UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

WILLIE YORK, et al.,

Plaintiffs,

v.

BANK OF AMERICA, et al.,

Defendants.

Case No. 14-cv-02471-RS

ORDER DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs Willie York ("York") and his daughter Caroline York Miles ("Miles") bring this action against a number of defendants in connection with allegedly illegal and predatory lending practices relating to reverse mortgages on plaintiffs' home in San Francisco. During the course of this protracted litigation, several defendants have been dismissed or have entered into a settlement with plaintiffs. The remaining defendants are Thomas Perkins, the individual who originated the loans to York, his employer Reverse Mortgages of California ("RMC"), and Surety Bonding Company of America ("SBCA"), the surety for Agnes McNamara, a notary public who notarized an allegedly unauthorized reverse mortgage in 2009. All three defendants now move for summary judgment on the claims asserted against them. For the reasons that follow, summary judgment is granted as to all claims against SBCA, and granted in part and denied in part as to the claims against Perkins and RMC.

II. BACKGROUND

The following facts are not in dispute. Willie York is an 88-year-old San Francisco resident who has lived in the same home for 45 years. In early 2007, Thomas Perkins approached York claiming to have money for him. York was intrigued by this possibility, and met with Perkins in the spring or summer of that year. Perkins explained that completing a reverse mortgage on York's home would allow York to receive money, forego payments on the property for the rest of his life, and pass the property to his heirs. York agreed to have Perkins complete the application for a reverse mortgage on his behalf so that he could pay off his home loan completely and receive money to make necessary repairs to the house.

On June 25, 2007, Perkins came to York's house with the requisite loan documents for York to sign. During that brief meeting, Perkins quickly flipped through the papers, pointing out where York should sign. Miles' name also appeared on the title to the home, so Perkins directed a friend of the York family, Norma Faye Maxwell, to forge Miles' signature on the deed grant in the presence of a notary public.[1] This purportedly transferred Miles' half ownership of the home to her father. When the 2007 loan closed and the forged deed was filed, the County Tax Assessor regarded it as a sale and reassessed the Home, dramatically increasing York's property taxes to a level beyond his ability to pay. Perkins did not advise York that he could submit a timely request for exclusion from reassessment for an intra-familial transfer.

In July 2009, Perkins, by that time an employee of RMC, brokered a second reverse mortgage on York's house with Bank of America ("BOA") in the amount of $78,000, using the house as collateral. Both York and Miles were unaware that Perkins had applied for this second reverse mortgage. They neither signed the loan papers nor authorized anyone to enter into the agreement on their behalf. Nonetheless, the reverse mortgage was notarized by Agnes McNamara, a notary public. York did not learn about the second reverse mortgage until several years later,

[1] Perkins submits a declaration in support of his motion for summary judgment in which he recalls possibly meeting with York in connection with the 2007 reverse mortgage. Because he neither mentions nor denies other details regarding his interactions with York as recounted by plaintiffs' submitted declarations, those facts are treated as undisputed for the purposes of this summary judgment motion.

when seeking legal advice.

In 2009, York received a letter from the City and County of San Francisco, informing him that he owed property taxes on his home. Maxwell accompanied York to City Hall to make the payment, where a city clerk informed York that BOA had already paid the property taxes. As a result, York believed BOA would make all future payments on his behalf, as Perkins had apparently promised.

Sometime in 2013, York received a letter from BOA informing him that he was in arrears on his property tax payments. York's daughter, Janice Hardy, called BOA to gather information about the basis for the letter and to discuss how to address its demands. After that conversation, York understood for the first time that he was obligated to pay taxes and insurance on his home. Hardy negotiated an agreement with BOA that allowed York to pay $200 per month until the property tax and insurance arrears were paid in full.

Even though BOA had agreed not to foreclose on the house if York made the monthly payments, BOA and Champion (its servicer and successor) initiated foreclosure proceedings. In April 2014, York received a notice of trustee sale on his home to take place on June 15, 2014. On May 24, 2014, he found another notice of sale to occur on June 4, 2014, resulting from default on the 2009 reverse mortgage.

