THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2019-0120

BALZOTTI GLOBAL GROUP, LLC et al.

v.

SHEPHERD'S HILL PROPONENTS, LLC et al.

Rule 7 Appeal from the Rockingham County Superior Court

Joint Brief of the Defendants

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CHAPTER 508 LIMITATION OF ACTIONS

I. Except as otherwise provided by law, all personal actions, except actions for slander or libel, may be brought only within 3 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.

II. Personal actions for slander or libel, unless otherwise provided by law, may be brought only within 3 years of the time the cause of action accrued.

CHAPTER 356-B

I. The declarant may convert all or any portion of any convertible land into one or more units or limited common areas, or both, subject to any restrictions and limitations which the condominium instruments may specify. Any such conversion shall be deemed to have occurred at the time of the recordation of appropriate instruments pursuant to paragraph II and RSA 356-B:20, III.

II. Simultaneously with the recording of site plans and floor plans pursuant to RSA 356-B:20, III, the declarant shall prepare, execute, and record an amendment to the declaration describing the conversion. Such amendment shall assign an identifying number to each unit formed out of a convertible land and shall reallocate undivided interests in the common areas in accordance with RSA 356-B:18, II. Such amendment shall describe or delineate the limited common areas formed out of the convertible land, showing or designating the unit or units to which each is assigned.

III. All convertible lands shall be deemed a part of the common areas except for such portions thereof as are converted in accordance with the provisions of this section. Until the expiration of the period during which conversion may occur or until actual conversion, whichever occurs first, real estate taxes shall be assessed against the declarant rather than the unit owners as to both the convertible land and any improvements thereon. No such conversion shall occur after 5 years from the recordation of the declaration, or such shorter period of time period as the declaration may specify, provided, however, that the time limit contained in the declaration may be extended by not more than 5 years by an amendment to the declaration adopted pursuant to RSA 356-B:54, V.

STATEMENT OF THE CASE

Balzotti Global Group, LLC and Caesar Balzotti, Sr. (collectively "BGG" unless noted otherwise) appealed the decision of the Rockingham County Superior Court (Wageling, J.) granting the appellants' motion to dismiss BGG's complaint under RSA 508:4.

On February 2, 2018, BGG sued the appellants, Shepherds Hill Development Company, LLC ("SHDC"), Shepherds Hill Proponents, LLC ("Proponents"), Ernest J. Thibeault, III, and Ralph Caruso, (collectively "Defendants"), asserting claims all arising out of SHDC's loss of rights to build condominium units under a state-approved condominium project of which Caesar Balzotti was a business partner. Apx. I at 5-13 (BGG's Complaint). Shepherds Hill Homeowners Association, Inc. (the "Association") successfully moved to intervene and BGG made amendments to its complaint. Thereafter, Defendants and the Association moved to dismiss on the basis that BGG failed to filed suit within three years of the applicable statute of limitations.

The trial court (Wageling, J.) ordered an evidentiary hearing to determine when BGG knew or should have known about the loss of the development rights. Id. at 92. The hearing was held on September 5, 2018. Apx. V. at 386 (Evidentiary Hearing Transcript). The record in this case recites a number of key dates:

EVENT	DATE	SIGNIFICANCE
1.	February 25, 2003	Condominium Declaration recorded
2.	February 25, 2013	End of 10 year development period found by Judge Wageling as date Plaintiffs' cause of action accrued.
3.	March 18, 2014	Superior Court of Judge Colburn ruling that development rights expired on February 25, 2013.
4.	August 2014	Time period found by Judge Wageling, **as a matter of fact,** when Plaintiff was informed by Thibeault of Judge Colburn's Order (No. 3 above).
5.	Spring 2015	Time period asserted by Plaintiff when Event #4 occurred that was rejected by Judge Wageling, **as a matter of fact.**

6.	April 16, 2015	Notice of N.H. Supreme Court decision affirming Judge Colburn's Order (Event # 3 above).
7.	February 25, 2016	**End of Statute of Limitations** period based on expiration of development rights (Event # 2 above).
8.	March 18, 2017	**End of Statute of Limitations** period assuming accrual commenced with Judge Colburn's March 18, 2014 Order (Event # 3 above).
9.	August 2017	**End of Statute of Limitations** period assuming accrual commenced with Plaintiff being informed by Thibeault of Judge Colburn's March 18, 2014 Order (Event # 4 above).
10.	**February 2, 2018**	**Date Plaintiffs commenced underlying action.**
11.	April 16, 2018	Plaintiffs' asserted end of Statute of Limitations period assuming accrual commenced with N.H. Supreme Court Order on April 16, 2015 (Event # 6 above), which was rejected by Judge Wageling. Draper v. Brennan, 142 N.H. 780 (1998).

In Judge Wageling's thorough Opinion, dated November 6, 2018, the Court swatted away the alternate theories pushed by Plaintiffs. The underlying case was time barred, since it was filed on February 2, 2018 long after:

- **February 25, 2016** – 3 years after when the development rights expired;
- **March 18, 2017 –** 3 years after Judge Colburn's Order; and
- **August 2017 –** 3 years after Plaintiff learned from Thibeault of Judge Colburn's Order.

Judge Wageling also accepted that Draper v. Brennan was binding precedent, meaning that the Statute of Limitations cannot be tied to this Court's April 16, 2015 Notice of Decision. The Court also determined that Plaintiffs had not sustained their burden to even invoke the tolling protections afforded under N.H.'s discovery rule.

On appeal, Plaintiffs raise a number of issues. However, the principal contention rests in the trial court's finding that Plaintiffs failed to meet its burden to show the applicability of the discovery rule. In making these arguments, Plaintiffs, however, fail to acknowledge the significance of Judge Wageling's ***finding of fact*** that Plaintiff was aware in August 2014 of Judge Colburn's Order. Thus, even if, Plaintiffs were entitled to invoke the discovery rule to bring a case after February 25, 2016, such tolling rights expired in August 2017. This case was not filed until February 2, 2018.

