FILED BY CLERK
NOV 23 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CLAVOS BUILDING COMPANY, L.L.C., an Arizona limited liability company; and RANDEL JACOB,	)	2 CA-CV 2011-0037
	)	DEPARTMENT B
Plaintiffs/Appellants,	)	MEMORANDUM DECISION
	)	Not for Publication
v.	)	Rule 28, Rules of Civil Appellate Procedure
BEVERLY TONEY and GEORGE E. LEIN, wife and husband; FREDERICK C. SHAFFER and JAYNE SHAFFER, husband and wife; and FREDERICK C. SHAFFER, CPA, P.C.,	)	
Defendants/Appellees.	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20084614

Honorable Kenneth Lee, Judge

AFFIRMED

William G. Walker, P.C.
By William G. Walker — Tucson
Attorney for Plaintiffs/Appellants

Grasso Law Firm, P.C.
By Robert Grasso, Jr. and Kim S. Alvarado — Chandler
Attorneys for Defendants/Appellees

E S P I N O S A, Judge.

¶1 In this professional-negligence action, Clavos Building Company, L.L.C. (Clavos) and Randel Jacob appeal from the trial court's grant of summary judgment in favor of Beverly Toney, George Lein, Frederick Shaffer, Jayne Shaffer, and Frederick C. Shaffer, CPA, P.C. (collectively Shaffer). We affirm.

Factual Background and Procedural History

¶2 "[W]e view the evidence and all reasonable inferences in the light most favorable to the party against whom summary judgment was entered." *CDT, Inc. v. Addison, Roberts & Ludwig, C.P.A., P.C.*, 198 Ariz. 173, ¶ 2, 7 P.3d 979, 980 (App. 2000). In 2001, Randel Jacob and Brian Ewing formed Clavos, a limited liability company that built custom homes in the Tucson area. Jacob and Ewing were the only members and split ownership of the company equally. They agreed Ewing would be responsible for "the administrative, business, and day-to-day construction responsibilities of Clavos," while Jacob, a professional architect, would contribute his "technical construction expertise and the construction license for Clavos projects." In accordance with this division of responsibility, Ewing would review Clavos's bank statements and other financial documents without Jacob's participation. Clavos hired Shaffer to perform accounting services, including tracking company revenue, reconciling job costs and deposits, preparing checks for Clavos's subcontractors, and preparing Clavos's tax returns. Jacob had little contact with Shaffer while Ewing worked for Clavos.

¶3 Clavos maintained accounts at Chase Bank and Northern Trust Bank. Clavos's accounting records included transactions from the Chase account but did not

include transactions from the Northern Trust account, and the tax returns Shaffer prepared for Clavos reflect income and expenses that passed through the Chase account but not the Northern Trust account.

¶4 In December 2005, Ewing and Jacob executed a redemption agreement in which Jacob purchased Ewing's interest in the business. Although Ewing was represented by counsel during the transaction, Jacob did not retain an attorney; nor did he investigate Clavos's banking, tax, or other business records. Instead, Jacob relied entirely on Ewing's appraisal of the company's value, which Ewing made with some input from Shaffer. After the buyout, Ewing continued to perform administrative duties for Clavos until June 2006. In the summer of 2006, apparently after Ewing had left the business, some of Clavos's subcontractors complained to Jacob that they had not been paid. Between "late" July and October 2006, Jacob reviewed Clavos's records and formed the opinion "that Ewing had received a substantial amount of money from Clavos that he was not entitled to" in the form of unequal distributions from both the Chase and Northern Trust accounts.[1] Jacob and Clavos sued Ewing, and they ultimately settled.

¶5 Jacob and Clavos also sued Shaffer, alleging professional negligence, negligent supervision, and breach of fiduciary duty. Shaffer filed a motion for summary judgment, arguing the plaintiffs' claims failed as a matter of law because they were time-

[1]A February 2010 report generated by a consulting firm reported the discrepancy as follows: "[B]etween the Northern Trust off-book account and Clavos's operating bank account [*i.e.*, the Chase account,] Ewing received $905,036 more in disbursements than Jacob."

barred and because Jacob had unclean hands, "intentionally look[ing] the other way while [his] 50% partner . . . 'cook[ed] the books.'" Clavos and Jacob opposed Shaffer's motion and filed a cross-motion for summary judgment, which was later withdrawn.

¶6 The trial court granted Shaffer's motion for summary judgment, explaining, "It is undisputed that had . . . Jacob reviewed the financial statements and/or tax returns for . . . Clavos, he would have immediately discovered the claims he now makes." The court concluded, "[A]ny reasonable person in Plaintiff Jacob's position would have reviewed Plaintiff Clavos' financial statement[s] and tax returns prior to July[] 2006." We have jurisdiction over Clavos's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Discussion

¶7 The entry of summary judgment is appropriate "if the pleadings, deposition[s], answers to interrogatories, 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 a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). "In reviewing a motion for summary judgment, we determine de novo . . . whether the trial court properly applied the law." *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, ¶ 15, 165 P.3d 173, 177 (App. 2007).

