Circuit Court for Montgomery County
Case No. 410150-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 483

September Term, 2016

ROBERT D. SCHAECHTER

v.

JEFFREY NADEL, et al.

Graeff,
Berger,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon. J.

Filed: November 13, 2017

On October 1, 2015, Robert Schaechter ("Schaechter") filed a two-count complaint in the Circuit Court for Montgomery County against Jeffrey Nadel, Esquire ("Mr. Nadel") and the Law Offices of Jeffrey Nadel. Count I alleged that Mr. Nadel committed legal malpractice and Count II alleged that Mr. Nadel had made negligent representations to Schaechter. Both counts allege that the Law Offices of Jeffrey Nadel was vicariously liable for the torts allegedly committed by Mr. Nadel. Defendants, by counsel, filed a motion to dismiss, or in the alternative, motion for summary judgment. Schaechter filed an opposition to the motions and a hearing on the motions was held on February 10, 2016. One day after the hearing, the Circuit Court for Montgomery County signed an order, which was entered on February 16, 2016, that read, in material part, as follows:

> This matter came before the undersigned on February 10, 2016 on Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment (DE#9) and Plaintiff's Opposition thereto (DE#20). With the arguments having been heard on the record, and the entire proceedings having been considered, the Circuit Court for Montgomery County, Maryland, this 11th day of February, 2016:
>
> FINDS that the events relating to Plaintiff's claims against Defendants began to accrue in 2010, the time period when Plaintiff knew or should have known that Defendants' actions allegedly constituted professional negligence and/or negligent misrepresentation as alleged in Plaintiff's Complaint. It is therefore:
>
> ORDERED, that Defendants' Motion to Dismiss (DE#9) shall be, and hereby is, GRANTED AS PLAINTIFF'S CLAIMS ARE BARRED BY STATUTE OF LIMITATIONS.

Schaechter filed a motion for reconsideration on February 26, 2016, which was denied on April 27, 2016. This appeal followed.

Before discussing the facts of this case, it is useful to first decide whether to treat the order, filed by the court on February 16, 2016, as the grant of a motion to dismiss for failure to state a claim upon which relief may be granted, or to treat the order as granting summary judgment pursuant to Maryland Rule 2-501(a). The appellees contend, and appellant does not disagree with the contention, that: 1) when the motions judge used the phrase the "Motion to Dismiss (DE#9) shall be . . . granted" in its dispositive order, the phrase was used as shorthand for the words "Motion to Dismiss, or in the Alternative, Motion for Summary Judgment [shall be granted]"; 2) the motions judge, in deciding to dismiss the complaint on the grounds that appellant's claims were barred by the statute of limitations, by necessity, considered matters outside the four corners of the complaint; and, 3) therefore, the dismissal order must be treated as an order granting summary judgment.

We agree with appellees that we must treat the dispositive order as the grant of summary judgment. We say this for two reasons. First, the complaint alleges no facts upon which the trial judge could have possibly based his finding that in 2010, "[p]laintiff knew or should have known that [d]efendants' actions allegedly constituted professional negligence and/or negligent misrepresentation[.]" Second, at the motions hearing held on February 10, 2016, both sides recognized, at least impliedly, that the motion should be considered as one for summary judgment because, throughout the hearing, both counsel repeatedly referred to documents, transcripts and pleadings that were not attached as exhibits to the complaint or even mentioned therein. "When the circuit court considers matters outside the pleadings, the court treats the matter as a motion for summary

judgment[.]" *Committee for Responsible Development on 25th Street v. Mayor and City Counsel of Baltimore*, 137 Md. App. 60, 73-74 (2001) (quoting *Boyd v. Hickman*, 114 Md. App. 108, 117-18 (1997)).

For the foregoing reason, we shall treat the issue raised by Schaechter to be: whether the trial judge erred when he granted summary judgment in favor of the appellees on the grounds that appellant's claims were barred by the three year statute of limitations.

Md. Rule 2-501 provides, in pertinent part, that "[t]he court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f).

In *Frederick Road Ltd. Partnership v. Brown & Sturm*, 360 Md. 76, 93-94 (2000) (internal citations and quotation marks omitted), the Court reviewed the trial court's grant of summary judgment on limitations grounds and explained the applicable standard of review:

> Summary judgment is not a substitute for trial. The function of the trial court at the summary judgment stage is to determine whether there is a dispute as to a material fact sufficient to require an issue to be tried. Thus, an appellate court's review of the grant of summary judgment involves the determination whether a dispute of material fact exists, and whether the trial court was legally correct. Evidentiary matters, credibility issues, and material facts which are in dispute cannot properly be disposed of by summary judgment. Instead, a trial court reviewing a motion for summary judgment must ask whether there exists a genuine dispute as to a material fact and, if not, what the ruling of law should be upon those undisputed facts. If the facts are susceptible of more than one inference, the materiality of that arguable factual dispute must be judged by looking to the inferences that may be drawn in a light most favorable to the party against whom the motion is made and the light least favorable to the movant.