In response to the foreclosure proceedings and impending sale, York and Miles commenced this action, bringing claims against multiple defendants and requesting a temporary restraining order to prevent the sale of the house. The restraining order was issued on June 3, 2014, and a subsequent preliminary injunction request was denied as moot when Champion rescinded the notice of default and action to foreclose.

Significant motions practice has ensued, with numerous claims being dismissed. Plaintiffs have also amended their complaint three times. In the first amended complaint, filed on September 24, 2014, plaintiffs added McNamara as a defendant for her role in notarizing the 2009 reverse mortgage. Being unable to locate McNamara, plaintiffs then added McNamara's surety, SBCA, as a defendant in their third amended complaint, and brought claims against it for aiding and abetting

elder financial abuse, and for unfair business practices under California's Unfair Competition Law ("UCL"). Plaintiffs seek to hold SBCA liable for McNamara's misconduct pursuant to California Government Code Section 8214 ("For the official misconduct or neglect of a notary public, the notary public and the sureties on the notary public's official bond are liable in a civil action to the persons injured thereby for all the damages sustained.").

Plaintiffs have entered into a settlement with BANA and Champion. They, however, do not believe that Perkins and RMC are consequently relieved from liability, both for attorney's fees incurred to file this action and for attorney's fees incurred in the proceedings to roll back the incorrectly re-assessed property taxes on the home. With respect to the rescission, restitution, and declaratory judgment claims for relief, as a result of the pending settlement with BANA and Champion, York is now only seeking to be reimbursed moneys received by Perkins and RMC in the form of costs and fees.

III. LEGAL STANDARD

Summary judgment is proper "if the pleadings and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." *Celotex v. Catrett*, 477 U.S. 317, 323-24 (1986). The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings and admissions on file, together with the affidavits, if any which it believes demonstrate the absence of a genuine issue of material fact." *Id*. at 323 (citations and internal quotation marks omitted). If it meets this burden, the moving party is then entitled to judgment as a matter of law when the non-moving party fails to make a sufficient showing on an essential element of the case with respect to which he bears the burden of proof at trial. *Id*. at 322-23.

The non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The non-moving party cannot defeat the moving party's properly supported motion for summary judgment simply by alleging some factual dispute between the

parties. To preclude the entry of summary judgment, the non-moving party must bring forth material facts, *i.e.*, "facts that might affect the outcome of the suit under the governing law . . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 588 (1986).

The court must draw all reasonable inferences in favor of the non-moving party, including questions of credibility and of the weight to be accorded particular evidence. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991) (citing *Anderson*, 477 U.S. at 255); *Matsushita*, 475 U.S. at 588 (1986). It is the court's responsibility "to determine whether the 'specific facts' set forth by the nonmoving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence." *T.W. Elec. Service v. Pacific Elec. Contractors*, 809 F.2d 626, 631 (9th Cir. 1987). "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587.

"If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact . . . , the court may: (1) give an opportunity to properly support or address the fact; (2) consider the fact undisputed for purposes of the motion; (3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or (4) issue any other appropriate order." Rule 56(e) (2010).

IV. DISCUSSION

A. Claims Against RMC and Perkins

Perkins and RMC move for summary judgment on the grounds that plaintiffs have sustained no damages and lack admissible evidence to prevail on their claims at trial. Defendants also assert that summary judgment is proper because plaintiffs' settlement with Champion and

BANA will offset any damages assessed against RMC and Perkins. Issues of damages apportionment can be determined after a trial on the merits regarding liability. Therefore, plaintiffs' pending settlement with Champion and BANA has no bearing on the summary judgment analysis in this order.

1. Miles' Damages

Perkins and RMC (collectively, "Defendants") assert, as a general matter, that neither plaintiff has suffered damages. With respect to Miles, Defendants argue that because the 2007 deed was a forgery, the purported transfer was void and Miles retains her one half interest in the home. As Defendants characterize it, Miles is in no worse a position than she was prior to the alleged wrongdoing. Miles, on the other hand, argues that she is a direct victim of Perkins' misconduct, which led to loss of equity in her home and risk of foreclosure, and caused her to suffer emotional and physical distress. *See* Miles Decl. ¶ 12; *Molian v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 930 (1980). She also asserts that due to wrongdoing by Perkins and RMC, she was forced to file this action to protect her property interest and appeal the incorrect property tax assessment, and is entitled to recover attorney's fees in pursuing these actions.[2] *See Prentice v. N. Am. Title Guar. Corp.*, 498, 507-509 (1984) (where a defendant has wrongfully made it necessary for a plaintiff to sue a third person, the defendant is liable to compensate the plaintiff for the reasonably necessary loss of time, attorney's fees, and other expenses suffered or incurred). Accordingly, Defendants cannot prevail on summary judgment on the basis that Miles has not suffered damages.