FACTS IN THE RECORD SUPPORTING DISMISSAL

In 1997, appellant Caesar Balzotti originally formed SHDC to develop a 400 unit condominium project in Hudson, New Hampshire. Apx. II at 4 (BBG's 1st Amended Complaint) and Apx. V at 544-45. Balzotti testified that he was a sophisticated real estate developer with 30-plus years of experience. Apx. V at 459. Unfortunately, SHDC ran into financial trouble and, in April of 1999, filed a petition for bankruptcy reorganization in the New Hampshire Bankruptcy Court. Apx. II at 4.

In 2000, Caesar Balzotti, with the help of Ernest J. Thibeault, III and Ralph Caruso, worked together to reorganize SHDC. Apx. V at 545. On July 21, 2000, the New Hampshire Bankruptcy Court approved a bankruptcy reorganization plan (the "Plan") for SHDC. Apx. II at 4. Among other things, the Plan called for the formation of a new limited liability company, Shepherd's Hill Proponents, LLC (Proponents). Id. and Apx. III at 98-116 (LLC Agreement of Shepherd's Hill Proponents, LLC). Under the approved Plan, all prior membership and ownership interests in SHDC were terminated, and Proponents became the sole member of SHDC and the sole owner of its assets. Apx. II at 5. Thibeault and Caruso each owned 40% of Proponents and Balzotti owned 20%. Apx. III at 114.

The SHDC Bankruptcy Plan had many creditors, including Dawn Balzotti, Caesar Balzotti's wife, whose claim of $714,000.00 was approved by the bankruptcy court and documented by a promissory note. Apx. II at 188. While Mrs. Balzotti was the original holder of the July 2000 Note, BGG claims to be the present holder by virtue of an assignment executed by Mrs. Balzotti "in or about August 2014." Apx. II at 7. The note was payable [in] "Five years or as per Plan of Reorganization confirmed in In Re Shepherd's Hill Development Co., LLC NHBK 99-11097 [sic]-JMD." Id. at 21. The sale of condominium units provided the only means to repay bankruptcy creditors. Apx. I at 7-81, 269-326. As each unit was sold, SHDC was

obligated to pay creditors $20,000 in priority of their claims pursuant to the terms of the bankruptcy plan. On July 21, 2000, Proponents and Ernest J. Thibeault, III each purportedly executed a Limited Guaranty of the July 2000 Note (the "July 2000 Guaranty"). Apx. III at 26-31 (Limited Guaranty). Since, under the bankruptcy plan, the development of the condominium project was the only means to payment of the July 2000 Note, Balzotti had a significant financial interest in the successful outcome of the condominium project. Apx. V at 550.

On February 25, 2003, SHDC established the Shepherds Hill Condominium by recording a Declaration of Condominium with the Hillsborough County Registry of Deeds. Apx. I at 18 (Declaration of Condominium of Shepherds Hill). The initial declaration contemplated a maximum of 400 units. Id. SHDC planned to construct the condominium units in phases, beginning with 100 residential units. Id. Upon completion of phase one of the project, SHDC had a right to construct an additional 300 units within the development property known as "convertible/withdrawable land". Id. at 19. The success of the build out of convertible land was contingent upon several conditions, including, but not limited to, time constraints imposed by law. See RSA 356-B:23, III ("No such [build out of convertible land] shall occur after 5 years from the recordation of the declaration, or such shorter period of time period as the declaration may specify, provided, however, that the time limit contained in the declaration may be extended by not more than 5 years by an amendment to the declaration."). Consistent with the law, SHDC's recorded declaration, paragraph J.1, provided that all convertible land "may be converted or withdrawn from the condominium as permitted under RSA 356-B." Id. at 21. On February 26, 2003, SHDC filed at the registry of deeds an amendment to said condominium declaration expressly identifying a five year extension to build out the convertible land: "[T]he Declarant shall have until February 25, 2013 to complete conversion of Units located within the convertible land as described in the Declaration of Condominium." Supplement to Apx. V at 671.

More than a decade later, in early 2013, the Association filed suit against SHDC in the Hillsborough County Superior Court, Southern District. See Shepherds Hill Homeowners Association, Inc. v. Shepherds Hill Development Co., LLC, Hillsborough County Superior Court, Southern District, No. 2013-CV-00241. The Association sought a declaratory ruling that it owned the convertible land and that SHDC be enjoined from developing it. Apx. I at 250. SHDC objected on the basis that it recorded in the Hillsborough County Registry of Deeds a valid amendment to its condominium declaration purporting to extend its development rights

past February 25, 2013. Id. In deciding the dispute, Judge Colburn found that the Association's claim was correct by force of RSA 356-B:23, III: "Giving [the statute's] plain language its reasonable meaning, the Court finds that SHDC had only until February 25, 2013 to build - or at the very least begin to build - the "units" [within the convertible land]." Apx. I at 255 (Colburn, J., Order on Plf. Mot. S.J, Shepherds Hill Homeowners Association, Inc. v. Shepherds Hill Development Co., LLC, Hillsborough County Superior Court, Southern District, No. 2013-CV-00241, March 18, 2014, affirmed on April 2, 2015 in an unpublished opinion by the New Hampshire Supreme Court in Case No. 2014-0306, Apx. V at 620).

The import of RSA 356-B:23, III was also apparent to Balzotti. At the September 5, 2018 evidentiary hearing held to decide Defendants' motions to dismiss, Balzotti was presented with a copy of the amended declaration recorded on February 26, 2003. Apx. V at 495 (Exhibit T-F). Under cross examination, Balzotti demonstrated that he understood that the amendment to the condominium declaration "told the world" that SHDC had until February 2013 to complete the conversion of all the units within the development. Id. at 496. He testified that he did not look for the document in the registry of deeds but had he done so, he would have recognized that SHDC's rights to develop the convertible land would expire on February 25, 2013. Id. When pressed to explain why he did not examine the documents at the registry of deed, or retain an attorney to do so, Balzotti testified that as a passive investor he only had to sit back and wait for the money to come in until it stopped coming in. Id. at 497. When the money stopped coming in, Balzotti testified that he made what were the appropriate inquiries at the time. Id. at 498. None of the inquiries included an examination of SHDC's condominium documents.