In this case, the appellees, of course, argue that the circuit court did not err in granting them summary judgment on the grounds that Schaechter's claims were barred by the three year statute of limitations. Appellees, however, have also filed a cross-appeal in which they argue, in the alternative, that assuming Schaechter's claims were not barred by limitations, the circuit court erred by not granting them summary judgment on four other grounds: 1) the appellees did not owe Schaechter any duty; 2) the actions of appellees were not the proximate cause of Schaechter's damages; 3) Schaechter's claims are barred by the appellant's own contributing negligence; or 4) that summary judgment should have been granted as to Count II, alleging negligent misrepresentation, because Schaechter failed to identify any misrepresentation made to him by Mr. Nadel.

I.

BACKGROUND

Unless otherwise stated, all the facts set forth in Part I are based on documents, affidavits, pleadings and other papers filed in two federal bankruptcy proceedings that will be discussed *infra*.

In the fall of 2006, Steven Madeoy ("Madeoy") asked Schaechter to lend him $500,000.00. At the time that this request was made, Schaechter had, on forty or fifty prior occasions, loaned money to Madeoy. The parties agreed that Schaechter would loan Madeoy $500,000.00 but that Madeoy would owe Schaechter $525,000.00, the extra $25,000.00 representing "points." Additionally, Madeoy agreed to pay appellant interest on the $525,000.00 loan at the rate of 16% annually.

At the time the loan was negotiated, Madeoy owned a 45% interest in 3501 13th Street, N.W., LLC (hereafter "the LLC"). The remaining 55% ownership in the LLC was held by D. Scott Posey (10% owner) and the personal representative of Madeoy's late brother-in-law, Michael J. Friedman (45%). At the time of the loan, the LLC owned a valuable apartment house located at 3501 13th St., N.W. in Washington, D.C. That property was encumbered by a First Deed of Trust securing a loan made by another lender in the amount of $3,800,000.00. Schaechter and Madeoy agreed that the $525,000.00 loan would be secured by Madeoy's 45% membership interest in the LLC.[1]

On December 7, 2006, Schaechter wrote a check to Madeoy in the amount of $500,000.00. Madeoy contacted Mr. Nadel and asked him to prepare the necessary paperwork to reflect the agreement of the parties.

Mr. Nadel testified at a deposition given in a bankruptcy proceeding that at the time he first was contacted by Madeoy about the loan transaction, he (Mr. Nadel) believed that Madeoy owned 100% of the LLC because that is what Madeoy told him. In any event, Mr. Nadel proceeded to prepare a Promissory Note that stated that the LLC had borrowed $525,000.00 from Schaechter. The Promissory Note, as originally drafted, also stated that

[1] Because we are considering the propriety, *vel non*, of the grant of summary judgment, the facts (unless otherwise indicated) are set forth in the light most favorable to Schaechter.

In a counter-claim filed by Schaechter in a bankruptcy proceeding, Schaechter said that at the time the loan was made, it was his intention and that of Mr. Madeoy, "that the collateral for the guaranty of the loan made by Schaechter was to be Madeoy's membership interest in 3501 13th Street N.W. LLC."

the loan was to be repaid by the LLC in ninety days. Mr. Nadel also prepared a "Money Loaned Deed of Trust" in favor of Schaechter that purported to encumber 3501 13th St., N.W., the property owned by the LLC. The Deed of Trust, dated December 7, 2006, stated that it was to secure the repayment of the "indebtedness evidenced by Borrower's Promissory Note dated even date herewith . . . held by Robert Schaechter in the principal sum of" $525,000.00. The Deed of Trust and the Promissory Note were signed on behalf of the LLC by Madeoy and D. Scott Posey. The Deed of Trust inaccurately stated that D. Scott Posey and Madeoy were the "[s]ole [m]embers" of the LLC.

We note, parenthetically, that although it is now undisputed that the LLC did not borrow any money from Schaechter, the Promissory Note and the Deed of Trust indicated that the LLC had borrowed $525,000.00 from Schaechter. In addition to the documents already mentioned, Madeoy signed a guaranty of the Promissory Note and agreed "to be bound by the same as if an original Maker thereto[.]"

In December 2006, Madeoy and Schaechter agreed, between themselves, that the Deed of Trust in favor of Schaechter would not be recorded at that time because Madeoy believed that if it was immediately recorded, it would act as a "trigger" that would allow the lender secured by the more senior $3,800,000.00 Deed of Trust, to immediately demand full payment of that loan.

