UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2286

September Term, 2014

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LORETTA E. LITTLE

v.

GENERATION MORTGAGE COMPANY

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Meredith,
Friedman,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

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Opinion by Eyler, James R., J.

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Filed: March 8, 2016

Loretta E. Little, appellant, sued Generation Mortgage Company, appellee, in the Circuit Court for Montgomery County, alleging violations of the Maryland Finder's Fee Act ("FFA").[1] The Circuit Court for Montgomery County granted appellee's motion to dismiss appellant's amended complaint. In this appeal, appellant presents the following questions for our review:

> 1. Did the circuit court misapply the "legally capable" limitation on conspiracy liability, enunciated in *Shenker v. Laureate Education, Inc.*, 411 Md. 317 (2009), to claims for conspiracy to violate the Finder's Fee Act?
>
> 2. Did the circuit court err in applying the Federal standard for aiding and abetting the violation of a Federal securities statute to the Maryland Finder's Fee Act?
>
> 3. Did the circuit court misapply the statutory specialty analysis, enunciated in *NVR Mortg. Fin., Inc. v. Carlson*, 439 Md. 427 (2014), to § 12-804(e) of the Finder's Fee Act?

Appellee answers the above questions in the negative and, in the alternative, argues that appellant's claims are preempted by federal law.

We shall conclude that appellant's claims against appellee are not statutory specialties that are subject to a 12-year statute of limitations. Accordingly, because the circuit court properly dismissed appellant's amended complaint as time-barred, we need not address the merits of the first two questions. Similarly, we need not address the preemption issue.

[1] Md. Code (2013 Repl. Vol.), Commercial Law Article ("CL"), §§ 12-801*, et seq.*

## FACTUAL AND PROCEDURAL BACKGROUND

As the issue on appeal is whether the trial court erred in granting appellee's motion to dismiss appellant's amended complaint for failure to state a claim upon which relief may be granted, we recite only the facts alleged in the amended complaint and its incorporated exhibits.

Appellant and her husband, James Little, obtained a reverse mortgage loan ("the loan") on their residence from Savings First Mortgage, LLC ("Savings First"), identified in the complaint as the mortgage broker and, in the closing documents, as the lender.[2] The loan closed on July 14, 2009. At the closing of the loan transaction, Savings First collected from appellant a "loan origination fee" of $2800 and a "Service Release Premium" of $350.61.

Subsequent to closing, Savings First assigned the note and deed of trust to appellee. Appellant alleged that the actual lender was appellee, which funded the loan at the closing, a practice known as "table-funding."[3] Appellant alleged that the loan origination fee and the service release premium were "finder's fees" as defined in the Finder's Fee Act, Md.

[2] Mr. Little passed away before the complaint that is the subject of this appeal was filed.

[3] "A 'table-funded' transaction is a closing at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds." *NVR Mortgage Fin., Inc. v. Carlsen*, 439 Md. 427, 438 (2014) (citations omitted).

Code (2013 Repl. Vol.), Commercial Law Article ("CL"), § 12-801(d).[4] Appellant alleged that, because Savings First presented itself as the mortgage broker and the lender, it was prohibited from collecting finder's fees by § 12-804(e) of the Finder's Fee Act. That section provides that "[a] mortgage broker may not charge a finder's fee in any transaction in which the mortgage broker or an owner, part owner, partner, director, officer, or employee of the mortgage broker is the lender or an owner, part owner, partner, director, officer, or employee of the lender."

Appellant alleged that appellee conspired with, and aided and abetted Savings First in violating "the [FFA] by agreeing and requiring that Savings First (a) act as both the mortgage broker and the mortgage lender in [appellant's] reverse mortgage transaction, when [appellee] and Savings First knew, agreed and understood that [appellee] was the funding lender; and (b) charge [appellant] unlawful finder's fees directly and indirectly[.]"

In Count One of the amended complaint, appellant sought relief from the court in the form of a declaratory judgment declaring that, pursuant to the Finder's Fee Act, appellee was liable to appellant for "illegal 'finder's fees'" paid to Savings First under theories of civil conspiracy and aiding and abetting liability. In Count Two, appellant claimed a violation of the Finder's Fee Act, and requested relief in the form of an award of damages "including

[4] A "finder's fee" is "any compensation or commission directly or indirectly imposed by a broker and paid by or on behalf of the borrower for the broker's services in procuring, arranging, or otherwise assisting a borrower in obtaining a loan or advance of money." CL § 12-801(d).

but not limited to the finder's fees charged in [appellant's] mortgage loan transaction[,]" as well as statutory penalties, costs, and attorneys' fees. [5]

Appellee filed a motion to dismiss the amended complaint for failure to state a claim upon which relief could be granted, asserting that (1) the action was barred by the three-year statute of limitations; (2) appellee could not be held liable for civil conspiracy or aiding or abetting the violation of a statute because it was not a mortgage broker and, therefore, lacked the legal capacity to violate the FFA; (3) appellee was not liable for damages under the FFA; (4) the complaint did not allege payment of a finder's fee; and (5) the FFA claim was pre-empted by federal law. Following a hearing on appellee's motion, the court granted the motion to dismiss (1) on the ground of limitations and (2) because appellee could not be held liable for conspiracy and aiding and abetting because, as a non-broker, it was not legally capable of violating the FFA.[6]

[5] C.L. § 12-807 provides that "[a]ny mortgage broker who violates any provision of this subtitle shall forfeit to the borrower the greater of:

(1) Three times the amount of the finder's fee collected; or

(2) The sum of $500."

[6] In light of our conclusion that appellant's claims are barred by limitations, we need not address appellee's claim of preemption.

## STANDARD OF REVIEW

The Court of Appeals recently summarized the standard of review applicable to a trial court's ruling on a motion to dismiss as follows:

> [The appellate court] reviews the grant of a motion to dismiss for legal correctness. . . . On appeal from a dismissal for failure to state a claim, we must assume the truth of, and view in a light most favorable to the non-moving party, all well-pleaded facts and allegations contained in the complaint, as well as all inferences that may reasonably be drawn from them, and order dismissal only if the allegations and permissible inferences, if true, would not afford relief to the plaintiff, *i.e.*, the allegations do not state a cause of action for which relief may be granted. We must confine our review of the universe of facts pertinent to the court's analysis of the motion to the four corners of the complaint and its incorporated supporting exhibits, if any.

*Rounds v. Maryland-Nat. Capital Park & Planning Comm'n*, 441 Md. 621, 635-36 , *reconsideration denied,* (2015) (citations and internal quotation marks omitted). We will affirm the circuit court's grant of a motion to dismiss on any ground "adequately shown by the record, even one upon which the circuit court has not relied or one that the parties have not raised." *Advance Telecom Process LLC v. DSFederal, Inc*., 224 Md. App. 164, 174 (2015) (citation and internal quotation marks omitted).

## DISCUSSION

Pursuant to Md. Code (2013 Repl. Vol.), Courts and Judicial Proceedings Article ("CJP"), § 5-101, a civil action must be filed "within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced." Accordingly, the accrual date of a claim to recover fees paid

at closing was the date of the closing, July 14, 2009, unless a different limitations period applies. *See Rounds*, 441 Md. at 654 ("[g]enerally, a claim accrues when the plaintiff suffers the actionable harm.")

CJP § 5-102(a) provides for a 12-year period of limitations for "specialties," which includes, *inter alia*, judgments, bonds, contracts under seal, and "other specialt[ies]." Certain statutory claims have been held to be "specialties," but the Court of Appeals has held that "[t]he 'other specialty' stated in CJP § 5-102(a)(6) is a relatively narrow catchall that does not suffice to exempt from the three-year period every claim that happens to be based in some way on a statute." *Master Financial Inc. v. Crowder*, 409 Md. 51, 70 (2009). In *Crowder*, the Court announced the following test for determining whether a statutory action is a "specialty" falling within CJP § 5-102(a)(6):

> An action based on a statute will constitute an "other specialty" subject to the 12-year period of limitations if (1) the duty, obligation, prohibition, or right sought to be enforced is created or imposed **solely** by the statute, or a related statute, and does not otherwise exist as a matter of common law; (2) the remedy pursued in the action is authorized **solely** by the statute, or a related statute, and does not otherwise exist under the common law; and (3) if the action is one for civil damages or recompense in the nature of civil damages, those damages are liquidated, fixed, or, by applying clear statutory criteria, are readily ascertainable.

