

STATE OF MICHIGAN
COURT OF APPEALS

MARY LOU UNDERWOOD and GLENN R.
UNDERWOOD,

UNPUBLISHED
December 7, 2010

Plaintiffs-Appellants,

v

STEPHEN C. ALBERY, Personal Representative
of the Estate of JOHN GLENN UNDERWOOD,
Deceased,

No. 292151
Oakland Probate Court
LC No. 2006-306917-CZ

Defendant-Appellee.

Before: BECKERING, P.J., and JANSEN and TALBOT, JJ.

PER CURIAM.

Plaintiffs, Mary Lou Underwood (Mary Lou) and Glenn Underwood (Glenn), appeal by right the probate court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7). We affirm.

As an initial matter, we note that the instant case is related to a prior case decided by Oakland Circuit Court Judge John J. McDonald, which was decided on appeal by this Court in *Carto v Underwood Property Mgt Co*, unpublished opinion per curiam of the Court of Appeals, issued June 12, 2008 (Docket No. 272747). *Carto* involved a lawsuit in which several of Glenn's siblings, including his sister Patricia Selent, sued him for mismanagement of the family partnership in which the decedent John Glenn Underwood was also a partner.¹

Plaintiffs first argue that the probate court's grant of summary disposition was premature because additional discovery was necessary. We disagree. We review a trial court's decision regarding discovery for an abuse of discretion. *VanVorous v Burmeister*, 262 Mich App 467, 476; 687 NW2d 132 (2004).

¹ Patricia Selent served as plenary guardian of the decedent John Glenn Underwood during the decedent's life.

A motion for summary disposition filed before the close of discovery is premature unless there is no fair likelihood that further discovery will yield support for the nonmoving party's position. *Liparoto Constr, Inc v General Shale Brick, Inc*, 284 Mich App 25, 33-34; 772 NW2d 801 (2009). However, "[i]f a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence.'" *Davis v Detroit*, 269 Mich App 376, 379-380; 711 NW2d 462 (2006), quoting *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994). "Mere conjecture does not entitle a party to discovery, because such discovery would be no more than a fishing expedition." *Davis*, 269 Mich App at 380.

As plaintiffs did before the probate court, they argue that there is an outstanding issue relating to the assets in the decedent's estate on which discovery has yet to be completed. Specifically, plaintiffs reference the need for additional discovery concerning how Selent used the funds in the decedent's estate as the decedent's guardian. However, the way in which the funds from the decedent's estate were appropriated is unrelated and irrelevant to whether plaintiffs are entitled to additional compensation for the care services they provided to the decedent. Further, plaintiffs fail to explain how further discovery will yield support for their position that their claims are not barred by res judicata and the statute of limitations. Thus, plaintiffs have failed to assert an evidentiary basis to support their claim that further discovery stands a fair chance of revealing the existence of additional support for their claim.

Next, plaintiffs argue that their claim is not barred by the statute of limitations contained in MCL 600.5807(8). We disagree. Under MCR 2.116(C)(7), a party may move for summary disposition on the ground that a claim is barred by the statute of limitations. We review de novo a trial court's decision on a motion for summary disposition. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). In reviewing a motion under subrule (C)(7), a court accepts as true the plaintiff's well-pleaded allegations of fact, construing them in the plaintiff's favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The court must consider affidavits, pleadings, depositions, admissions, and any other documentary evidence submitted by the parties to determine whether a genuine issue of material fact exists. *Id.* If no facts are in dispute, whether the claim is barred is a question of law. *Dewey v Tabor*, 226 Mich App 189, 192; 572 NW2d 715 (1997).

In its decision on defendant's motion for summary disposition, the probate court concluded that plaintiffs' claim was time-barred because the six-year statute of limitations had run. Specifically, the probate court found that plaintiffs had filed their complaint on October 18, 2006, but that the statute of limitations period had expired as of May 8, 2004, six years after plaintiffs had ceased caring for the decedent.

The limitations period for breach of contract actions is six years. MCL 600.5807(8). This six-year period commences when the claim accrues, and "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. Accrual occurs on the date of the breach, not the date the breach is discovered. *Michigan Millers Mut Ins Co v West Detroit Bldg Co, Inc*, 196 Mich App 367, 372 n 1; 494 NW2d 1 (1992).

Plaintiffs' complaint alleges one count of unjust enrichment. Although Mary Lou submitted an amended complaint that added a count for compensation under MCL 700.5315(1), the amended complaint was stricken pursuant to a court order granting plaintiffs' motion to strike. Thus, plaintiffs allege only that there was an implied contract and that the decedent's estate will be unjustly enriched if they are not compensated. As alleged in the complaint, Glenn's and Mary Lou's care for the decedent continued until May 7, 1998, when the decedent moved to a group home. Thus, plaintiffs claim regarding compensation for the decedent's care accrued on May 8, 1998, the date they ceased caring for the decedent.