Between February 2003 and June 2009, SHDC exercised its development rights and constructed 174 units on the convertible land. Id. at 249. However, due to the failing economy in 2008-2009, the development of additional units did not proceed as hoped. Id.

The Plaintiff's relationship with Mr. Thibeault and Mr. Caruso deteriorated after 2003. Specifically:

- On June 9, 2006, Balzotti filed a Petition for Preliminary and Permanent Injunctive Relief and Damages (the "2006 Balzotti Petition") against SHDC, Proponents, Thibeault, and Thibeault Corporation of N.E., Inc. in the Northern District of the Hillsborough County Superior Court; Case No. 06-E-0278 (the "2006 Balzotti Action"). Apx. III at 33 (Order of Notice, dated June 20, 2006) and Apx. III at 35 (Petition for Preliminary and Permanent Injunctive Relief). On January 18, 2007, following a hearing on those

motions, the Hillsborough Superior Court entered an order dismissing Balzotti's breach of fiduciary duty claims against Thibeault and Caruso. Apx. III at 50-63 (Hillsborough Superior Court Order dated January 18, 2007). Ultimately, the 2006 Balzotti Action was finally resolved by a jury verdict in favor of the defendants. Apx. III at 66 (Jury Verdict, dated January 27, 2010).

- On August 11, 2010, Dawn Balzotti (hereafter, "Mrs. Balzotti"), at her husband's direction, made formal demand on SHDC, Proponents, and Thibeault for repayment of the July 2000 Note and the July 2000 Guaranty. Apx. III at 70 (August 11, 2010 demand letter, hereinafter "2010 Balzotti Demand") that Mr. Thibeault did not believe was due.
- On August 30, 2010, Mrs. Balzotti, at the direction of her husband Caesar Balzotti, filed separate involuntary bankruptcy petitions (the "Involuntary Petitions") against SHDC, Proponents, and Thibeault in the New Hampshire Bankruptcy Court; Bk. No. 10-13708-JMD (the "2010 Involuntary Actions"). Apx. III at 82 (Involuntary Petitions, dated August 30, 2010), Apx III at 86 (Bankruptcy Court Order, dated May 16, 2011 ("Dawn Balzotti testified that her husband, Caesar Balzotti, made the decision to file the involuntary petitions against the Alleged Debtors in August of 2010. . . ."). The Bankruptcy Court dismissed the 2010 Involuntary Actions, concluding that the Involuntary Petitions had been filed without justification and in violation of pertinent requirements under the Bankruptcy Code. Id. at 89. The Bankruptcy Court found that Balzotti had filed the 2010 Involuntary Actions in **bad faith** and, by way of sanction, ordered Dawn Balzotti to reimburse Thibeault for the substantial attorney's fees he had incurred in that process. Id. at 94 (Fee Award Order).

Balzotti testified that his relationship with Thibeault was poor after 2006. Id. at 488. Balzotti did not trust Thibeault when it came to spending money or paying him. Id. at 554. Balzotti, as a minority member of SHDC, knew he could request court assistance to obtain an accounting of SHDC to obtain information he believed Thibeault was hiding. Apx. V at 491. In the summer or early fall of 2014, Mr. Balzotti arrived uninvited at Mr. Thibeault's place of business. Apx. V at 573. Thibeault, at such meeting, provided Mr. Balzotti with a update on the status of the failed condominium project and the loss of development rights in the superior court. Id. at 568.

On February 2, 2018, BGG instituted yet another round of litigation and sued the Defendants, claiming damages arising out of SHDC's loss of right to build out additional

condominium units. Apx. I at 5-13. On September 5, 2018, the trial court held an evidentiary hearing to determine when BGG knew or should have known about the loss of SHDC's development rights for the purpose of deciding Defendants' motions to dismiss. The trial court found that Balzotti was not a credible witness. The defendants prevailed and this appeal followed.

STANDARD OF REVIEW

This Court will uphold the trial court's findings of fact and rulings of law unless they lack evidentiary support or constitute a clear error of law. Loon Valley Homeowner's Ass'n v. Pollack, 171 N.H. 75, 78 (2018). The standard of review is whether a reasonable person could have reached the same decision as the trial court based upon the same evidence. Id. The Court should reverse a trial court's findings and rulings if "they are lacking in evidential support or tainted by error of law." In the Matter of Letendre & Letendre, 149 N.H. 31, 34 (2002).

This Court reviews the trial court's decisions on the admissibility of evidence under an unsustainable exercise of discretion standard. Kelleher v. Marvin Lumber & Cedar Co., 152 N.H. 813, 832 (2005).

SUMMARY OF ARGUMENT

The trial court's order dismissing BGG's complaint as untimely is based on facts evident in the record properly applied to the elements of RSA 508:4. The parties appear to agree that Defendants and the Association have satisfied their burden to show the applicability of RSA 508:4, i.e., that BGG's cause of action against Defendant arose when, on February 25, 2013, SHDC lost its right to develop condominium units. Defendants' resultant inability to pay BGG due to the loss of the only funding mechanism to pay the July 2000 Note and Guaranty constituted the injury. There is no dispute that BGG filed suit three years after February 25, 2013.

BGG's contention on appeal is limited to a review of the trial court's determination that the discovery rule cannot be invoked to make BBG's complaint timely. On appeal, BGG has failed to show that the record does not support the trial court's findings. Rather than show that the record is devoid of such facts, BGG primarily complains that the trial court should have viewed the facts differently. See Kane v. N.H. State Liquor Comm'n, 118 N.H. 706, 708 (1978) (while consideration of the trial record could lead to a different conclusion on questions of fact,

is not sufficient reason to reverse the decision of the trial court). Finally, BGG attempts to raise several other challenges that fail by force of logic. These arguments are addressed below.