2. York's Damages

Defendants' claim that York suffered no damages is premised on the assumption that York

[2] For this reason, defendants' assertion that this action is barred for failure to exhaust administrative remedies through tax reassessment is unavailing. Plaintiffs do not seek an order from this Court mandating the rollback of the property tax assessment. Rather, they seek damages in the form of costs and attorney's fees incurred to pursue the tax reassessment as a result of Perkins' alleged malfeasance. Accordingly, plaintiffs are not required to exhaust the tax reassessment process before proceeding in federal court.

received the loan proceeds from the 2007 and 2009 reverse mortgages. York denies receiving proceeds from either of the loans. Kane Decl. Ex. A ¶¶ 10, 11, 16. In addition to the lost loan proceeds, York claims damages from being compelled by Perkins to sign over moneys from the 2007 reverse mortgage for repairs to his home, even though York had complained to Perkins that the work remained unsatisfactory. Kane Decl. Ex. A ¶ 9. He, like Miles, was required to file this action to defend his interest in his home, which was put in jeopardy due to the alleged malfeasance of Perkins and RMC. Finally, York has experienced emotional distress as a result of Defendants' wrongdoing and, contrary to the representations of Defendants, is not precluded by the appointment of a guardian ad litem from testifying as to those damages. Even if York were to become unavailable to testify, there is nothing barring plaintiffs from offering the testimony of other witnesses to support York's claim for emotional distress. For these reasons, Defendants are not entitled to summary judgment on the grounds that York suffered no damages.

3. Elder Financial Abuse[3]

California's Welfare and Institutions Code prohibits any individual from taking, or assisting in the taking of, the real or personal property of an elder adult for a wrongful use or with the intent to defraud. Cal. Welf. & Indus. Code § 15610.30(a). A loan originator who misrepresents or otherwise commits fraud in connection with a funded loan to someone over 65 years of age commits elder abuse. *Zimmer v. Nawabi*, 566 F. Supp. 2d 1025, 1034 (E.D. Cal. 2008).

York intends to prove at trial that Perkins made a number of misrepresentations. First, Perkins, who knew York's age from the loan application, misrepresented to York that he would not have to make any payments with regard to the home for the rest of his life. Kane Decl. Ex. A ¶ 6; Ex. D at 34. In reliance on this misrepresentation, which was never corrected, York assumed that after executing the 2007 reverse mortgage, he had no further obligation to pay taxes or make

[3] As plaintiffs only discuss York with respect to the elder abuse claims, and because Miles is not protected by elder abuse statutes, it is assumed that this claim, along with the aiding and abetting claim, is asserted only by York.

insurance payments on the property. Upon discovering that the property taxes on York's home were in arrears in 2012, his daughter Janice Hardy attempted to correct the assessment, as the balance had grown too large for York to pay. She has so far been unsuccessful, as reassessment was deemed untimely. Plaintiffs also offer evidence that Perkins directed Maxwell to forge Miles' name on the 2007 deed and then transmitted the forged deed to the first lender. Mohammed Decl. ¶ 5; Kane Decl. Ex. H, JBNC112. The forgery also allowed Perkins to execute a second reverse mortgage on York's behalf in 2009. These loans eventually resulted in foreclosure proceedings and forced the filing of this action to prevent the loss of the home.

Defendants assert that plaintiffs have no admissible evidence of elder abuse because York has been declared mentally incompetent and will be unable to testify. On the contrary, York's counsel represents that he intends to testify, and there has been no determination on whether he lacks the competency to do so. In addition, in the event of York's unavailability, lay and expert witnesses and documentary evidence may be available to establish elder abuse.