On December 12, 2006, Mr. Nadel prepared a letter to Schaechter, a copy of which was later found in a file in Mr. Nadel's office. The letter read, in material part, as follows:

> Further to our three way conversation of December 6, 2006, which included yourself, Steve Madeoy and the undersigned, enclosed please find

> a Promissory Note and Deed of Trust in the original principal sum of $525,000.00, which memorializes your loan made to 3501 13th Street NW LLC and guaranteed by Steve Madeoy. It is our understanding that Steve picked up your check directly from you on December 7, 2006, hence the documents are dated for that date.
>
> As we discussed, the Deed of Trust is being given to you for you to record only in the event that the LLC and/or Steve defaults in their obligations to you. You have agreed to this arrangement, inasmuch as Steve has indicated that the recording of any junior financing on this property, will act as a trigger to have the first trust loan fully called. We have further agreed that this office will not be providing you with title insurance on this transaction, as it is the intention of the borrower and lender, that the security instrument not be recorded. We have also indicated to you in view of the particulars of this transaction, that we have not had a full title search performed, but rather, we have reviewed a rundown of title from the time of the acquisition by Steve's LLC, on line, and found only the one senior trust recorded. We have further inquired from the District of Columbia, and the LLC is in fact in good standing as of December 8, 2006.

(Emphasis added.)

Schaechter claims never to have received a copy of either the Promissory Note or the Deed of Trust mentioned in the December 12, 2006 letter until May 2014. In a deposition taken in a bankruptcy proceeding (on November 13, 2014), Schaechter was asked whether Nadel's December 12, 2006 letter was "something you historically had or whether you received it recently." Schaechter replied: "I don't know. I can't tell you." Mr. Nadel, in his deposition taken on the same date, was not asked whether he sent the letter to Schaechter in December 2006 or, perhaps, sometime afterwards.

After December 7, 2006, no payments were made on the Promissory Note. Because Schaechter had not been paid, Schaechter, Nadel, and Madeoy met, in July 2010, at Mr. Nadel's office to discuss the loan. At the meeting, Madeoy and Schaechter told Mr. Nadel

that they wanted him to correct the Promissory Note and the Deed of Trust to show that Schaechter had made a five year loan not a 90 day loan. Accordingly, Mr. Nadel changed the first page of the Note and the first page of the Deed of Trust to reflect that the Note was payable in five years - not 90 days. They also told Mr. Nadel that they wanted Mr. Nadel to record the Deed of Trust in the District of Columbia land records.

According to Mr. Nadel, it was not until the aforementioned meeting in July 2010 that he learned that Steven Madeoy did not have a 100% ownership interest in the LLC but had, instead, only a 45% interest. On July 14, 2010, Mr. Nadel sent an email to Schaechter that read:

> Subject: 3501 13th Street
>
> Dear Bobby
>
> Per our discussion, you have asked that we record the Deed of Trust for the referenced property on your behalf, and we are in the process of doing same. By way of explanation, when this loan was created, you indicated that you did not want to record the security agreement, but at this point you have agreed with Steve [Madeoy] that you wish to proceed with recordation at this time. You have further asked that we correct the Note and Deed of Trust to show that this was actually to have been a five year loan, rather than 90 days; we have done that as well and have Steve and Scott Posey's approval for same in writing.
>
> At this point I would like you to please confirm the following for me:
>
> 1. that the above recitations are correct
> 2. that you have requested that we handle this matter on your behalf
> 3. that you understand and agree that in essence, Steve is truly only able to encumber his personal interest in the LLC as to the subject real property, that is to say that he represents to me that he has only a 45% interest as a member of the LLC, and you can only look to that interest of Steve's as to the property, from which to collect your outstanding loan.

> If you will kindly respond by email that the above is correct I can proceed for you.
>
> Thanks and best regards
> [J]eff

Five days after the email was sent, Schaechter replied to the email as follows: "I'm in agreement with all items[.] [T]hanks for y[]our help in this matter."

In a deposition that Mr. Nadel gave in Madeoy's bankruptcy proceeding, he was asked about the July 10, 2010 email, viz.:

> Q. If Mr. Madeoy had decided – I'm sorry. If Mr. Schaechter had decided to look to Steve's interest in the property, how would he have gone about that?
>
> A. My understanding is that he was trying to go against the property, which is what was always represented to me. And Mr. Madeoy wanted it to be against the property, not simply his interest in the LLC, but in the property.
>
> Q. But don't you write [in the July 14, 2010 email] that Mr. Schaechter is able to look only to the interest of Steve in the property?
>
> A. That what it says.
>
> Q. So what does it mean? How would he go about that?
>
> A. It was the intention, as I understood it, that the property would function as the security for the loan that Mr. Schaechter made. That's it.
>
> Q. If that's the case, why would Mr. Schaechter be able to look only to Madeoy's interest in the property?
>
> A. The reason that I wrote this, and which will hopefully answer your question, is that originally it was represented to me that Mr. Madeoy had the only financial interest in the property, and then when it became known to me that the, that he only owned 45 percent, and it was not accurate that he owned a hundred percent, I wanted to bring that matter to light and tell him, look, to the extent that Mr. Madeoy has his property, and to the extent it gets sold or

> refinanced, and you want to get, you want to collect your money, you may only be able to look to the portion that is his out of that property.
>
> Q. Now, as of July 14th –
>
> A. In other words, if there wasn't enough money, for example, that he might not have been able to collect his full amount as against somebody else's interest in that property.

Schaechter, at his deposition in the same bankruptcy case was also asked about his interpretation of Mr. Nadel's July 14, 2010 email, viz.:

> Q. And you agreed to the content of his e-mail that he sent to you on July 14th. Correct?
>
> A. Yes.
>
> Q. What did you interpret his statement in paragraph 3 to mean when he says, "And you can only look to that interest of Steven's as to the property from which to collect your outstanding loan"?
>
> A. My interpretation of it was that when the property got sold, that hopefully there would be enough assets left to pay me back my loan. The 45 percent interest was told to me that was Steve's interest in that property; not that I can go after the whole thing.
>
> Q. You could only go after the 45 percent interest?
>
> A. Exactly.

On August 5, 2010, the Deed of Trust purporting to secure Schaechter and to encumber 3501 13th Street, N.W. was recorded in the land records of the District of Columbia by Mr. Nadel.

Madeoy filed a personal Chapter 7 Bankruptcy Petition in the United States Bankruptcy Court for the District of Maryland on December 21, 2012. Roger Schlossberg was appointed the bankruptcy trustee for Madeoy. Schlossberg thereafter filed an

Adversary Proceeding objecting to Madeoy's discharge in bankruptcy because Madeoy had made false or fraudulent statements during the course of the bankruptcy proceedings. On July 19, 2013, the LLC filed a Chapter 11 Bankruptcy Petition in the same court.

In Madeoy's personal bankruptcy filing, he identified Schaechter as having a secured lien against his [Madeoy's] membership interest in the LLC. But, in the bankruptcy filing by the LLC, Madeoy stated that Schaechter had a secured lien (second position Deed of Trust) against the real property owned by the LLC.

Meanwhile, in the LLC's bankruptcy case, the trustee brought an adversary proceeding to determine the validity of Schaechter's Deed of Trust that purported to encumber the LLC's property. If the Deed of Trust did not properly attach to Madeoy's interest in the LLC or to the LLC's property itself, Schaechter would be an unsecured creditor of Madeoy and, upon a sale of the property owned by LLC, would have to join a long line of Madeoy's other unsecured creditors.

In response to the adversary proceeding, Schaechter, on April 7, 2014, filed a counter-claim in the bankruptcy court against the LLC and a third-party complaint against Madeoy seeking reformation of the loan documents to reflect a lien in favor of Schaechter against Madeoy's 45% interest in the LLC. In the bankruptcy proceedings, Schaechter acknowledged that he did not, in fact, lend money to the LLC, which meant that the Deed of Trust did not accurately represent the transaction. He also admitted that the Deed of Trust, as drafted, would be ineffective in creating a lien against Madeoy's 45% interest in the LLC or against the real property owned by the LLC.

In June 2015, the United States Bankruptcy Court for the District of Maryland ruled that the Deed of Trust purporting to secure Schaechter was not an enforceable second lien against the real property owned by the LLC.

In Madeoy's bankruptcy proceeding, there were depositions taken of Mr. Nadel, Schaechter and Madeoy. In those depositions, both Schaechter and Madeoy referred to Mr. Nadel's role in the loan transaction as that of a "scrivener." In his deposition, Schaechter testified that in 2006 it was Madeoy's idea to contact Mr. Nadel to assist in the documentation of the $500,000.00 loan and, that, although Mr. Nadel had (prior to 2006) done some property settlement work for either himself (Schaechter) or one of his children, he (Schaechter) did not have an attorney-client relationship with Mr. Nadel in 2006 or thereafter. He also admitted that he paid Mr. Nadel no fee in regard to the loan transaction and that he understood that Mr. Nadel was representing Mr. Madeoy and not him.

Mr. Nadel testified at a deposition held on November 13, 2014, in Madeoy's bankruptcy case, that it was always the intent of the parties that Schaechter's loan be secured by the Deed of Trust that he (Mr. Nadel) prepared. The Deed of Trust was recorded, in Mr. Nadel's words, to "protect Bobby [Schaechter]." He further testified that he understood that Schaechter and Madeoy wanted a lien against the LLC's property, not simply Madeoy's interest in the LLC.

According to a deposition Schaechter gave on November 13, 2014, he first came into physical possession of a copy of the Deed of Trust and the Promissory Note in May of 2014. Schaechter also testified that he did not know, until sometime in 2014, that the

Promissory Note and the Deed of Trust both stated that the LLC (not Madeoy) had borrowed $525,000.00 from him. In that same deposition he admitted, however, that he might have seen the Promissory Note when he met in Mr. Nadel's office in 2010. But later, in an affidavit dated May 11, 2015, which was filed in a counter-claim Schaechter filed in the bankruptcy proceedings, Schaechter swore he first saw the Promissory Note and the Deed of Trust in 2014.

Before the motions court in the subject case, it was undisputed that the Deed of Trust filed by Mr. Nadel did not: 1) create a lien against the LLC because, *inter alia*, the LLC had borrowed no money from Schaechter; and 2) did not create a lien against Madeoy's 45% interest in the LLC. The proper way to secure a personal loan (to a member of a LLC) with real property owned by an LLC is: (a) have the LLC guarantee repayment of the personal loan, and record an Indemnity Deed of Trust against the property owned by the LLC; (b) record UCC-1 financing statements securing the loan against the member's membership interest in the LLC; or (c) do both.

As a result of the ruling of the bankruptcy court, Schaechter was deemed to be an unsecured creditor of Madeoy. The Property owned by the LLC was sold, on May 29, 2014, for $6,000,000.00. After paying off the money due to the holder of the first Deed of Trust, there remained a surplus of over 1.7 million dollars plus a $600,000.00 deposit. Schaechter alleged in his circuit court complaint that had Mr. Nadel properly secured his loan against Madeoy's 45% interest in the LLC, there would have been, after the sale of LLC's Property, sufficient funds to satisfy all or most of Madeoy's indebtedness to him.

In the complaint Schaechter filed in the case *sub judice*, he also alleged in Count I that Mr. Nadel was negligent in several respects by,[2] *inter alia*:

- Failing to prepare, file and/or record appropriate legal documents in connection with the Loan;
- Failing to perfect the Plaintiff's security in Madeoy's interest in 3501 LLC;
- Failing to properly secure Plaintiff's personal Loan to Madeoy, despite the fact that Madeoy's interest in 3501 LLC constituted sufficient collateral;
- Failing to prepare, file and/or record a UCC-1 financing statement and related documentation;
- Failing to properly prepare a Promissory Note and related documentation which would protect Plaintiff; . . .
- Failing to recognize that an individual's membership interest in a limited liability company cannot be collateralized by recording a deed of trust;
- Failing to investigate or confirm the ownership interests in 3501 LLC, including the fact that Steven Madeoy owned a 45% membership interest, Scott Posey owned a 10% membership interest, and that the Estate of Michael Friedman and/or a related trust owned a 45% interest as an interest holder[.]

In Count II, Schaechter alleged that he was harmed because Mr. Nadel misrepresented to him "that (a) the Loan would be secured by the Property, (b) that the Deed of Trust would be an effective instrument to secure the Loan; and (c) the Loan was otherwise collateralized and secured."

[2] As we said in *VanHook v. Merchants Mutual Insurance Company*, 22 Md. App. 22, 27 (1974):

> The function of pleadings in summary judgment cases is twofold:
> 1. They serve to frame the issues with respect to which the court must determine materiality.
> 2. Allegations and the response, or lack of response, may establish facts as admitted or deemed to be admitted, for the purpose of the case.

II.

STATUTE OF LIMITATIONS

As mentioned, Schaechter filed his complaint for legal malpractice and negligent representation on October 1, 2015. The applicable statute of limitations in this case was three years from the date Schaechter's alleged causes of action accrued. *See* Md. Code, Courts and Judicial Proceedings Article, § 5-101. Therefore, if Schaechter's causes of action accrued at any point prior to October 1, 2012, his claims were barred by the statute of limitations.

In negligence cases, Maryland applies the discovery rule. Under that rule, a cause of action accrues, and the statute of limitations begins to run "at the time the claimant first knew or *reasonably should have known of the alleged wrong*. *Russo v. Ascher*, 76 Md. App. 465, 469 (1988). *See also Frederick Road Limited Partnership v. Brown & Sturm*, 360 Md. 76, 95-96 (2000); *Lumsden v. Design Tech Builders, Inc.*, 358 Md. 435, 443-44 (2000). As set forth in *Russo*, "when a plaintiff has knowledge of circumstances indicating that he may have been harmed, the law imposes a duty on that plaintiff to investigate whether in fact he has been harmed." *Russo*, 76 Md. App. at 470; *Fairfax Savings, F.S.B. v. Weinberg & Green*, 112 Md. App. 587, 613 (1996)("The dispositive issue in determining when limitations begin to run is when the plaintiff was put on notice that he may have been injured."). "It is the discovery of the injury, and not the discovery of all of the elements of a cause of action that starts the running of the clock for limitations purposes." *Lumsden*, 358 Md. at 450 (citation omitted).

The seminal case in Maryland concerning the discovery rule is *Poffenberger v. Risser*, 290 Md. 631 (1981). In *Poffenberger*, the Court of Appeals defined actual knowledge as that term is used in the discovery rule, as either

> express cognition, or awareness implied from knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry [thus, charging the individual] with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued.

Id. at 637 (citation omitted).

Appellees contend that limitations began to run against Schaechter in December 2006, which is at least three years earlier than the date that the motions judge "held" that limitations began. Appellees' argument in this regard is as follows:

> [I]t is undisputed that the transaction at issue took place in December 2006. Furthermore, on December 12, 2006, Nadel wrote Schaechter, expressly informing him that the loan was being made to 3501 LLC and that he was being issued a Deed of Trust against the LLC's real property as security for the transaction. As such, Schaechter knew, or reasonably should have known, as of December 12, 2006, that he was being provided with a lien against 3501 LLC's property (as compared to a security interest in Madeoy's membership interests in the LLC), thereby triggering the statute of limitations which expired in late December 2009.
>
> Stated another way, if circulating a binder containing over seventy documents constitutes inquiry notice that a financing statement has not been filed, thus triggering the running of the statute of limitations (as the Court of Appeals held in [*The Bank of New York, Trustee v.*] *Sheff* [, 382 Md. 235, 238-40 (2004)]), then being provided with written confirmation that a lien is being placed on real property owned by an LLC, as compared to membership interests held by a member of the LLC, certainly provided Schaechter with at least inquiry notice, if not actual notice, of Appellees' alleged negligence. Since the statute of limitations is not tolled while the claimant undertakes the requisite investigation, *Pennwalt* [*v. Nasios*], 314 Md. [433,] . . . 447 [1988], Schaechter's claims are barred, as a matter of law, by the statute of limitations.

(Reference to record extract omitted.)

There might be merit in the above argument if the record was clear that in 2006 Schaechter received a copy of Nadel's December 12, 2006 missive with its enclosures. But, Schaechter swore in his deposition that he never received a copy of either the Deed of Trust or the Promissory Note until May 2014. Also, he filed an affidavit stating that he never saw the Deed of Trust or the Promissory Note until 2014. And, as mentioned earlier, Mr. Nadel was not asked at his deposition whether he sent the December 12, 2006 letter. Under such circumstances, if Schaechter's affidavit and deposition were believed by a trier of fact, it could be inferred, legitimately, that he never received a copy of the letter that (purportedly) enclosed both of those documents.

Alternatively, appellees contend that the statute of limitations began to run on July 14, 2010, which was the date that Mr. Nadel sent an email to Schaechter. In this regard, appellees argue:

> [O]n July 14, 2010, Nadel emailed Schaechter in connection with his request that the Deed of Trust be filed in the land records for Washington D.C., as he had not received any payments on the outstanding loan balance. As set forth therein, Nadel expressly stated that: (1) "Per our discussions, you [Schaechter] have asked that we [Appellees] record the Deed of Trust for the referenced property on your behalf, and we are in the process of doing the same"; (2) "You have further asked that we correct the Note and Deed of Trust to show that this was actually to have been a five year loan, rather than 90 days. . ."; and (3) that you understand and agree that in essence, Steve [Madeoy] is truly only able to encumber his personal interest in the LLC **as to subject real property**, that is to say that he represents to me that he has only a 45% interest as a member of the LLC, and you can only look to that interest of Steve's **as to the property**, from which to collect your outstanding loan." Schaechter responded, stating that "I'm in agreement with all items"; thus it cannot be argued that he did not receive or read Nadel's email.

> Accordingly, as of July 19, 2010, Schaechter had actual knowledge that a Deed of Trust was being filed against the real property owned by 3501 LLC, that 3501 LLC was identified as the borrower in the loan documents (as evidenced by Schaechter's requested edits to the Promissory Note) and that despite any representations to the contrary, Madeoy only owned 45% of the LLC. Yet, despite this knowledge, and Schaechter's allegations in this lawsuit that Madeoy should have been identified as the borrower and that the loan should have been secured by Madeoy's membership interests in the LLC, as compared to the LLC's real property, Schaechter nonetheless failed to file suit within three years. Accordingly, the Circuit Court for Montgomery County . . . correctly determined that Schaechter's claims are barred, as a matter of law, by the statute of limitations, as he was on notice that he may have been harmed more than three years before the filing of the Complaint.

(References to record extract omitted.)

It is true, as appellees point out, that as of July 2010, Schaechter knew that a Deed of Trust was to be filed against the LLC's property. But that fact, standing alone, would not put Schaechter on notice that he had been harmed by Mr. Nadel's actions. We say this for two reasons. First, according to Schaechter's deposition, when the loan was made in 2006, he knew at that time that Madeoy only owned a 45% interest in the LLC and the original agreement between Schaechter and Madeoy was that Schaechter would be secured to the extent of Madeoy's interest in that LLC. If that deposition testimony was true, the email of July 2010 would not have put him on notice that he was getting anything less than that for which he had bargained. Second, Mr. Nadel's July 14, 2010 email advised Schaechter, in essence, that when the Deed of Trust was recorded, that Deed of Trust would only be able to encumber Madeoy's 45% "personal interest in the LLC" and Schaechter could "only look to the interest of . . . [Madeoy]" in that property. This, according to Schaechter, is exactly what he and Madeoy had agreed to in the first place. In other words,

if Mr. Nadel's representations were true, a reasonable person in Schaechter's position would not have known, as of July 2010, that any act, or failure to act, on Mr. Nadel's part, had caused him harm.

We turn next to appellees' contention that Schaechter knew in 2010, based on his "requested edits to the Promissory Note," that Mr. Nadel misidentified the borrower in the Promissory Note and in the Deed of Trust. The record does not provide enough information for a trier of fact to infer such knowledge. We say this because the record does not reveal how the edits to the Promissory Note came about. For instance, it is possible, especially in light of Schaechter's affidavit in which he swore that he never saw the documents until 2014, that Madeoy may have simply mentioned to Schaechter in 2010 that the Note was for only ninety days and the two then agreed that the time period should be changed. As the record now exists, it simply cannot be said, as a matter of law that Schaechter knew, or reasonably should have known, in July 2010, that the Promissory Note listed the LLC, and not Madeoy, as the borrower.[3]

[3] Even if Schaechter knew, in July 2010, that the Promissory Note stated that the LLC, not Madeoy, was the borrower, Schaechter would not necessarily have known, as of that date, that he had been harmed by Mr. Nadel's actions because it is undisputed that Madeoy also signed a document, prepared by Mr. Nadel, that guaranteed that Madeoy would pay the Promissory Note, if the LLC did not. Arguably, even if Schaechter had seen the Promissory Note in 2010, he, or a reasonable person in his position, might have concluded: (1) that even though the Promissory Note listed the wrong borrower, he was still protected based on the language in the guaranty; and (2) based on the implied assurance in Mr. Nadel's email that Schaechter's loan was protected to the extent of Mr. Madeoy's 45% interest in the LLC.

III.

THE CROSS-CLAIM FILED BY THE APPELLEES

As noted earlier, the appellees argue that in the event that the motion's judge erred in granting summary judgment on the basis that the claims were barred by the statute of limitations, the judgment should still be affirmed because the motion's judge erred in failing to grant summary judgment on several other grounds. In making this argument, appellees overlook the well-established rule that ordinarily an appellate court will not affirm the grant of summary judgment on any ground not relied upon by the trial court. In *Springer v. Erie Insurance*, 439 Md. 142, 156 (2014), Judge Lynne Battaglia, speaking for the Court, and quoting from *River Walk Apartments, LLC v. Twigg*, 396 Md. 527, 541-42 (2007) said:

> If no material facts are in dispute, we must determine whether summary judgment was correctly entered as a matter of law. *Standard Fire Ins. Co.* [*v. Berrett*], 395 Md. [439] at 450 [(2006)]; *Ross* [*v. State Bd. Of Elections*], 387 Md. [649] at 659 [(2005)]; *Todd* [*v. Mass Transit Admin.*], 373 Md. [149] at 155 [(2003)]; *Beyer* [*v. Morgan State Univ.*], 369 Md. [335] at 360 [(2002)]. On appeal from an order entering summary judgment, we review "only the grounds upon which the trial court relied in granting summary judgment." *Standard Fire*, 395 Md. at 450; *Ross*, 387 Md. at 659, quoting *Eid v. Duke*, 373 Md. 2, 10 (2003), quoting in turn *Lovelace v. Anderson*, 366 Md. 690, 695 (2001).

(Emphasis added, secondary citations omitted.)

The rule that an appellate court will not affirm the grant of summary judgment on any grounds not relied upon by the circuit court was very recently cited and applied by this Court in *Gilroy v. SVF Riva Annapolis LLC*, 234 Md. App. 104 (2017). In *Gilroy*, the decedent, Sean McLaughlin, was killed while working on a jobsite in Annapolis. *Id*. at

105. The defendants/appellees were granted summary judgment based on the twenty year statute of repose set forth in Md. Code Ann., § 5-108(a) of the Courts & Judicial Proceedings Article ("CJP"). *Id*. at 105-06. The appellants contended in the trial court and on appeal that an exception to the statute of repose, set forth in § 5-108(d)(2)(i), was applicable and therefore their claims were not barred by the statute of repose. This Court agreed with appellants and reversed the grant of summary judgment. *Id*. at 125. After holding that the statute of repose did not bar the appellants' claims, Judge Kehoe, speaking for this Court said:

> At the circuit court level, CEC [one of the defendant/appellees] raised two issues in addition to its statute of repose argument. The first was appellants' claim is barred by contributory negligence. The second was that the claim was time barred by Maryland's Wrongful Death Act, CJP § 3-904. Subsection (g)(1) of the statute requires most claims under the act to be "filed within three years of the death of the injured person" but by the time appellants filed their suit in the Circuit Court for Anne Arundel County after the federal court dismissed it, more than three years had passed since McLaughlin's death.
>
> We decline to address these issues at this time. This is because "'[o]n appeal from an order entering summary judgment, we review only the grounds upon which the trial court relied in granting summary judgment.'" *Springer v. Erie Ins. Exch.*, 439 Md. 142, 156 (2014) (quoting *River Walk Apartments, LLC v. Twigg*, 396 Md. 527, 541-42 (2007)) (internal citations and quotation marks omitted).
>
> Upon remand, the trial court should rule on the contentions raised by CEC.

Id. at 125-26 (emphasis added, secondary citations omitted).

For the same reason as the one stated in *Gilroy*, we too decline to address the four alternative grounds for summary judgment raised in this case by appellees. Upon remand,

the Circuit Court for Montgomery County should decide the validity, *vel non*, of those alternative grounds.[4]

[4] As can be seen, *Springer and Gilroy* appear to set forth an absolute rule that an appellate court should never affirm the grant of summary judgment on a ground not ruled upon by the circuit court. We note, however, that on very rare occasions, appellate courts in this state have affirmed the grant of summary judgment on grounds other than those relied upon by the motions judge. The very limited standard of review for a denial of summary judgment was set forth in *Dashiell v. Meeks*, 396 Md. 149, 164-65 (2006), viz.:

> "Ordinarily, no party is entitled to a summary judgment as a matter of law. It is within the discretion of the judge hearing the motion, if he finds no uncontroverted material facts, to grant summary judgment or to require a trial on the merits. It is not reversible error for him to deny the motion and require a trial." [Quoting *Foy v. Prudential Ins. Co. of America*, 316 Md. 418, 423-24 (1989)] As indicated, a trial court may even exercise its discretionary power to deny a motion for summary judgment when the moving party has met the technical requirements of summary judgment. Thus, on appeal, the standard of review for a denial of a motion for summary judgment is whether the trial judge abused his discretion and in the absence of such a showing, the decision of the trial judge will not be disturbed.

(Emphasis added, some citations omitted.)

We have found two cases where an appellate court in this state affirmed a grant of summary judgment on a ground not relied upon by the trial court. Those cases are *Dehn Motor Sales, LLC v. Schultz*, 212 Md. App. 374, 378-79 (2013) and *Diep v. Rivas*, 126 Md. App. 133, 145-46 (1999) reversed on other grounds, *Diep v Rivas*, 357 Md. 668 (2000). In *Dehn*, this Court, after affirming the circuit court's grant of summary judgment in favor of two police officers on three separate grounds (*id.* at 379), also affirmed on a ground rejected by the motions judge, i.e., that the officers were engaged, at all times pertinent, in a community caretaking function. *Id*. at 392. In *Diep*, a case involving a dispute as to which of the claimants were entitled to life insurance proceeds, we held as a matter of law, that the appellants were barred from recovery based on the Slayer's Rule, which precludes secondary beneficiaries (the siblings of a beneficiary who murdered his wife) from collecting on an insurance policy. The motions judge's grant of summary judgment was affirmed by this Court for a reason not relied upon by the circuit court. 126 Md. App at 145-46. In both *Dehn* and *Diep*, there was no dispute of facts and the cases were decided

(continued . . .)

JUDGMENT REVERSED; CASE REMANDED TO THE CIRCUIT COURT FOR MONTGOMERY COUNTY; COSTS TO BE PAID BY APPELLEES.

(. . . continued)
based solely on legal principles, i.e., the Slayer's Rule (*Diep*) and the constitutional principle that police officers cannot be sued for carrying out a valid inventory search of an automobile (*Dehn*). In other words, in those cases, we held the view that the motions court had no discretion but to grant summary judgment on the alternate grounds set forth by the movants.

In this case, the cross-appellants did not even argue that the motions judge did not have discretion to deny the motion for summary judgment on the four alternative grounds.