For these reasons, the trial court's order must be affirmed.

ARGUMENT

I. THE SUPERIOR COURT PROPERLY DISMISSED BGG'S COMPLAINT AS UNTIMELY.

The primary issue on appeal is whether the trial record is absent evidence to support the trial court's finding that BGG was obligated to file suit on or before February 25, 2016 and, in any event, no later than August 2017. See Loon Valley Homeowner's Ass'n., 171 N.H. at78. For the reasons stated in the trial court order, the appeal must be decided in favor of Defendants and the Association.

A. THE DEFENDANTS' SATISFIED THEIR BURDEN UNDER RSA 508:4

Defendants and the Association asserted RSA 508:4 as an affirmative defense and bear the initial burden of proving its application. See Lamprey v. Britton Constr., 163 N.H. 252, 257(2012)(citation omitted). BGG had three years to file suit from the act or omission constituting the defendants' breach. See RSA 508:4, I:

> I. Except as otherwise provided by law, all personal actions, except actions for slander or libel, may be brought only within 3 years of the act or omission complained of ... RSA 508:4.

BGG's amended complaint identifies the alleged acts constituting breach: SHDC breached its contractual obligations to BGG when due to the loss of its development rights it was unable to meet its obligation to pay creditors under the bankruptcy plan. Apx. II at 6 (Amended Complaint, ¶18-25). Similarly, BGG alleges that defendants Ernest J. Thibeault, III and Caruso were responsible for the loss of developments rights. Id. at (Amended Complaint, ¶19). Therefore, SHDC's loss of development rights is the point of fact establishing when BGG's cause of action arose under RSA 508:4. See Draper v. Brennan, 142 N.H. 780, 783-84 (1998) (A cause of action arises once all of the necessary elements are present but does not "accrue" for purposes of applying the discovery rule until the plaintiff knew or reasonably should have known of the causal relationship to the breach). The trial court found an act or omission constituting breach: SHDC lost its rights to develop on February 25, 2013 which resulted in Defendant's nonpayment

of the July 2000 Note and Guaranty. On appeal, BGG does not appear to dispute this finding as it applies to Defendants' and the Association's burden to establish the applicability of RSA 508:4.

The dispute on appeal rests on the trial court's determination of the moment of accrual, i.e., when BGG discovered or should have reasonably discovered SHDC's loss of development rights. See Beane v. Dana S. Beane & Co., 160 N.H. 708, 712 (2010) (to secure the protections afforded under the discovery rule it is the plaintiff's burden to show it did not know and could not have reasonably known of the harm).

B. THE TRIAL COURT PROPERLY ANALYZED THE DISCOVERY RULE

On appeal, BGG argues that the trial court committed reversible error when it determined the tolling protection afforded under the discovery rule was not available to it. Plf. Brief at 28.

The discovery rule only serves to toll the limitations period until BGG discovers or should reasonably have discovered SHDC's breach. The pertinent language in RSA 508:4 is as follows:

> "I. [if a defendant establishes its burden of proof to show the applicability of the three year statute of limitations, the plaintiff's claim is time barred], **except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.** " (emphasis added).

At the trial level, BGG had the burden to prove that the discovery rule applied to an action otherwise barred. Beane, 160 N.H. at 712. To succeed, BGG had to show that "[1] ... the injury and its causal relationship to the act or omission were not discovered **and** [2] could not reasonably have been discovered at the time of the act or omission ..." RSA 508:4 (emphasis added); see also Beane, 160 N.H. at 713 ("the discovery rule exception does not apply unless the plaintiff did not discover, and could not reasonably have discovered, either the alleged injury or its causal connection to the alleged negligent act.") (internal citation omitted). With regard to the second prong of the test, the protections of the discovery rule are not available if BGG "could reasonably discern it suffered some harm" that "possibly existed." Id. The harm to be discerned by BGG is, as alleged by BGG, SHDC's loss of development rights. "Whether [BGG] did in

fact exercise reasonable diligence is a question of fact." Black Bear Lodge, 136 N.H. at 638.

1. BGG'S CAUSE OF ACTION ACCRUED ON FEBRUARY 25, 2013.

The trial court found that BGG's harm coincided with SHDC's loss of development rights on February 25, 2013 by force of RSA 356-B:23, III and as further memorialized in SHDC's amendment to its declaration of condominium filed at the registry of deeds ten years earlier. See Apx. III at 211-19 (Order on Plaintiff's Motion for Summary Judgment, Shepherds Hill Homeowners Association, Inc. v. Shepherds Hill Development Co., LLC, affirmed on April 2, 2015 in an unpublished opinion by the New Hampshire Supreme Court in Case No. 2014-0306, Apx. V at 620); see also Supplement to Apx. V at 671 (copy of amended declaration). "An action for breach of contract unlike a tort action accrues when the breach occurs whether any damage then occurred or not." See Black Bear Lodge v. Trillium Corp., 136 N.H. 635, 637 (1993); see also Plf.'s Brief at 20; see also, RSA 508:4 (accrual relates back to "the injury and its causal relationship to the act or omission complained of.")

The trial court correctly found that BGG discovered or in the exercise of reasonable diligence should have made a connection between SHDC's loss of development rights as of February 25, 2013 and thus, the concurrent extinguishment of the sole mechanism for the payment of the note and guaranty. See Beane, 160 N.H. at 712. The record is well supplied with facts further supporting the trial court's finding.

All people, including Balzotti, a professional real estate developer, are presumed to know law. Therefore they are presumed to understand that RSA 356-B:23, III extinguished SHDC's right to continue to build units after February 25, 2013. See Lennartz v. Oak Point Assocs., P.A., 167 N.H. 459, 464 (2015).