Defendants also claim there is no evidence they had any knowledge York would default on the second reverse mortgage, as York was not mentally incapacitated at the time the reverse mortgages were executed and was capable of making decisions for himself. On the contrary, plaintiffs offer evidence that York was elderly, illiterate, relatively uneducated, and of modest means. They need not demonstrate mental incapacity to establish that Perkins took advantage of his particular vulnerability. In other words, they do not accuse Defendants of merely failing to "babysit" York. Rather, the heart of plaintiffs' claims are that Perkins affirmatively exploited York's ignorance by inducing him to enter into unwise financial arrangements without the knowledge of his family.

Finally, Defendants contend there is insufficient proof that Perkins was involved in the forgery of the 2007 deed. According to Defendants, the evidence offered by plaintiffs—Maxwell's declaration and a copy of the deed that was sent to Perkins by fax on July 3, 2007—is inadequate to create an issue of fact because Maxwell does not affirmatively state that Perkins' instruction to forge Miles' signature caused her to commit the forgery. These arguments are unpersuasive.

Perkins does not appear to dispute the fact that he directed Maxwell to forge Miles' signature, an action that surely raises an inference he caused her to do so.[4] While Defendants may wish to put forth arguments about causation and Perkins' lack of motivation to commit forgery, issues of fact regarding Perkins' role in forgery of Miles' signature preclude summary judgment at this juncture. Accordingly, Perkins' motion for summary judgment on York's elder abuse claim is denied.

The undisputed evidence, however, indicates that RMC cannot be held liable for directly committing elder financial abuse. According to plaintiffs, Perkins' knowledge of the forgery and other problems connected to the 2007 reverse mortgage are imputed to his principal, RMC, when he originated the 2009 loan. "Knowledge possessed by an agent while he occupies that relation and is executing the authority conferred upon him as to matters within the scope of his authority, is notice to his principal, although such knowledge may have been acquired before the agency was created, if it appears that such knowledge was present in his mind at the time he acted for the principal." *Eagle Indem. Co. v. Indus. Accident Comm'n*, 92 Cal. App. 2d 222, 225 (1949) (emphasis in original). Even assuming that RMC received payment on the 2009 reverse mortgage with knowledge of irregularities in the underlying documentation, *see* Kane Decl. Ex. D. at 147, 156, it does not follow necessarily that RMC "obtained [York's] property for an improper use, or acted in bad faith or with a fraudulent intent." *Das v. Bank of Am., N.A.*, 186 Cal. App. 4th 727, 744, 112 Cal. Rptr. 3d 439, 453 (2010). Without evidence of RMC's bad faith, the motion for summary judgment on York's elder abuse claim against RMC must be granted.

4. Assisting Elder Abuse

Perkins' alleged participation in the forgery of the 2007 deed effectively kept Miles in the dark about the reverse mortgages on her home and allowed York to be the subject of elder abuse. Puccio Decl. ¶ 9; Garcia Decl., Ex. B. York has been shown various checks written on the account that contained the loan proceeds and denies signing the checks. Kane Decl. Ex. B at 66-99. Given

[4] Although Perkins' declaration does not mention the forged signature of Miles, he does not specifically deny plaintiffs' allegations regarding the forgery.

York's vulnerabilities, Perkins either knew or should have known that his malfeasance would allow various contractors, advisors, lenders, and others to take financial advantage of York. Accordingly, Perkins' motion for summary judgment on York's aiding and abetting elder abuse claim is denied.

RMC's motion for summary judgment on the aiding and abetting elder abuse claim is also denied. Perkins allegedly knew that the forged 2007 deed could not convey title and thus invalidated both mortgages. As discussed above, that knowledge is imputed to Perkins' principle in the 2009 reverse mortgage, RMC, which went ahead with the transaction and received payment. Although such knowledge is not sufficient to hold RMC directly liable for elder abuse, it is adequate to establish that RMC assisted the commission of elder abuse. *See Das*, 186 Cal. App. 4th at 745, 112 Cal. Rptr. 3d at 454 (2010) ("We thus conclude that when, as here, a bank provides ordinary services that effectuate financial abuse by a third party, the bank may be found to have 'assisted' the financial abuse only if it knew of the third party's wrongful conduct."). For those reasons, RMC may be found liable for aiding and abetting the elder abuse committed by Perkins.

5. Breach of Fiduciary Duty

Perkins and RMC acted as York's agents and owed him fiduciary duties. *Wyatt v. Union Mortgage Co.*, 24 Cal. 3d 773, 782 (1979). They were charged with the "loan brokers duty of fullest disclosure of all material facts concerning the transaction." *Id.* This duty extends to oral misrepresentations even where a written document may disclose all the terms and includes an obligation to make a full and accurate disclosure of the terms of the loan to borrowers and to act in good faith. *Id.* at 783. These obligations are particularly critical when dealing with an unsophisticated borrower. *Id.* at 783-84.

Here, York was not only unsophisticated, but also illiterate. In his dealings with York, plaintiffs accuse Perkins of failing to provide adequate disclosure and guidance at numerous points. In plaintiffs' view, Perkins' most egregious violations of fiduciary duty were: (1) directing Maxwell to forge Miles' name, (2) coercing York to pay for unsatisfactory repair work, (3) failing to advise York of the impact of removing an owner from title and its effect on the property tax

assessment, and (4) misleading York as to the obligation to continue paying property taxes and insurance. Puccio Decl. ¶ 9; Garcia Decl. Ex. B.

Defendants move for summary judgment on this claim on the grounds that plaintiffs cannot establish any alleged wrongful acts constituted breaches of fiduciary duty. As discussed above, however, plaintiffs offer ample evidence that Perkins was involved with the creation of the forged 2007 deed and its transmission to the lender. This was an identifiable breach of fiduciary duty. Perkins also denies any legal obligations with respect to the unsatisfactory repair work and property tax implications of the 2007 transfer. The property tax assessment was a direct consequence of the 2007 reverse mortgage, which Perkins helped initiate. Therefore, this may be viewed as a material fact with respect to that transaction, which Perkins should have disclosed. Perkins' role with respect to the unsatisfactory repair work is somewhat less clear. Plaintiffs' theory apparently is that Perkins helped funnel York's loan proceeds toward contractors Perkins had recommended, without regard to whether they would fit York's needs. This theory supports a breach of fiduciary duty claim, because Perkins was the originator of the loan and failed to act in York's best interest. Finally, Perkins denies liability can be based on York's belief that "not having to make another payment" meant he did not have to pay property taxes or insurance, on the grounds that written agreements and counseling reflect otherwise. York is unable to read, and he denies learning of the requirement to continue paying taxes and insurance until several years after entering into the reverse mortgages. In any event, focusing on the individual wrongful acts does not obscure the undisputed fact that Perkins knew or should have known that York was an unsophisticated borrower, and nonetheless failed to be forthright with York about material facts concerning financial transactions that Perkins facilitated. Accordingly, summary judgment on York's breach of fiduciary duty claim against Perkins is denied.

With respect to RMC, plaintiffs do not distinguish in their pleading or opposition papers between breaches by RMC and Perkins, nor do they offer any legal argument for imputing liability for Perkins' breaches to RMC. That being said, there appears to be little dispute that RMC, as the broker on the 2009 reverse mortgage, was a fiduciary of York. According to plaintiffs, RMC acted

wrongfully by proceeding with the transaction even though it was aware, through its agent (Perkins), that there were problems with the underlying documentation that could cause injury to York. For that reason, RMC's motion for summary judgment is also denied.

Defendants do, however, point out that plaintiffs have not made clear whether Perkins and RMC had a fiduciary relationship to Miles or owed any duties to her. Because plaintiffs do not address that question in their opposition, and there is no evidence of such a fiduciary relationship, the motions for summary judgment are granted as to Miles' claim for breach of fiduciary duty, to the extent she asserts one.

6. Unfair Business Practices

California Business and Professions Code Section 17200 "prohibits practices that are either 'unfair,' 'unlawful' or 'fraudulent.'" *Countrywide Financial Corp. v. Bundy*, 187 Cal. App. 4th 234, 256 (2010). Remedies under the statute are limited to restitution, injunctive relief and attorney's fees. Defendants argue that because plaintiffs cannot establish entitlement to any of these forms of relief, summary judgment on this claim should be granted. Plaintiffs disagree, asserting that the initiation of foreclosure proceedings and the expenditure of legal fees to defend against foreclosure are sufficient to establish economic injury from the alleged unfair business practices. *See Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 323 (2011).

