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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2170767

Fidelity National Title Insurance Company

v.

Western Surety Company

Appeal from Limestone Circuit Court
(CV-17-900109)

PITTMAN, Judge.

This appeal involves a question of the proper limitations period applicable to an action brought against a surety of a notary public based upon the notary's failure to personally

witness the signatures affixed to a document upon which she had placed her notarial attestation and seal.

In March 2017, a civil action was brought against Western Surety Company ("the surety") by Fidelity National Title Insurance Company ("the title insurer"). In the complaint, the title insurer averred that, in December 2011, it had issued a policy of insurance to Gateway Mortgage Group, LLC ("the lender"), with respect to a real-estate transaction involving a loan secured by a mortgage executed by Donald E. Hamblett and Judith A. Hamblett ("the homeowners"), the proceeds of which loan were to be used for the construction of a dwelling on a parcel of property in Limestone County located within the corporate limits of the city of Madison. The title insurer also alleged that, during the process of constructing the dwelling in October 2011, the homeowners' home-construction contractor, Green Way Homes, Inc. ("the contractor"), had ordered certain materials from Niehaus Lumber Company, Inc. ("the materialman"), and that the materialman had subsequently delivered the materials to the parcel; the title insurer also alleged that the materialman had requested a payment of $17,324 from the contractor for the

materials, but that the contractor had not paid for the materials. The title insurer further averred that, before its policy was issued, the title insurer had insisted that the contractor obtain notarized waiver-of-lien forms from each party that had provided labor or materials during the construction process; however, no such form was actually obtained from the materialman. Rather, Ann Holton ("the notary"), a real-estate agent employed of the contractor who also served as a notary public, attested to the materialman's execution of a waiver-of-lien form that had, in fact, not been signed by an authorized representative of the materialman. In August 2012, after the materialman had recorded a lien against the property on which the dwelling was located and had initiated a civil action against the lender, the contractor, and the homeowners, the title insurer paid $16,500 to the materialman in order to settle the civil action and cause the lien to be discharged. The title insurer asserted that the surety was liable for that $16,500 payment, as well as interest, costs, and attorney fees.

In response to the title insurer's complaint, the surety filed a motion to dismiss pursuant to Rule 12(b)(6), Ala. R.

Civ. P., asserting that the title insurer's complaint failed to state a claim upon which relief could be granted. In that motion, the surety asserted that the conduct of which the title insurer had complained had taken place more than two years before the filing of the complaint and that the title insurer's action was barred by Ala. Code 1975, § 6-2-38(l), Alabama's residual tort statute of limitations, which mandates the bringing within two years of their accrual actions asserting "any injury to the person or rights of another not arising from contract and not specifically enumerated" elsewhere in the Code. The title insurer responded that the proper limitations period was six years, citing Ala. Code 1975, § 6-2-34(7), which applies to "[m]otions and other actions against the sureties of any sheriff, coroner, constable, or any public officer ... for any nonfeasance, misfeasance, or malfeasance, whatsoever, of their principal ...." The circuit court denied the surety's motion to dismiss, after which the surety answered the complaint and affirmatively pleaded that the title insurer's claim was barred by the applicable statute of limitations.

In December 2017, the surety filed a motion for a summary judgment that was supported by, among other things, the pleadings and the parties' joint statement of undisputed facts. In its memorandum in support of its motion, the surety again argued for the applicability of § 6-2-38(l), asserting, among other things, that it was entitled to "avail itself of any defense not personal to its principal, including the statute of limitations," and that the two-year statute had been applied in Ex parte Floyd, 796 So. 2d 303 (Ala. 2001), to an action against a notary and a surety alleging a wrongful or negligent notarization. The title insurer filed a response to the surety's summary-judgment motion and also filed a cross-motion for a summary judgment in favor of the title insurer, relying upon § 6-2-34(7) and caselaw interpreting that statute as encompassing claims against sureties of notaries public (Governor v. Gordon, 15 Ala. 72 (1848)). After argument, the circuit court denied the title insurer's summary-judgment motion, granted the surety's summary-judgment motion, and concluded that § 6-2-38(l) was the governing statute of limitations in the action.

The title insurer has appealed to this court from the circuit court's judgment, reiterating its contentions regarding the applicability of a six-year statute of limitations to its action rather than the two-year statute applied by the circuit court at the surety's behest. The surety, for its part, reiterates its argument that the two-year statute is applicable. Because "[t]he facts in this case are undisputed," this court will review the circuit court's legal determination "to determine whether the [surety was] entitled to a judgment as a matter of law." Carpenter v. Davis, 688 So. 2d 256, 258 (Ala. 1997).

The statute invoked by the title insurer, § 6-2-34(7), has its roots in an 1832 legislative act prospectively providing, in pertinent part, that "no action, suit or motion[] shall be maintained against the security or securities of any sheriff, constable or other public officer of this State, for any misfeasance, malfeasance, or other cause whatsoever" unless that proceeding was "commenced and prosecuted within six years next after the commission of the act complained of." Ala. Acts 1832, p.27 (emphasis added). That statute was carried forward verbatim in C.C. Clay's 1843

Digest of the Laws of the State of Alabama (p. 329, § 90), in which form its applicability was considered by our supreme court in Gordon, supra. In Gordon, the governor of Alabama brought an action in 1846 against the surety of a notary public who, it was alleged, had been retained in January 1839 by the payee of a note in order to give effective notice of nonpayment to the only solvent endorser of the note, but the notary had thereafter had a judgment entered against him because he had failed to properly undertake that task. The surety had successfully defended the governor's action in the trial court on the basis that that action was time-barred under the six-year statute of limitations set forth in the 1832 act. Our supreme court affirmed the judgment in favor of the surety, holding as an intermediate matter that "a notary public is a public officer within the meaning of the first section of the act of 1832" and that the notary's surety was "not liable on his bond for his malfeasance, misfeasance, or other improper conduct, unless suit was commenced against [the surety] 'within six years next after the commission of the act complained of.'" 15 Ala. at 76.

In 1852, Alabama adopted a general code of laws that contained an article directly addressing time limitations applicable to civil actions. In Article I of Chapter XXI of that Code, the legislature evidenced its intent that civil actions "be commenced ... within the periods prescribed in this chapter, and not afterwards." Ala. Code 1852, § 2474. The 1852 Code grouped a number of types of civil actions within the section setting a six-year limitations period, including both "[m]otions[] and other actions against the sureties of any sheriff, coroner, constable, or any public officer" and "actions against the sureties of executors, administrators, or guardian" for "any misfeasance, or malfeasance whatever to their principal." Ala. Code 1852, § 2477(6). However, the 1852 Code also, for the first time, included a 10-year limitation-of-actions provision as to all actions brought directly against "sheriffs, coroners, constables, and other public officers, for nonfeasance, misfeasance, or malfeasance in office." Ala. Code 1852, § 2476(3).[1] Finally, the Code of 1852 established a one-year

[1]The enactment of the 10-year statute of limitations occurred simultaneously with the legislative adoption of statutes governing "Remedies" and "Statutory Summary

statute of limitations applicable to "[c]ivil actions[] for any injury to the person[] or rights of another" not enumerated in Article I of Chapter XXI of that Code. Ala. Code 1852, § 2481(6).

The statutes of limitations adopted in the 1852 Code have remained in effect in Alabama for many decades with relatively few changes. Like its 1852 counterpart, the 1975 Code of Alabama sets forth a six-year statute of limitations applicable to "[m]otions and other actions against the sureties of any sheriff, coroner, constable, or any public officer ... for an nonfeasance, misfeasance, or malfeasance, whatsoever, of their principal ...." Ala. Code 1975, § 6-2-34(7). Moreover, the legislature's adoption of the 1852 Code and subsequent codes without substantial alteration to the language appearing in the 1832 statute construed in Gordon tends to indicate legislative approval of the principle espoused by our supreme court in that case that the term "public officer" indeed includes notaries. See Wright v.

Proceedings Involving Officials," as the United States Court of Appeals for the Fifth Circuit noted in Nathan Rodgers Construction & Realty Corp. v. City of Saraland, 670 F.2d 16, 19 (5th Cir. 1982).

Childree, 972 So. 2d 771, 779-80 (Ala. 2006) (readoption of code section or incorporation of section into a subsequent code is presumed to deliberately include interpretations of that section by our supreme court). We thus reject the proposition, advanced by the surety, that the age of the decision in Gordon alone warrants disregard of the holding thereof.

However, the legislature has not remained completely idle in this area since 1852. In 1985, the legislature repealed Ala. Code 1975, § 6-2-39, which had carried forward the one-year general tort statute of limitations of § 2481(6), Ala. Code 1852, and replaced it with § 6-2-38(l), which provides for a two-year general tort limitations period. Further, in 1996, the legislature prospectively restricted the applicability of the 10-year limitations period stemming from Ala. Code 1852, § 2476(3), which had formerly been applicable to all "actions ... against sheriffs, coroners, constables, and other public officers[] for nonfeasance, misfeasance, or malfeasance in office" to "actions brought by or on behalf of the State of Alabama, a county, a municipality, or another political subdivision of the state against sheriffs, coroners,

constables, and other public officers for nonfeasance, misfeasance, or malfeasance in office." Ala. Code 1975, § 6-2-33(3) (as amended by Act No. 96-513, Ala. Acts 1996).

The effect of the new restriction on the applicability of the 10-year statute of limitations upon actions brought against notaries initiated by private parties was almost instant. In Ex parte Floyd, supra, our supreme court reviewed a judgment of dismissal entered on limitations grounds in favor of a notary and a surety as to claims brought in 1999 (after the amendment of § 6-2-33(3)) by a corporation and one of its officers asserting breach of notarial duties; specifically, it was alleged in the complaint in Ex parte Floyd that, although only the president of the corporation had the authority to execute a document evidencing satisfaction of a mortgage, the defendant notary had acknowledged that the signature of a vice president of that corporation was actually the signature of the president. Our supreme court affirmed the judgment of dismissal as to the plaintiff corporate officer, but it reversed the judgment of dismissal as to the corporation based upon a conclusion that the corporation's claim did not accrue on the date suggested by the notary and

the surety in that case, but had instead accrued when Colonial Bank ("Colonial"), in reliance upon the purported satisfaction document, had first asserted a security interest in the subject property superior to that held by the corporation. However, the reasoning employed in Ex parte Floyd left no doubt that the applicable statute of limitations was the two-year statute upon which the defendants in that case had relied, i.e., § 6-2-38(l):

> "The allegations in the complaint suggest that [the corporation] was the victim of wrongdoing by persons responsible for the making and recording of the forged satisfaction, wrongdoing that included the alleged negligence or wantonness on the part of the notary public.... In the absence of any evidence indicating that [the corporation] had prior knowledge of a cloud on its title and evidence indicating that it incurred a loss or an expense as a result of having that knowledge, we must conclude that the earliest that the limitations period could have begun to run on [the corporation]'s claim against [the notary] would have been the time when it incurred actual damage as a result of [the notary]'s actions.
>
> "Colonial purchased the property at the foreclosure sale and recorded its foreclosure deed on July 16, 1998. Colonial thereafter, on September 29, 1998, intervened in pending litigation, to assert the priority of its mortgage. At that time, [the corporation] was required to defend its title, and its first pecuniary loss occurred. The injury necessary to give rise to a negligence cause of action against [the defendant] ... notary public[] and [the surety] ... occurred on September 29, 1998,

> when Colonial intervened and [the corporation] was required to defend against its claim. The limitations period of two years began to run on that date. [The corporation] filed its action against [the notary and the surety] on February 8, 1999, within two years of September 29, 1998."

Ex parte Floyd, 796 So. 2d at 308-09 (emphasis added). Thus, in Ex parte Floyd, a single, 2-year statute of limitations applicable to negligence claims was asserted by both the notary and the surety, and was applied by our supreme court, instead of the 10-year and 6-year periods espoused, respectively, in § 6-2-33(3) and § 6-2-34(7).

We further note that, as the surety has indicated in its brief, Alabama law has long recognized the proposition that "[t]he liability of the surety follows that of the principal, and the surety can make any defense, not personal to the principal, that the principal can." United States Fid. & Guar. Co. v. Town of Dothan, 174 Ala. 480, 487, 56 So. 953, 955 (1911). This court, in Commercial Standard Insurance Co. v. Alabama Surface Mining Reclamation Commission, 443 So. 2d 1245 (Ala. Civ. App. 1983), cited Town of Dothan in support of that general principle of surety law and also embraced the pertinent corollary proposition that "a surety may assert as a defense the statute of limitations available to the

principal," even in situations when the principal does not assert that defense. 443 So. 2d at 1249. More recently, in Housing Authority of Huntsville v. Hartford Accident & Indemnity Co., 954 So. 2d 577 (Ala. 2006), our supreme court confirmed the validity of those principles under Alabama law notwithstanding the existence of a split of authority in other jurisdictions as to the right of sureties to assert limitation-of-actions defenses available to their principals; that court noted that its holding in that case, i.e., that the surety of a fire-alarm installer was entitled to assert a statute-of-limitations defense available to the installer, was "in accordance with" the general law of suretyship as set forth in the Restatement (Third) of Suretyship & Guaranty:

> "'[I]f the obligee fails to institute action against the secondary obligor on the secondary obligation until after the obligee's action against the principal obligor on the underlying obligation is barred by the running of the statute of limitations as to that action, the secondary obligor's rights and duties with respect to the principal obligor and the obligee are the same as if, on the day that the statute of limitations expired, the obligee had released the principal obligor from its duties pursuant to the underlying obligation without preserving the secondary obligor's recourse against the principal obligor. Accordingly, the principal obligor is discharged from duties to the secondary obligor ..., and the secondary obligor is discharged from duties to the obligee....'"

Housing Authority of Huntsville, 954 So. 2d at 581 (quoting Restatement (Third) of Suretyship & Guaranty § 43 (1996)).

In this case, the condition set forth in the Restatement has indeed occurred: the title insurer (i.e., the obligee) waited more than four years after having paid the $16,500 settlement in August 2012 as to the claims brought by the materialman against the lender, the contractor, and the homeowners before attempting to sue the surety (i.e., the secondary obligor) on the claimed basis that the surety should be liable for any wrongful conduct on the part of the notary in acknowledging an unauthorized signature on the waiver-of-lien form as the signature of the materialman. Had the title insurer, as a private party, also named the notary (i.e., the primary obligor) as a defendant in this case, she would clearly have been entitled, under Ala. Code 1975, § 6-2-38(l) and Ex parte Floyd, to dismissal of the action against her. Ergo, the title insurer's delay in bringing an action against the surety in this case has resulted in the discharge of any duties that the surety would have owed to the title insurer in this case. Housing Authority of Huntsville, supra.

The judgment of the Limestone Circuit Court dismissing the title insurer's action as time-barred under § 6-2-38(l) is affirmed.

AFFIRMED.

Thompson, P.J., and Thomas, Moore, and Donaldson, JJ., concur.