Additionally, on February 26, 2003, SHDC filed in the registry of deeds an amendment to its condominium declaration expressly identifying February 25, 2013 as the date on which SHDC would lose its right to develop condominium units. Supplement to Apx. V at 671. This document was available to BGG as far back as February 2003. At the September 5, 2018 evidentiary hearing, Balzotti was presented with a copy of the amended declaration recorded on February 26, 2003. Apx. at 495 (Exhibit T-F, Supplement to Apx. V at 671). Balzotti testified that he understood that the amendment "told the world" that SHDC had until February 2013 to complete the conversion of all the condominium units within the development. Apx. V at 496. He testified that he did not look for the document in the registry of deeds but had he done so, he

would have recognized that SHDC's rights to develop the convertible land would expire in February 2013. Id.

BGG's owner, Caesar Balzotti, was an originator of SHDC back in 1997. Apx. II at 4. As a real estate developer, Balzotti is reasonably sophisticated. Apx. V at 459. According to BGG, "[Balzotti] has been a significant player in the construction and real estate businesses for the last 30 years, simultaneously managing multiple construction and roofing projects across the United States and has either built or rehabbed more than 2,000 residential units and rehabbed more than 1 million square feet of commercial and industrial space during his career." Supplement to Apx. V at 673. Balzotti is sophisticated enough to have completed massive construction projects: Boston's Logan International Airport, the Suffolk County Court House, John Hancock Berkeley Building, Massachusetts Port Authority Pier in Charlestown, and the General Motors Plant in Framingham, Massachusetts. Id. Balzotti is also sophisticated in handling the complexities of distressed commercial debt: "[Balzotti] has also been a sizable force in the distressed debt industry. Throughout the last 30 years, he has purchased and recovered hundreds of millions of dollars worth of consumer and commercial debt portfolios." Id. at 672. Therefore, Balzotti, even more so than an average person, was well equipped to understand the import of the amendment and relevant law.

For these reasons, the trial court's finding is well supported by the trial record.

i. Whether final judgment is the date of accrual under RSA 508:4

In its brief, BGG argues that it could not have known or reasonably should have known Defendants' February 25, 2013 breach caused it harm until April 16, 2015, the date the New Hampshire Supreme Court sent out notice of its decision affirming Judge Colburn's finding that SHDC had lost its development rights. Plf. Brief at 20. BGG contends that accrual under RSA 508:4 is tolled until the appellate process is complete and the superior court's decision becomes final. Given the settled state of New Hampshire law on this issue, it is remarkable that (i) Plaintiffs make this argument; and (ii) fail to cite or attempt to even distinguish this Court's prior decisions.

This Court has in fact considered and rejected the argument that the statute of limitations should be tolled pending the outcome of collateral litigation. Pichowicz v. Watson Ins. Agency, Inc., 146 N.H. 166 (2001) (upholding the trial court's dismissal of plaintiff's action under RSA 508:4 because the discovery rule does not toll an action pending a trial court's determination of a

declaratory judgment suit). In Pichowicz, the plaintiff developed condominium units. Id. at 167. The septic system serving the units failed and the condominium association sued plaintiffs. Id. The plaintiff's insurance carrier denied plaintiff coverage under the policy sold to them by the defendant, an insurance agency. Id. Plaintiff filed a declaratory judgment action against the insurance carrier and lost. Id. Thereafter, the plaintiff sought recourse against the insurance agent who allegedly failed to procure the appropriate insurance policy. Id. The insurance agent moved to dismiss the complaint on the basis of untimeliness because suit was filed more than three years after the date of the alleged harm, i.e., the date when the plaintiff began to incur attorney's fees while arguing for coverage under the failed policy. Id. The plaintiff argued that they could not have reasonably discovered the harm until the superior court ruled on the declaratory judgment action. Id. at 168. This Court upheld the trial court's order dismissing the plaintiff's suit because the discovery rule does not serve to toll the statute of limitations pending the superior court's final decision on the collateral declaratory judgment action. Id. Therefore, the existence of the Association's declaratory judgment litigation did not have the effect of tolling the statute of limitations for BGG's current complaint.

Similarly, the Court has also considered and rejected the tolling of RSA 508:4 pending appellate review. See Draper v. Brennan, 142 N.H. 780, 787 (1998) (holding that the focus of the statute of limitations is on discovery of the injury not success on appeal). In Draper, the plaintiff appealed the trial court's grant of summary judgment in a legal malpractice action premised on an allegation that the plaintiff's attorney failed to correct the terms of a settlement agreement that later negated the benefit of free medical insurance coverage the plaintiff otherwise expected to receive. Id. at 781. The settlement agreement was reached on February 12, 1986. A few years later, in May 1988, the plaintiff was notified that he had to pay premiums toward his medical insurance coverage. Id. Litigation over the settlement agreement ensued. In February 1991, a trial court ruled that the plaintiff could be required to pay premiums. Id. at 782. The trial court's ruling was not considered on appeal because the notice of appeal was filed too late. Id. Thereafter, the plaintiff filed suit against his attorney alleging that his loss of insurance coverage under the settlement agreement was caused by his attorney's negligence. The malpractice suit was dismissed on the ground that the plaintiff's suit was time barred by the statute of limitations. Id. Among other issues considered in Draper, the plaintiff argued that under RSA 508:4, he could not have had knowledge of his injury, the loss of free medical benefits, until after the expiration of his right to appeal the trial court's February 1991 order denying his motion to

enforce the settlement agreement. Id. at 787. Citing case law in other jurisdictions, this Court declined to accept tolling during appellate review and affirmed the scope of RSA 508:4's discovery rule as concerning an inquiry into facts relevant to plaintiff's diligence in discovering his injury and its causal connection to the alleged harm. Id.

In the instant matter, Judge Wageling followed precedent when she disregarded BGG's argument that the statute of limitations was tolled until the outcome of the Association's declaratory judgment action or SHDC's appeal of Judge Coburn's decision. On the contrary, RSA 508:4 requires that a trial court determine the date of the breach, SHDC's loss of the development rights, and the harm to the plaintiff, the resulting lack of a mechanism to pay the July 2000 Note and Guaranty. Id. For these reasons, the trial court's order must be sustained.

While difficult to follow, BGG seems to argue that application of the doctrine of res judicata somehow operates to toll the statute of limitations. Plf.'s Brief at 21. BGG's rational is not clear as it cites two cases wholly inapplicable to considerations of tolling. Id. (citing Haynes v. Ordway, 52 N.H. 284, 285 (1870) (holding that res judicata cannot bar a counter claims in a second suit when the first is on appeal and undecided) and Eastman v. Amoskeag Mfg. Co., 47 N.H. 71, 78 (1866) (holding that principles of finality prevented plaintiffs from proceeding in a court of equity while maintaining a separate suit at law in a different court). These cases decided whether a cause of action filed in a second suit could survive motions to dismiss while resolution of the same cause of action filed in a preceding suit were pending final decision. Neither case concerns tolling, and to synthesize the holdings as urged by BGG is confusing. For example, the doctrine of res judicata as considered in Haynes does not apply to the circumstances on appeal because BGG was not a party to the action between the Association and SHDC and the causes of action are different. See Eastern Marine Const. Corp. v. First Southern Leasing, 129 N.H. 270, 274 (1987) (holding the term 'cause of action' means the right to recover, regardless of the theory of recovery.").

Finally, BGG is incorrect to argue that the trial court erred as a matter of law when it relied on Restatement (Second) of Judgments § 13 to determine that Judge Colburn's March 18, 2014 order was a final judgment. Plf. Brief at 21. There is nothing in the language of RSA 508:4 that precludes the trial court from considering February 25, 2013 as the date of accrual for purposes of applying RSA 508:4. When the defendants moved to dismiss BGG's complaint under RSA 508:4, it was the trial court's function to decide the moment of accrual, i.e. when BGG knew or should have known of the connection between the breach and the alleged harm.

See Draper, 142 N.H. at 783-84 (a cause of action "accrues" when the plaintiff knew or reasonably should have known of the harm). In its well-reasoned order, the trial court identified February 25, 2013 as the date of accrual because that it is the day when Balzotti, a professional real estate developer, was presumed to know the import of RSA 356-B:23, III with regard to the viability of the project and, consequently, nonpayment under the July 2000 Note and Guaranty. See Lennartz, 167 N.H. at 464.

For these reasons, the trial court did not err when it determined that BGG's discovery under RSA 508:4 occurred on February 25, 2013.

ii. Whether BGG was confused by SHDC's amendment dated February 22, 2013 purporting to extend its development rights past February 25, 2013.

In its brief, BGG argues that the trial court erred in finding it knew or reasonably should have known of Defendants' breach on February 25, 2013, because it overlooked evidence that SHDC filed an improper and ineffective amendment in the registry of deeds purporting to extend its development rights past February 25, 2013. Plf. Brief at 19. Interestingly, Balzotti acknowledges that he never looked at this amendment, therefore, his claim that he could reasonably rely upon such a document is befuddling. In any event, BGG merely raises an issue of fact that does not justify reversal. The standard of review applied to a trial court's factual findings is that "[a]bsent an abuse of discretion, [this Court] will not overturn the trial court's findings 'unless it clearly appears they were **made without** evidence....'" Chagnon Lumber Co., Inc. v. DeMulder, 121 N.H. 173, 175, 427 A.2d 48, 50 (1981) (emphasis added); see also Kane v. N.H. State Liquor Comm'n, 118 N.H. 706, 708 (1978) (while consideration of the trial record could lead to a different conclusion on questions of fact, is not sufficient reason to reverse the decision of the trial court). Justice Wageling's comprehensive analysis set forth in her Order show that she reviewed the record and considered all of the testimony presented to her. For the reasons discussed at length above, the trial court's determination of the date of loss is based on facts evident in the record including the relative credibility of the witnesses who testified.

2. BGG'S CAUSE OF ACTION ACCRUED, AT THE LATEST, BY AUGUST 2014.

Alternatively, the trial court found that BGG knew or should have known of the loss of SHDC's development rights by August 2014. To reach its conclusion, the trial court properly credited the testimony of Ernest J. Thibeault, III who testified that in the summer of 2014 he told

Balzotti that the Association had been successful in the declaratory judgment action and SHDC had lost its development rights. Apx. V at 568 and 573. Balzotti's testimony differed about the date that this conversation occurred. However, the trial court discredited Balzotti's testimony finding it non-responsive and evasive. The court also found Thibeault's testimony to credible as he testified in a cohesive and non-evasive manner. The trial court thoroughly explained its reasoning with reference to the record which bears no repeating here.

On appeal, BGG challenges the trial court's crediting of Thibeault's testimony. Plfs Brief at 24. BGG's argument is premised on the trial court's evaluation of admissible evidence rather than a misinterpretation, misunderstanding, and/or its non-existence. Under such circumstances, where testimony presented by parties conflict, it is a long-standing rule that a fact finder is in the best position to evaluate evidence, measure its persuasiveness, and assess credibility of witnesses and their demeanor. See In re Henry, 163 N.H. 175, 180 (2012); see also In the Matter of Kurowski & Kurowski, 161 N.H. 578, 600 (2011) ("It is not our role to calculate how much weight the trial court should afford specific evidence, second guess its decision on matters of witness credibility, or substitute our judgment for that of the trial court on a discretionary ruling."); see also In the Matter of Peirano & Larsen, 155 N.H. 738, 752 (2007)(finding that the trial court was in the best position to assess the credibility of the witness and weigh the evidence before it.). For these reasons, BGG has failed to show that the trial court committed reversible error in crediting the testimony of Thibeault in reaching its alternative date of accrual of BGG causes of action.

3. BALZOTTI DID NOT ACT REASONABLY DILIGENT

Finally, the trial court also found that BGG failed to sustain its burden to show the applicability of the discovery rule because Balzotti was not reasonably diligent in discovering a causal relationship between the loss of development rights and nonpayment under the July 2000 Note. See RSA 508:4 (a cause of action accrues when the plaintiff "in the exercise of reasonably diligence should have discovered, then injury and its causal relationship to the act or omission complained of."); see also Beane, 160 N.H. at 713.