York's UCL claims against Perkins and RMC are premised on the same set of allegations supporting his claims for elder abuse and breach of fiduciary duty. Because summary judgment is denied as to those claims, summary judgment is also denied as to York's corresponding UCL claims.[5] Miles' UCL claim against Perkins is predicated on his alleged involvement in the forgery of her name in 2007, which precipitated a chain of events that led to the near loss of the property she co-owned. This is sufficient to establish a UCL violation under all three prongs of the statute. On the other hand, the nature of Miles' UCL claim against RMC is unclear from the pleadings and

[5] As explained elsewhere in this order, defendants' objections to the factual bases of York's UCL claim do not preclude summary judgment.

the parties' briefing on summary judgment. Because RMC did not have a relationship with Perkins in 2007, there is no evidence that RMC supervised or ratified Perkins' alleged participation in the forgery. Therefore, RMC's motion for summary judgment on Miles' UCL claim is granted.

7. Negligence

Licensed real estate brokers and agents have a statutory duty not to make substantial misrepresentations, false promises or engage in other dishonest dealings. Cal. Bus. & Prof. Code § 10176(a), (b), (i). Because failure to follow a standard of proper conduct set by statute is negligence per se, *see Clinkscals v. Carver*, 22 Cal. 2d 72, 75 (1943), plaintiffs assert that proof of a Section 10176 violation can support a finding of negligence against Perkins. RMC would then be liable as a matter of law for Perkins' misconduct, to the extent it constituted a tortious act by its salesperson committed within the course and scope of employment. *See, e.g., Alhino v. Starr*, 112 Cal. App. 3d 158, 173-74 (1980).

Other than asserting that plaintiffs do not identify negligent acts giving rise to a finding of liability, Defendants do not address plaintiffs' negligence per se argument. As explained above, plaintiffs have put forth evidence of numerous misrepresentations and false promises made by Perkins during his course of dealings with York, which resulted in substantial risk of property loss to both York and Miles. Because it can be reasonably inferred that these alleged wrongful acts amounted to failure to follow the proper standard of conduct for license real estate brokers, Perkins' motion for summary judgment is denied as to both York's and Miles' negligence claims. Because RMC brokered the 2009 reverse mortgage, and because there is no evidence that Perkins was acting outside the scope of his employment when he initiated the transaction, RMC may be held liable for Perkins' negligent conduct as a matter of law. Accordingly, RMC's motion for summary judgment on the negligence claims of York and Miles is also denied.

B. Claims Against SBCA

A surety bond is a written instrument executed by the principal and surety in which the surety agrees to answer for the debt, default, or miscarriage of the principal. Cal. Civ. Code § 2787. In this case, plaintiffs seek to hold SBCA liable for the alleged malfeasance of its principal,

McNamara. SBCA moves for summary judgment on the two remaining claims against it, for elder abuse and violation of the UCL, on the grounds that both claims are time-barred.

a. Statute of Limitations

SBCA argues plaintiffs' claims are barred by the six-year statute of repose for claims against notaries public embodied in California Code of Civil Procedure section 338(f). Section 338(f) provides, in relevant part:

> (f)(1) An action against a notary public on his or her bond or in his or her official capacity [must be brought within three years of accrual] except that a cause of action based on malfeasance or misfeasance is not deemed to have accrued until discovery, by the aggrieved party or his or her agent, of the facts constituting the cause of action.
> . . .
> (3) Notwithstanding paragraph (1), an action against a notary public on his or her bond or in his or her official capacity shall be commenced within six years.

Cal. Code Civ. P. § 338(f). The six-year statute of repose refers to both actions against the principal and her surety. *See Butterfield v. Northwestern National Ins. Co.*, 100 Cal. App. 3d 974, 979 (1980). SBCA argues plaintiffs' claims are absolutely barred by the six-year statute of repose in section 338(f)(3) because they accrued with McNamara's challenged notarization on May 19, 2009, but were not brought against SBCA until November 19, 2015.