*Id*. (emphasis added).

Appellant contends that a claim for a violation of § 12-804(e) of the Finder's Fee Act is a statutory specialty under CJP § 5-102(a)(6). Appellant argues that the essence of her

complaint is that "[appellee] and Savings First conspired to violate the Finder's Fee Act[.]" She further argues that conspiracy and aiding and abetting are means of extending liability beyond the person who committed the unlawful act, and that such derivative liability claims incorporate the statute of limitations applicable to the underlying legal violation.

Appellee responds that, under *Crowder,* the three-year statute of limitations applies to appellant's claim, because (1) she seeks to enforce a legal duty that is not "created or imposed solely by the Finder's Fee Act," and (2) the remedies pursued by appellant are not authorized solely by the Finder's Fee Act.

In *NVR Mortgage Finance, Inc. v. Carlsen*, 439 Md. 427 (2014), a borrower sued a mortgage broker, alleging a violation of CL § 12-805(d). The Court of Appeals held that "an alleged violation of [CL] § 12-805(d) is not an 'other specialty' under CJP § 5-102(a)(6), and thus is subject to CJP § 5-101, which is the default three-year statute of limitations."[7] *Id*. at 429. Although the Court addressed only § 12-805(d), we agree with

[7] CL § 12-805(d) provides:

> (1) A finder's fee may not be charged unless it is pursuant to a written agreement between the mortgage broker and the borrower which is separate and distinct from any other document.
>
> (2) The terms of the proposed agreement shall:
>
> (i) Be disclosed to the borrower before the mortgage broker undertakes to assist the borrower in obtaining a loan or advance of money;
>
> (ii) Specify the amount of the finder's fee; and
>
> (iii) Contain a representation by the mortgage broker that

(continued...)

appellee that the Court's rationale applies equally to appellant's claims under § 12-804(e) and controls the outcome.

Section 12-805(d) provides that a mortgage broker may not charge a finder's fee unless it is pursuant to a written agreement between the broker and borrower that complies with the statutory requirements. *See* fn 7, *supra.* Applying the test announced in *Crowder,* the *NVR* Court concluded that CL § 12-805(d) was not an "other specialty" under CJP 5-102(a)(6) because, "in an action for an alleged violation of CL § 12-805(d), the duty sought to be enforced exists as a matter of common law, rather than having been created solely by CL § 12-805(d)." *Id.* at 433. The Court explained that a mortgage broker owes to a borrower a common law duty to "disclose . . . all facts or information which may be relevant or material influencing the judgment or action of the [borrower] in the matter." (quoting *St Paul at Chase Corp. v. Mfgs. Life Ins. Co.*, 262 Md. 192, 215-16(1971)). The same is true with respect to appellant's action against appellee under CL § 12-804(e).

Appellant's complaint clearly alleged that Savings First, and not appellee, was the mortgage broker. Subsection 12-804(e) prohibits only a *mortgage broker* from charging finder's fees when the mortgage broker is also the lender in the transaction. Appellant does not challenge that proposition; rather, she seeks to recover from appellee the statutory

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[7](...continued)

> the mortgage broker is acting as a mortgage broker and not as a lender in the transaction.

penalties for Savings First's alleged violation of the Finder's Fee Act under theories of conspiracy and aiding and abetting.

Subsection 12-804(e) does not provide a right to pursue a claim against appellee, a non-broker. Therefore, with respect to the first prong of the *Crowder* test, appellant's alleged causes of action are not solely created by the statute but necessarily are based on common law principles of civil conspiracy and aiding and abetting liability. Neither of those theories are mentioned in the FFA, and even if they were, the alleged duty of a non-broker to refrain from conspiring and aiding and abetting would have its basis in common law.

Accordingly, we conclude that under the guidelines enunciated in *Crowder*, as applied in *NVR*, appellant's claims against appellee in the instant case are not statutory specialties. Therefore, because the claim was not filed within the general three-year statute of limitations, the circuit court properly granted appellee's motion to dismiss.

**JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT**.