals using the Schonberger sale as a comparable used a false deed book and page number. Either he willingly engaged in the fraud, or he lied about performing appraisals pursuant to state and federal law and professional appraisal regulations. A jury should determine Respondent McQuade’s liability.

Respondent McQuade further argues that the Petitioners failed to allege that he knew about the Schonberger fraud and the confidential rebates. (McQuade Brief at 6, 7.) The Petitioners described their allegations in great detail and alleged over and over again alleged that McQuade falsified the appraisals and knew about the fraud and misconduct. *See, e.g.*, Second Amended Complaint (Appendix at 68) at paragraphs 60, 63, 69-70, 75-76, 83, 85-87, 92-93, 97-98, 102-103, 108-109, 112, 115-117, 119-123, 125-126, 128-129, 131-132. Moreover, the Petitioners alleged that McQuade “falsely, knowingly, and fraudulently [was] complicit in, through joint venture and civil conspiracy, and actively enabled and allowed WSMR to misrepresent, and themselves misrepresented value, investment potential, retirement potential and the overall characteristics and amenities of the lots in WSMR . . . and to otherwise commit bank and mortgage fraud” on the dates and in the manner described in the Second Amended Complaint. (Second Amended Complaint at paragraph 137 (Appendix at 118).) The Petitioners further alleged that “[t]hese were material misrepresentations and were committed by . . . Defendant Stan McQuade.” (Second Amended Complaint at paragraph 138 (Appendix at 118).) In Count Three of the Second Amended Complaint,

the Petitioners allege that McQuade was a party to a civil conspiracy and that he had an agreement and an understanding with the other defendants to commit violations of state and federal law pertaining to bank fraud and mortgage fraud, as detailed in the Second Amended Complaint in minute detail. (Second Amended Complaint at paragraphs 157-166 (Appendix at 124-126.)

Additionally, the Petitioners allege that McQuade indeed did have knowledge of the Schonberger fraud, and admitted his knowledge in a 2009 appraisal where he noted that the [Schonberger] home “was built by the developer for himself.” (Second Amended Complaint at paragraph 44 (Appendix at 36).)

Respondent McQuade mischaracterizes the Second Amended Complaint as solely alleging that the appraisals overstated the values of the properties, causing the Petitioners to pay inflated amounts. (McQuade Brief at 13.) Although the conduct of McQuade did overstate the value of the properties, and did cause the Petitioners to pay inflated amounts, those allegations are but a small part of the allegations against the respondents. The Petitioners described and alleged a complex real estate investment scam that fraudulently induced people into buying not just real estate with an inflated value, but real estate they never would have bought in the first place had they not been fraudulently induced. They were induced to purchase an investment that was not an investment. They were induced to buy mortgages that were based on false documents and false numbers. Not one investor has recouped their money out of WSMR. This is not due to the economy. This is due to the fact that the properties never had a legitimate foundation of arm’s length comparables. The Second Amended Complaint details McQuade’s involvement in detail and includes McQuade as a defendant in

reference to the allegations in Counts One, Two, Three, Four, Five, Eight and Eleven. (Appendix at 118-132.)

Respondent McQuade argues that the Second Amended Complaint does not include allegations of reliance. (McQuade Brief at 17.) However, the Petitioners alleged in detail the role McQuade had in the Schonberger fraud and all subsequent appraisals. Furthermore, the individual petitioners noted that they were “[g]iven the curriculum vitae provided by Stan McQuade and Thelma McQuade, which was made a part of the appraisals for the Plaintiffs’ appraisals, and given the express assurances contained therein that all state and federal laws, as well as professional appraisal regulations and rules were complied with . . .” and that “the McQuade Defendants should have reasonably expected that the representations made to the Plaintiffs would be relied upon and given great weight by the Plaintiffs.” (Second Amended Complaint at paragraph 201 (Appendix at 132).)

CONCLUSION

The Circuit Court erred in dismissing the Petitioners’ claim under Rule 12(b)(6) when they provided 68 pages and 203 paragraphs of detailed allegations of misconduct by United Bank, Inc. employees and Respondent McQuade. The Petitioners are entitled to their day in court and a resolution on the merits of their claims rather than on the timing of their claims - especially when they allege they instituted this civil action as soon as they became aware of the allegations.

The Petitioners urge this Honorable Court to overturn the February 27, 2014 Order from the Circuit Court of Monroe County and to remand this case for further proceedings.

CHARLES J. EVANS, CYNTHIA B. EVANS and OBIE WOODS, and WAYNE CLIBURN and LUCY CLIBURN, and SERGIO BAEZ, and PETER CALDERON and MIKE HOLLANDSWORTH, VIVIAN HOLLANDSWORTH, and JAN JERGE and JAMES CARROLL, JR. and FRED A LIVESAY and JIM MACKEY, SHAYNA MACKEY, and PETER DEL CIO PPO and JEAN MILLARD, MICHELLE MILLARD and STEPHEN RICE, LAUREEN RICE and LON FOUNTAIN, LOUISE FOUNTAIN and MICHAEL ROBEY, LORRI ROBEY, ROBERT SCHLOSSBERG, HELENE SCHLOSSBERG, SALVATORE ZAMBRI, MARY ZAMBRI, JOSEPH ZAMBRI, ANTHONY ZAMBRI, and ZAMBRI ENTERPRISES, LLC, a Maryland limited liability company, and ROBERT AMICO, BEVERLY AMICO, and JOSEPH KIM,
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CERTIFICATE OF SERVICE

I, John H. Bryan, hereby certify that a true and exact copy of the foregoing
Petitioners' Reply Brief has been served upon the Respondents by sending the same
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