Plaintiffs make several different arguments in response, all of which are unsuccessful. First, plaintiffs assert their claims against SBCA are not time-barred because McNamara committed a second act of malfeasance when she failed to deliver her notarial journal to the Contra Costa County clerk when her notary commission expired in September 2010. Government Code Section 8209 requires that a notary return her notarial journals within 30 days of the expiration of her notary commission. Had McNamara done so, plaintiffs contend, they would have earlier discovered that the notarization of York's signature on two deeds of trusts related to the 2009 reverse mortgage were improper. Instead, the improper notarization was not discovered until York's deposition, when a page from McNamara's journal was produced demonstrating that she did not have satisfactory evidence of York's identity at the time of notarization. Because SBCA

was served within six years of this act of malfeasance, plaintiffs argue, their claims are not time-barred.

Although McNamara's alleged failure to return her notarial notebook could give rise to a second cause of action against her, plaintiffs' claim against SBCA is premised on her act of notarial malfeasance in connection with the 2009 deed. Indeed, the failure to return the notebook is not mentioned in any of the versions of the complaint, including the one naming SBCA as a defendant. Moreover, plaintiffs do not articulate how McNamara's failure to return her notebook led them to incur damages. Unlike McNamara's improper notarization of the 2009 reverse mortgage, which can be directly linked to the eventual foreclosure on York's home, the effect of McNamara's notebook offense was that plaintiffs did not learn the notarization was improper until York's deposition. In other words, the harm identified by plaintiffs is a lack of evidence with which to prosecute this case, but they fail to articulate how they suffered damages as required for a finding of liability against a notary under Government Code § 8209. Therefore, the relevant date for the purposes of running the limitations period on plaintiffs' claims is the day McNamara notarized the 2009 deed.

Second, plaintiffs assert that Section 338(f) is superseded by the specific statutes of limitations for financial elder abuse and unfair business practices, which are based in part on the challenged notarizations by McNamara and may be tolled by the discovery rule. Plaintiffs do not refer to any authority for the proposition that the six-year bar in Section 338(f) may be circumvented in this manner. SBCA argues persuasively that because Section 338(f)(1) sets a three-year statute of limitations that accrues upon the date of discovery, while Section 338(f)(3) sets a six-year maximum, the latter is intended to cut off any right of action (regardless of discovery) after that specified period of time. As SBCA points out, the six-year statute of repose, which gives no indication that it may be tolled based on date of discovery, would serve no purpose if the six-year period could be indefinitely extended by other statutes of limitations. Accordingly, because plaintiffs' claims are subject to the six-year bar in Section 338(f), their tolling arguments based on the elder abuse and UCL statutes of limitation need not be addressed.

Third, plaintiffs contend that since the liability of the surety is derivative in nature, SBCA should not be able to invoke the statute of limitations bar when its principal, McNamara, was named within six years of the challenged notarizations.[6] They do not, however, point to any authority supporting the proposition that naming the principal within the six-year limitations period can serve as a placeholder for later-asserted claims against a surety. Plaintiffs do not suggest that McNamara was an alter ego of SBCA, nor do they offer an explanation for their inability to locate or identify SBCA at the time they named McNamara as a defendant. Therefore, the timely assertion of claims against McNamara does not preclude dismissal of late-filed claims against SBCA. Because SBCA was served over six years after McNamara performed the challenged notarization of the 2009 reverse mortgage, the claims against SBCA predicated on this act are time-barred. Accordingly, SBCA's motion for summary judgment is granted and SBCA is dismissed from this action.

V. CONCLUSION

In summary, SBCA's motion for summary judgment is granted as to all claims. The surviving claims are: York's elder abuse, assisting elder abuse, breach of fiduciary duty, UCL, and negligence claims against Perkins; York's assisting elder abuse, breach of fiduciary duty, UCL, and negligence claims against RMC; Miles' UCL claim against Perkins; and Miles' negligence claims against Perkins and RMC. All other claims are dismissed from this action.

IT IS SO ORDERED.

Dated: May 1, 2018

RICHARD SEEBORG
United States District Judge

[6] The notarizations were executed on May 19, 2009 and McNamara was named as a defendant on September 24, 2014.