BGG's strategy at the trial level largely rested on testimony offered by Balzotti that as a passive investor in SHDC, his primary duty was to "sit back and wait for the money to come in" and take action only when he did not receive payment. Apx. V at 496-98 and 543-44. According

to Balzotti, he solely relied on Ernest J. Thibeault to manage the endeavor out of which Balzotti stood to gain more than $3 million. Apx. V at 554.

Despite this reliance on Thibeault, Balzotti testified that he did not trust Thibeault. Id. Balzotti's lack of trust in Thibeault is manifestly evident in the years of spiteful and failed litigation initiated by Balzotti, including the bankruptcy court where Balzotti was found to have acted in bad faith. Apx. III at 94 (Fee Award Order). Balzotti also admitted that Thibeault had for years avoided communicating with him. Any suggestion that Balzotti was reasonably relying on Thibeault to provide him information about the real estate project is foolish.

For these reasons, the trial court properly found that Balzotti was not being reasonably diligent in relying solely on information received he hoped would be provided by the reluctant Thibeault.

i. The opinion letter, title report, and commitment letter lack import

On appeal, BGG argues that the trial court, in finding Balzotti did not act reasonably diligent, erroneously focused her attention on the lack of any investigation by Balzotti in August 2014. Plf. Brief at 30-31. This argument is based on BGG's claim that the meeting did not occur in August 2014. As discussed above, the court made a factual finding that the meeting did occur in August 2014 and that finding is well supported by the evidence. Evidence about what Balzotti did in April of 2015 does not invalidate the court's finding that Balzotti had key knowledge in August 2014.

BGG next argues that the trial court erred when it denied BGG's motion to admit into evidence a Northborough Capital Partners, LLC loan commitment letter and a title report both dated in June 2015. Id. at 31-32. According to BGG, the evidence was probative of Balzotti's due diligence and further evidence that third-party acts of due diligence were insufficient to uncover SHDC's loss of development rights. Id. BGG's characterization of the trial court's ruling is in need of refinement. Careful review of the hearing transcript reveals that the trial court did not grant Defendants' repeated objections to exclude the documents from evidence. Apx. V at 421. After consideration of repeated objections, replies thereto, and foundational testimony, the trial court overruled the objections in favor of limiting admissibility to the extent the documents and related testimony were probative of Balzotti's state of mind pertinent to the discovery rule. Id. Therefore, BGG's argument lacks merit to the extent it argues the trial court categorically denied admission and/or declined to consider its weight in deciding the issue of

Balzotti's due diligence. Needless to say, the documents under the hearsay evidence rules could not be admitted to establish the thoughts of third parties concerning the discoverability of the status of SHDC's development rights. BGG offered no testimony by any third party regarding the substance of these documents.

Finally, to the extent these documents and related testimony are probative of Balzotti's due diligence, there is little weight to be given as these documents, dated June 2015, post date either accrual dates of January 25, 2013 and August 2014 by an appreciable amount of time. BGG bears the burden of demonstrating why the applicable accrual date should be tolled. Considerations of documents dated June 2015 do little to explain why BGG was not mindful of the import of RSA 356-B:23, III and Thibeault's admission to Balzotti in August 2014 that SHDC had lost the development rights. The trial court concluded that (1) Plaintiffs were chargeable with knowledge of what is recorded in the registry of deeds, (2) Plaintiffs were presumed to know the law, (3) Plaintiffs knew or should have known about the loss of the development rights the moment they expired, February 25, 2013, and (4) Plaintiffs were put on notice to accrual of their claim no later than August 2014. Any information the plaintiffs obtained from any source after February 25, 2013 and August 2014 is arguably irrelevant. Therefore, even if the court were to consider the import of the 2015 title report, it would have no effect on the February 25, 2013 and August 2014 accrual dates.

For these reasons, BGG fails to show why the trial court committed reversible error.

ii. The admissibility of the timeline of events is not prejudicial

BGG also argues that the trial court injected prejudice into the case when it admitted into evidence BGG's timeline of events over its objection on the grounds of privileged attorney-client work product. Plf. Brief at 33. On appeal, this Court reviews the trial court's decision on the admissibility of evidence under an unsustainable exercise of discretion standard. See Moreau v. Figlioli, 151 N.H. 618, 628 (2005). Justice Wageling's statements during the evidentiary hearing and the analysis set forth in her orders show that she reviewed the record and considered all of the testimony presented to her. After consideration of voir dire conducted by defense counsel, the trial court properly found that the timeline was not protected work product. Apx. V at 448.

Assuming, arguendo, the trial court erred, there is no evidence of prejudice and, therefore, admissibility was harmless to the outcome of the case. See Blake v. Lord, 90 N.H. 42 (N.H. 1939). The timeline had no bearing on the court's determination that Thibeault informed

Balzotti of SHDC's loss of the development rights no later than August 2014. In reaching this finding, the trial court credited the credibility of Thibeault's testimony over Balzotti's testimony as discussed above.

BGG argues that the inclusion of the timeline exposed Balzotti to questions regarding the accuracy of an incomplete document which produced inconsistencies in Balzotti's testimony, which BGG maintains "had and did remain constant throughout the litigation." Plf. Brief at 34. Presumably, BGG contends that Balzotti's performance and inconsistencies on the witness stand concerning the accuracy of key dates were persuasive to the trial court. An examination of the trial court order reveals otherwise.

The trial court discredited Balzotti for multiple reasons. The court found he was evasive and non-responsive. The court also found Balzotti downplayed facts which painted him in a negative light. For example, Balzotti refused to admit, contrary to clear records, that the 2010 involuntary bankruptcy was brought in bad faith. The court concluded that this type of denial reflected poorly on Balzotti's credibility as a witness. Therefore, BGG's assertion that Balzotti credibility as a witness was undermined by the inclusion of the timeline is patently untrue and not supported by the court order or the trial record.

For these reasons, BGG has failed to show it suffered any harm to justify a different outcome.

II. THE TRIAL COURT DID NOT CHANGE THE SCOPE OF THE EVIDENTIARY HEARING

The parties agree that the evidentiary hearing served to determine whether the statute of limitations applied to bar BGG's lawsuit. See Apx. IV at 92 (Order Regarding Evidentiary Hearing, (Wageling, J.):

> "Here, the injury or damage is Balzotti's inability to collect upon the Note through the sale of new condominium units, and the act or omission complained of is the loss of the development rights ... [i]n light of the foregoing, the Court orders an evidentiary hearing ... to determine when Balzotti knew or should have known about the loss of the development rights. This inquiry necessarily **includes** when Balzotti knew or should have known about Judge Colburn's [order]" (emphasis added).

The plain language of the order placed the parties on notice that the hearing was set to determine whether the defendants could meet their burden under RSA 508:4 and, if so, to decide whether BGG was afforded protection under the discovery rule. Beane, 160 N.H. at 712. Given

the scope of the hearing, BGG and the defendants had the obligation to prepare exhibits and witnesses to address any and all elements pertinent to their relative burdens and defenses. If BGG was in fact confused over the wording of the order (and it is hard to believe it was or could have been), it had every right to seek the clarification it needed prior to the hearing. BGG failed to do so and bears the responsibility of not remedying its confusion.

BGG argues in its brief that the trial court prejudicially changed the scope of the hearing by allowing into evidence testimony and/or exhibits not directly relevant to Judge Colburn's March 18, 2014 order. Plf. Brief at 35. BGG's argument is unreasonable as the parties were put on notice of a hearing to decide all of the elements applicable to RSA 508:4. The trial court's order did not use language limiting factual inquiry to Judge Colburn's order. The excerpt above readily reveals that the trial court identified Judge Colburn's order as just one fact to be considered in the inquiry of the parties' respective burdens. Judge Colburn's order was never given exclusivity in such determination. For these reasons, BGG's argument is without merit.

III. JUDICIAL ESTOPPEL DOES NOT APPLY

Finally, BBG contends that even if the trial court's reasoning is sound, it must be reversed because the basis of the order rests on an unjustifiable contradiction disallowed by force of the doctrine of judicial estoppel. Plf. Brief at 26-7. This argument lacks substance and is based on a complete and troubling mischaracterization of what transpired in the 2010 bankruptcy case.

BGG complains that the Defendants succeeded in dismissing the 2010 involuntary bankruptcy by convincing the Bankruptcy Court that at that time there was no breach of the July 2000 Note and Guaranty. Id. at 27. Apparently, BGG suggests that if, in 2010, the defendants maintained the July 2000 Note was not breached, the defendants are now judicially barred from identifying a breach that could have arisen after 2010. Id. at 28. The argument is difficult to follow since BGG alleged in its complaint in the instant case that the defendants' breach arises out of the loss of development rights in 2013. It is entirely feasible and well within the purview of rational thought that the defendants could breach the note after the bankruptcy matter came to a close. There is nothing inconsistent in the two positions warranting the doctrine of judicial estoppel.

"The doctrine of judicial estoppel generally prevents a party from prevailing in one

phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." Cohoon v. IDM Software, 153 N.H. 1, 4 (2005). Judicial estoppel is not a rigid doctrine and courts in applying the doctrine are given leeway in its application to achieve a just result. "While the circumstances under which judicial estoppel may be invoked vary with each situation, the court considers the following three factors:

> (1) whether the party's later position is ***clearly*** inconsistent with its earlier position;
> (2) whether the party has ***succeeded*** in persuading a court to accept that party's earlier position; and
> (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." Kelleher v. Marvin Lumber & Cedar Co., 152 N.H. 813, 848 (2005).

BGG cannot satisfy these elements.

The defendants' position in the instant litigation is not clearly inconsistent with its position in the bankruptcy court. BGG argues in its brief that in 2010 the defendants defended the Balzottis' involuntary bankrutpcy action solely by arguing that the July 2000 Note was not breached because a payment obligation was not due. This is not true. The defendants succeeded in dimissing the 2010 involuntary bankruptcy cases on procedural grounds.

Judge Deasy did not enter an order making a final determination on the substance of Dawn Balzotti's claim. Plf. Brief at 28 (citing Apx. V at 82-83). To the contrary, Judge Deasy, applying applicable bankrupty law and procedure, found that given the nature of her claim, Dawn Balzotti was unfit to initiate an involuntary bankruptcy case. Apx. V at 82-83.

Since Judge Deasy ruled that Balzotti was not a proper petitioning creditor, he did not need to reach the substance of her claim or make a ruling on the applicable statute of limitations. Therefore, Plaintiffs cannot invoke judicial estoppel since they have not satisfied any of the three factors required by this Court in Kelleher v. Marvin Lumber & Cedar Co., 152 N.H. 813 (2005).

CONCLUSION

For all of the reasons stated, the superior court's order must be affirmed.

REQUEST FOR ORAL ARGUMENT

The defendants respectfully request fifteen minutes of oral argument before the full court in order to explain and/or clarify any factual or legal issues with regard to this appeal.

CERTIFICATION OF COMPLIANCE

I hereby certify that this brief complies with Rule 16(3)(i) because copies of the appealed decisions are appended to this brief; Rule 16(11) because this brief contains 8,272 words exclusive of pages containing the table of contents, table of authorities, text of pertinent statutes; and Rule 26(7).

Respectfully Submitted,

October 1, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on this date that an electronic copy of the foregoing brief via the Court's electronic filing system's electronic services is being timely provided to counsel of record for the defendants: John M. Sullivan, Esq., Jeremy T. Walker, Esq., Joseph A. Foster, Esq., Steven Dutton, Esq., and Thomas W. Aylesworth, Esq., and counsel of record for the plaintiff, Matthew R. Johnson, Esq.

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