

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 9, 2011**

A. John Voelker  
Acting Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2010AP2971**

**Cir. Ct. No. 2008CV2228**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**FIRST BANK FINANCIAL CENTRE,**

**PLAINTIFF,**

**V.**

**THOMAS A. MILLER, JANE DOE MILLER , UNKNOWN SPOUSE OF  
THOMAS A. MILLER, DONALD GRIFFIN, MARK F. BERES, JOHN  
BERES BUILDERS, INC., DOMNITZ, MAWICKE & GOISMAN, S.C. ,  
N/K/A MAWICKE & GOISMAN, S.C., WALGREEN CO., JOSEPH  
LALICATA, DAN BELONGIA, STATE OF WISCONSIN DEPARTMENT OF  
REVENUE, STATE OF WISCONSIN DEPARTMENT OF WORKFORCE  
DEVELOPMENT, UNITED STATES OF AMERICA AND WISCONSIN  
ELECTRIC POWER COMPANY,**

**DEFENDANTS,**

**DAGMAR GRIFFIN,**

**DEFENDANT-THIRD-PARTY  
PLAINTIFF-APPELLANT,**

**V.**

**165 MAIN STREET LLC,**

**INTERESTED PARTY,**

**JOHN T. LYNCH,**

**THIRD-PARTY DEFENDANT,**

**TERRY E. MITCHELL, LOUIS D. KAISER, CNA INSURANCE COMPANY,**

**THIRD-PARTY DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Waukesha County:  
J. MAC DAVIS,<sup>1</sup> Judge. *Reversed and cause remanded.*

Before Neubauer, P.J., Reilly, J., and Neal Nettesheim, Reserve  
Judge.

¶1 PER CURIAM. This is the second appeal arising out of a foreclosure action of a commercial property (“the Greenfield property”). In this case, Dagmar Griffin appeals from a grant of summary judgment dismissing, on statute of limitations grounds, her third-party complaint against Attorneys Terry E. Mitchell and Louis D. Kaiser and their professional liability insurer, CNA Insurance Company. Griffin argues that Mitchell and Kaiser deliberately delayed recording the mortgage she executed on the Greenfield property in 1998 to make it junior to that of First Bank Financial Centre, a fact Griffin did not learn until First

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<sup>1</sup> Reserve Judge Patrick L. Snyder made the actual ruling that is being appealed. Judge J. Mac Davis signed the judgment.

Bank foreclosed on the property in 2008. The circuit court found that the latest date of legal injury was March 23, 2000, when she learned that her mortgage was only recently recorded. We agree with Griffin that whether she reasonably should have investigated the position of the mortgage at that point presents an issue of fact. We therefore reverse the judgment and remand for further proceedings.

¶2 Thomas Miller, then married to Griffin's daughter, co-owned a restaurant in West Allis on land adjacent to the Greenfield property. In 1993, Griffin and her husband made a loan to Miller to buy out his business partner. Miller gave the Griffins a mortgage on the restaurant property as security.

¶3 Some time later, First Bank loaned Miller \$800,000 for other properties. Miller agreed to repay \$400,000 by September 1998. Miller and Lynn divorced. As part of the settlement, the court placed a \$400,000 judgment against the West Allis restaurant. To address his various financial obligations, Miller negotiated an arrangement with Walgreen's under which Miller would raze the restaurant and develop the property as a Walgreen's on a long-term lease.

¶4 Park Bank, the lending institution in that deal, wanted clear title. Kaiser, one of Miller's attorneys, proposed to exchange the Griffins' mortgage on the restaurant property for one of equal value on the adjacent Greenfield property. Kaiser advised the Griffins in a letter dated June 16, 1998 that their new mortgage on the Greenfield property was second only to Park Bank's \$200,000 mortgage and that Miller would execute the new mortgage and submit it for recording when he refinanced to build the Walgreen's, which "will occur on or before July 10, 1998." A letter sent six days later repeated that Miller would sign the mortgage "and have it recorded at the closing" when he refinanced. Kaiser sent them a third

letter on July 22 with a satisfaction of mortgage for the restaurant property for their signature. Kaiser recorded the satisfaction on August 24, 1998.

¶5 Meanwhile, on July 31, Miller had executed the mortgage in favor of the Griffins on the Greenfield property. A week later, Mitchell, Kaiser's partner, contacted First Bank loan officer John Lynch and directed him to create a mortgage on the same Greenfield property. The proposed mortgage Mitchell faxed to Lynch had Miller giving First Bank a second mortgage on the Greenfield property and, like the Griffin mortgage, purported to be second only to a \$200,000 mortgage to Park Bank.

¶6 The First Bank mortgage was recorded on August 31, 1998. The Griffins' mortgage was recorded on January 11, 2000, seventeen months after its execution. Two months later, by letter dated March 23, 2000, Mitchell advised the Griffins:

Please find enclosed a photocopy of the recorded mortgage in your favor recorded by the Milwaukee County Register of Deeds on January 11, 2000 as Document Number 7857226 at pages 000008993-94.