¶8 Clavos and Jacob argue the trial court erred in determining as a matter of law that he reasonably should have known before July 2006 that Shaffer had breached its fiduciary duty. Relying on *Walk v. Ring*, 202 Ariz. 310, ¶ 23, 44 P.3d 990, 996 (2002),

and *Lawhon v. L.B.J. Inst. Supply, Inc.*, 159 Ariz. 179, 183, 765 P.2d 1003, 1007 (App. 1988), they contend "[t]he circumstances surrounding when a plaintiff should have discovered the malfeasance of a defendant are generally fact-intensive," and the issue of when their claims accrued in this case "should be a fact issue for the jury." This argument is predicated on the contention that Jacob did not discover the claims until October 2006 and "there was a plethora of operative facts from which [he] could have argued to a jury that it was 'reasonable' . . . not to discover claims" against Shaffer until that time.

¶9 Actions for negligent performance of professional services by an accountant and breach of fiduciary duty must be brought within two years of accrual. *See* A.R.S. § 12-542; *Sato v. Van Denburgh*, 123 Ariz. 225, 227, 599 P.2d 181, 183 (1979); *CDT, Inc.*, 198 Ariz. 173, ¶ 6, 7 P.3d at 981. A plaintiff's cause of action accrues when "'the plaintiff knows or with reasonable diligence should know the facts underlying the cause.'" *Id.* at ¶ 7, *quoting Doe v. Roe*, 191 Ariz. 313, ¶ 29, 955 P.2d 951, 960 (1998). "[A]ccrual requires only actual or constructive knowledge of the fact of damage, rather than of the total extent or calculated amount of damage." *Id.* ¶ 11. Thus, to overcome summary judgment, Jacob and Clavos had to adduce facts demonstrating compliance with the discovery rule, that is, that in the exercise of due diligence Jacob could not reasonably have known about his and Clavos's cause of action before July 8, 2006—two years before this lawsuit was filed.

¶10 Jacob maintains there was no reason he should have discovered the cause of action before October 2006 because "Ewing had all responsibility for administrative, business and day-to-day construction responsibilities of Clavos," Shaffer "exercised exclusive bookkeeping and financial reconciliation responsibilities for . . . Clavos" until October 2006, and Shaffer "communicated almost exclusively" with Ewing concerning financial matters until Jacob bought Ewing's share of the business. We find this argument unpersuasive for a number of reasons. Jacob purchased Ewing's interest in Clavos in December 2005, becoming the firm's sole member. In his affidavit opposing summary judgment, Jacob recognized the importance of member withdrawals from Clavos's accounts when valuing Ewing's interest in the company; nevertheless, he did not review Clavos's business records or financial statements before executing the redemption agreement. Moreover, as the sole owner after December 31, 2005, Jacob also signed Clavos's 2005 tax return, prepared in March 2006, and an amended return prepared in May 2006. Together, these facts establish that Jacob, in the exercise of reasonable diligence, could have and should have reviewed Clavos's financial records before July 2006, and it is undisputed that had he conducted such a review, he would have discovered his cause of action against Shaffer.[2]

¶11 Nor does the application of the statute of limitations here offend public policy. Unlike in *Walk*, for example, Shaffer is not in a "'far superior position to

[2]Indeed, it was by virtue of such a review that Jacob actually discovered his cause of action in October 2006.

comprehend the act and the injury'" giving rise to the cause of action. *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 589, 898 P.2d 964, 967 (1995), *quoting April Enters., Inc. v. KTTV*, 195 Cal. Rptr. 421, 436 (Ct. App. 1983); *see Walk*, 202 Ariz. 310, ¶ 4, 44 P.3d at 992. In his deposition, Jacob conceded he had no reason to believe Shaffer would have withheld information relating to Clavos's distributions from the Chase account, had he requested it. And Jacob's and Ewing's unequal draw amounts from that account were clearly recorded in Clavos's financial records and reported on Clavos's 2005 tax return, which Jacob signed. *See Teran v. Citicorp Person-to-Person Fin. Ctr.*, 146 Ariz. 370, 372, 706 P.2d 382, 384 (App. 1985) (signer of written document bound to know and assent to its provisions in absence of fraud, misrepresentation, or other wrongful act). Jacob does not dispute that he had access to these documents well before October 2006. *See* A.R.S. § 29-607 (limited liability company must make income tax returns and financial statements for previous three years available to members). Moreover, as noted above, Jacob was able to recognize his and Clavos's cause of action once he finally undertook to review the records.