The equitable theory of unjust enrichment is based on the theory that the law will imply a contract in order to prevent the unjust enrichment of another party. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). However, a contract to prevent unjust enrichment will be implied "only if there is no express contract covering the same subject matter." *Id.* When there is an express contract covering the same subject matter, summary disposition of the unjust enrichment claim is properly granted. *Id.* at 479. Plaintiffs argue that there was not an express agreement for their care of the decedent, despite the record evidence establishing the existence of an agreement with Selent that Glenn would be paid \$26 a day for the decedent's care. Because there appears to have been an express agreement, summary disposition of the unjust enrichment claim was properly granted. *Id.*

Moreover, even assuming *arguendo* that there was not an express contract, plaintiffs' claim of unjust enrichment was time-barred. A claim for unjust enrichment is the equitable counterpart of a legal claim for breach of contract. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 328; 657 NW2d 759 (2002). Our Supreme Court "has long recognized that statutes of limitation may apply by analogy to equitable claims." *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119, 127 n 9; 537 NW2d 596 (1995). "If legal limitations periods did not apply to analogous equitable suits, 'a plaintiff [could] dodge the bar set up by a limitations statute simply by resorting to an alternate form of relief provided by equity.'" *Id.*, quoting *Lothian v Detroit*, 414 Mich 160, 169; 324 NW2d 9 (1982).

In an instance where an equitable claim would provide relief that is analogous to the relief available under a similar legal claim, courts generally apply the legal claim's statute of limitations to the equitable claim as well. *Id.* We therefore conclude that the same six-year period of limitations applies to the unjust enrichment claim in this case. See *Huhtala v Travelers Ins Co*, 401 Mich 118, 125; 257 NW2d 640 (1977). Because plaintiffs did not file their claim by May 8, 2004, six years after their caregiver services ceased, their claim is time-barred by MCL 600.5807(8).

Plaintiffs also argue that the period of limitations was tolled by the allegedly wrongful actions of Selent, the decedent's guardian. Plaintiffs' claims regarding Selent's actions are the subject of a separate matter, which Glenn has appealed in Docket No. 291852. Further, as the probate court correctly noted, the alleged breaches of Selent's fiduciary duty as guardian have no relevance to plaintiffs' claim for compensation because plaintiffs presumably would be entitled to a set amount of compensation regardless of Selent's actions with regard to the decedent's estate. We cannot conclude that the period of limitations was tolled for the reasons asserted by plaintiffs.

Plaintiffs also argue that the probate court erred by granting summary disposition on the ground that their claim was barred by res judicata. In light of our holding that plaintiffs' claim was time-barred by the applicable period of limitations, we need not address this argument. At any rate, however, we conclude that the probate court did not err in this regard. The previous litigation in *Carto* was decided on the merits between the same parties or their privies, see *Viele v DCMA*, 167 Mich App 571, 580; 423 NW2d 270 (1988) (observing that a party in privity is someone "so identified in interest with another that he or she represents the same legal right"), and involved strikingly similar issues. Plaintiffs' instant claim—which arises out of the same transactional facts—could have, and should have, been litigated in that matter. The probate court correctly determined that the instant action was additionally barred by the doctrine of res judicata. *Adair v Michigan*, 470 Mich 105, 123-124; 680 NW2d 386 (2004); *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 212-213; 699 NW2d 707 (2005).

Lastly, plaintiffs argue that summary disposition was improperly granted under MCR 2.116(C)(7) because defendant failed to support his motion with sufficient documentary evidence. We disagree. In deciding a motion brought pursuant to subrule (C)(7), a court should consider all affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties. MCR 2.116(G)(5); *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000). If the pleadings or documentary evidence reveal no genuine issue of material fact, the court must decide as a matter of law whether the claim is barred. *Id.* A review of the record establishes that defendant properly supported his motion with documentary evidence. The facts establishing that plaintiffs' claim was barred are not in dispute, and even accepting as true the plaintiffs' allegations (including the allegation that there was not an express contract regarding the decedent's care), plaintiffs have failed to establish any genuine issue of material fact that would preclude dismissal of their claim under MCR 2.116(C)(7). Summary disposition was properly granted for defendant.

Affirmed. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ Jane M. Beckering

/s/ Kathleen Jansen

/s/ Michael J. Talbot