I am also providing a copy of this to your daughter, Lynn Griffin. I've informed her of the fact that we have finally received it back from the Register of Deeds office. I apologize for the delay and any inconvenience this has caused you. I believe that Mr. Miller is current on his payments. If he is not, please notify me.

¶7 The Griffins took no action in response to the letter.

¶8 By June of 2008, Miller had defaulted on his loan payments. First Bank filed an action to foreclose on Miller's various properties, including the Greenfield property, and moved for summary judgment on the basis that its

mortgage, recorded first, had priority. Griffin<sup>2</sup> responded that the First Bank mortgage was fraudulent and created a genuine question of material fact. That dispute is the subject of the other appeal before this court.

¶9 On April 23, 2009, Griffin filed third-party claims against Mitchell and Kaiser for promissory estoppel, negligence and fraudulent misrepresentation and later filed an amended third-party complaint alleging intentional interference with contract. Mitchell and Kaiser sought summary judgment on, among others, statutes of limitations grounds.<sup>3</sup> They asserted that Griffin suffered an injury to a legal right on August 31, 1998, when First Bank recorded its mortgage and obtained priority over her still-unrecorded mortgage. They argued that any cause of action that accrued prior to April 23, 2003—six years before she filed her third-party complaint—was barred by the statute of limitations.

¶10 The circuit court agreed. It concluded that, as a matter of law, the latest that Griffin should have known of her injury was March 23, 2000, the date of Mitchell's letter notifying her that her mortgage was not recorded until January 11, 2000. The court granted the motion. This appeal follows.

¶11 We review motions for summary judgment independently, applying the same methodology as the trial court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is proper when

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<sup>2</sup> Griffin's husband died in April 2008.

<sup>3</sup> The applicable statute of limitations on intentional interference with contract was two years. *See* WIS. STAT. § 893.57 (2007-08). The other claims had six-year limitations. *See* WIS. STAT. §§ 893.43, 893.53, 893.93(1)(b) (2009-10).

All references to the Wisconsin Statutes are to the 2009-10 version except where noted.

no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). Any reasonable doubt as to the existence of a genuine issue of material fact is resolved against the moving party. *Heck & Paetow Claim Serv., Inc. v. Heck*, 93 Wis. 2d 349, 356, 286 N.W.2d 831 (1980). Whether genuine material facts remain in dispute is a question of law this court decides de novo. See *Oney v. Schrauth*, 197 Wis. 2d 891, 897, 541 N.W.2d 229 (Ct. App. 1995).

¶12 Griffin relies on the discovery rule in contending that the trial court improperly granted summary judgment. Under the discovery rule, a cause of action accrues on the date the injury is discovered or with reasonable diligence should be discovered, whichever occurs first. *Hansen v. A.H. Robins Inc.*, 113 Wis. 2d 550, 560, 335 N.W.2d 578 (1983). Reasonable diligence “means such diligence as the great majority of persons would use in the same or similar circumstances.” *Spitler v. Dean*, 148 Wis. 2d 630, 638, 436 N.W.2d 308 (1989). Here, the injury was discovered in mid-2008 when First Bank sought to foreclose on the Greenfield property. The question is whether Griffin could have discovered it earlier through reasonable diligence.

¶13 The record indicates that Kaiser assured Griffin that her Greenfield mortgage would be submitted for recording “on or before July 10, 1998.” Although Mitchell’s March 23, 2000 letter notified her that the mortgage was not recorded until January 11, 2000, his letter also termed it “the mortgage in your favor” and noted that it “finally” had been returned from the Register of Deeds office. Mitchell and Kaiser contend the letter would have put a reasonable person on notice that he or she should verify the mortgage’s position because of the seventeen-month delay. Because the letter offered no information to the contrary, however, it allows another reasonable inference: that, despite some bureaucratic

tie-up at the Register of Deeds office, Griffin's mortgage position was as originally represented.

¶14 Summary judgment is inappropriate when reasonable people might disagree as to the significance of facts or when different interpretations of the evidence are possible. *See Park Bancorporation, Inc. v. Sletteland*, 182 Wis. 2d 131, 141, 513 N.W.2d 609 (Ct. App. 1994). Furthermore, the date of discovery generally is a question of fact for a jury. *Stroh Die Casting Co. v. Monsanto Co.*, 177 Wis. 2d 91, 104, 502 N.W.2d 132 (Ct. App. 1993). Because the March 2000 letter creates competing reasonable inferences, we conclude Griffin raised a genuine issue of material fact regarding whether she exercised reasonable diligence in discovering that First Bank's mortgage had priority.

*By the Court.*—Judgment reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