¶12 As for the distributions from the Northern Trust account, Jacob was a signer on this account, and he was aware from the time of the account's creation that it belonged to Clavos.[3] He also was aware the Northern Trust statements had been sent to Ewing's home address rather than to Clavos's business address and the checks from this

[3]The Northern Trust account's signature card, which bears Jacob's signature, is dated November 12, 2002.

account were not prepared by Shaffer, as was the case with checks drawn on the Chase account, but were handwritten by Ewing. Although Jacob maintains that until October 2006 he believed Shaffer was tracking the Northern Trust account, it is undisputed that a review of Clavos's financial documents or tax returns would have alerted him that this was not the case, and he does not dispute that the Northern Trust records were available to him. *See Gust, Rosenfeld & Henderson*, 182 Ariz. at 590, 898 P.2d at 968 ("[T]he important inquiry in applying the discovery rule is whether the plaintiff's injury or the conduct causing the injury is difficult for plaintiff to detect.").

¶13 Finally, we reject Jacob and Clavos's contention that it was reasonable for Jacob not to review Clavos's financial documents because Shaffer owed Clavos a fiduciary duty. Relying primarily on *Lasley v. Helms*, 179 Ariz. 589, 880 P.2d 1135 (App. 1994), Jacob maintains, "A fiduciary defendant has a duty to disclose the existence of a claim and its failure to do so may constitute a reason for a lack of diligence by the plaintiff." In *Lasley*, this court found a jury question existed regarding whether the statute of limitations had been tolled where the plaintiff had become addicted to a sleeping medication after relying on his physician's repeated assertions "that taking the drug was perfectly safe." *Id.* at 590, 880 P.2d at 1136. *Lasley* is distinguishable, not only on its facts, but also because the plaintiff there "directly asked [the physician] if he was addicted or being harmed by the drug." *Id.* Here, Jacob admits he requested no information from Shaffer whatsoever concerning Clavos's accounts. Moreover, in *Lasley*, the physician "knew the truth about the possible harm done to [the plaintiff] by

prescribing the drug . . . [and] concealed this truth from [the plaintiff]." *Id.* at 592, 880 P.2d at 1138. By contrast, there is no evidence Shaffer sought to conceal anything from Jacob; rather, the record indicates Jacob simply declined to involve himself in Clavos's finances. Accordingly, we do not agree that the fiduciary relationship between Clavos and Shaffer, standing alone, supports a "relaxed application of the discovery rule."[4]

¶14 We conclude that Jacob, in the exercise of reasonable diligence, *see CDT, Inc.*, 198 Ariz. 173, ¶ 7, 7 P.3d at 982, should have reviewed Clavos's financial statements and tax returns sometime before July 2006, whether in preparation for the buyout, when signing Clavos's 2005 tax return, or pursuant to his responsibility for the business as its sole owner. Such a review would have revealed the causes of action, as it did when Jacob eventually conducted the review in October 2006. Accordingly, the trial court correctly determined that Clavos and Jacob's cause of action accrued before

[4]Additionally, as Shaffer points out, Clavos and Jacob's position is very different from that in *Woodbine Electric Service, Inc. v. McReynolds*, 837 S.W.2d 258 (Tex. App. 1992), which they rely on and in which the plaintiffs alleged the defendant accountants had concealed records and material facts. *Id.* at 260. And, because Clavos and Jacob do not assert claims of fraud, their reliance on *Gonzalez v. Gonzalez*, 181 Ariz. 32, 34, 887 P.2d 562, 564 (App. 1994), and *Richard Gill Co. v. Jackson's Landing Owners' Ass'n*, 758 S.W.2d 921, 924 (Tex. App. 1988), is also misplaced. Finally, Clavos and Jacob rely on *Russell v. Campbell*, 725 S.W.2d 739, 748 (Tex. App. 1987), in which the court held that the statute of limitations in accounting professional-negligence cases is tolled until the accountant-client relationship ends. But, in addition to the fact that this case is not binding authority, it is distinguishable. The court made clear that the statute of limitations was tolled because the plaintiffs' "failure to discover [the accountant]'s breach of his fiduciary duty was not due to lack of diligence on their part." *Id.* Here, by contrast, Jacob failed to request information relating to withdrawals from the Chase account or otherwise exercise reasonable diligence. Thus, *Russell* does not support the argument that the statute of limitations had been tolled in this case.

July 2006 as a matter of law because no fact-finder could reasonably conclude otherwise, and that the action was therefore time-barred.

Disposition

¶15 For the foregoing reasons, the trial court's grant of summary judgment is affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge