STATE OF MICHIGAN

COURT OF APPEALS

MORRIS ASSOCIATES, INC.,

Plaintiff-Appellee,

V

JOSEPH DISTEFANO and A. ROCHELLE DISTEFANO,

Defendants-Appellants,

and

CARL W. KNAACK, JR. and REASSURE AMERICA LIFE INSURANCE COMPANY,

Defendants.

UNPUBLISHED
June 5, 2012

No. 303043
Oakland Circuit Court
LC No. 2009-103784-CZ

Before: SERVITTO, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Joseph and A. Rochelle DiStefano appeal as of right the trial court's order denying their motion for summary disposition and its order granting summary disposition in plaintiff's favor. We affirm.

Defendant Carl W. Knaack, Jr. was the president and CEO of plaintiff, Morris Associates, Inc., ("Morris") for a number of years. He was also a majority shareholder in plaintiff and on the Board of Directors for the corporation. In 1986, plaintiff purchased an insurance policy through defendant Reassure America Life Insurance Company's predecessor on Knaack's life in the amount of $2 million dollars. Plaintiff was both the owner and beneficiary of the policy and paid the significant yearly premium on the policy. In 1988, unbeknownst to and without the permission of plaintiff, Knaack executed an assignment under the life insurance policy, pledging a $400,000.00 interest in the policy in favor of the DiStefano defendants to secure a personal loan from them. According to plaintiff, in the years that followed, Knaack fraudulently concealed the assignment from it.

In 1994, plaintiff began a several-year comprehensive buyout of Knaack from the corporation. Plaintiff contends that it remained unaware of the assignment until 2009, when it

attempted to borrow against the policy at issue. Plaintiff thereafter initiated the instant lawsuit, asserting that Knaack did not own, and thus did not have the authority to make a valid assignment of, any interest in the policy and that he fraudulently concealed the assignment from plaintiff. Plaintiff thus sought to have the assignment declared void. The parties filed counter-motions for summary disposition, with plaintiff asserting that there were no genuine issues of material fact such that it was entitled to judgment as a matter of law (MCR 2.116(C)(10)) and the DiStefano defendants (hereafter "defendants") asserting that plaintiff's claims were barred by the applicable statute of limitations (MCR 2.116(C)(7)). The trial court granted plaintiff's motion and denied defendants' motion. This appeal followed.

We review de novo a trial court's resolution of a motion for summary disposition. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim based on the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Id*. We view the evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). Summary disposition is proper pursuant to MCR 2.116(C)(7) when a claim is barred by the statute of limitations. *Terlecki v Stewart*, 278 Mich App 644, 649; 754 NW2d 899 (2008). When addressing a (C)(7) motion, the court must accept as true the allegations of the complaint unless contradicted by the parties' documentary submissions. *Id*.

This Court also reviews de novo the proper interpretation of statutes. *State Farm Fire & Casualty Co v Corby Energy Services, Inc*, 271 Mich App 480, 483; 722 NW2d 906 (2006). We review a trial court's decision whether to grant declaratory relief for an abuse of discretion. *Allstate Ins Co v Hayes*, 442 Mich 56, 74; 499 NW2d 743 (1993).

On appeal, defendants first assert that plaintiff's action was barred by the applicable statute of limitations. We disagree.

The primary purposes behind statutes of limitations are to encourage plaintiffs to diligently pursue claims and to protect defendants from having to defend against stale and fraudulent claims. *Wright v Rinaldo*, 279 Mich App 526, 533; 761 NW2d 114 (2008). Defendants assert that the limitations period applicable to the instant matter is found at MCL 600.5813, which provides, that "[a]ll other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes." According to defendants, because Knaack's assignment of an interest in the life insurance policy occurred in 1988, the limitations period expired in 1994. While plaintiff does not necessarily dispute that a six year period of limitations would generally govern its action, it accurately points out that a special period of limitation governs when, as occurred here, the existence of a cause of action is fraudulently concealed.

MCL 600.5855 provides:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the

> action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

In order for fraudulent concealment to toll the statute of limitations, the plaintiff must show that the defendant committed affirmative acts or misrepresentations that were designed to prevent subsequent discovery. *Doe v Roman Catholic Archbishop of the Archdiocese of Detroit*, 264 Mich App 632, 642; 692 NW2d 398 (2004). "Mere silence is insufficient." *Sills v Oakland Gen Hosp*, 220 Mich App 303, 310; 559 NW2d 348 (1996). However, as this Court explained in *Lumber Vill, Inc v Siegler*, 135 Mich App 685, 694-95; 355 NW2d 654, 658 (1984), "[a]n exception to this rule is that there is an affirmative duty to disclose where the parties are in a fiduciary relationship." See also, *Barrett v Breault*, 275 Mich 482, 491; 267 NW 544 (1936). Thus, no affirmative act of concealment is necessary on the part of the defendant where a fiduciary relationship is present—the failure to disclose where such affirmative duty exists serves as the concealment.

It is beyond dispute that in Michigan, directors and officers of corporations are fiduciaries who owe a strict duty of good faith to the corporation which they serve. *Prod Finishing Corp v Shields*, 158 Mich App 479, 486; 405 NW2d 171 (1987). Those duties include "to communicate to his principal facts relating to the business which ought in good faith be made known to the latter . . ." *Id*. And, "[a] corporate officer or director is under a fiduciary obligation not to divert a corporate business opportunity for his own personal gain." *Id*. at 485.

There is no question that Knaack, as director and officer of plaintiff, owed plaintiff a fiduciary duty. Under the terms of Knaack's 1994 buyout agreement, Knaack was no longer the CEO of plaintiff, but was to remain employed with plaintiff as its vice-president and as a director until December 31, 2005. Thus, Knaack had a strict fiduciary duty of good faith to plaintiff until at least until December 31, 2005.

There also appears to be no question that plaintiff purchased, owned, and paid the premiums on the $2 million life insurance policy at issue. In fact, on July 29, 1988, mere months after assigning the $400,000.00 interest in the policy to defendants, Knaack signed a stock redemption agreement agreeing that plaintiff was the *sole* owner of the policy and had the right to borrow against or otherwise encumber the policy. The agreement further provided that "any insurance which shall at any time be subject hereto shall be deemed to be for the benefit of the Corporation . . ." The policy was thus treated as a business asset. That being so, Knaack had a duty to disclose that he had encumbered and/or transferred interest in a business asset for his own personal use at the moment he did so. Despite his explicit acknowledgement that the specific policy at issue was for the benefit of the corporation, and his fiduciary duty to the corporation, Knaack did not advise of the $400,000.00 assignment he had made on the policy. Knaack's signing the agreement without disclosing the assignment could be construed as an intention to mislead plaintiff and the other directors/shareholders as to the status of the insurance policy. His failure to disclose where a fiduciary duty was clearly present constitutes fraudulent concealment.

Accepting that if, in fact, Knaack had a fiduciary duty to disclose the assignment, defendants assert that plaintiff's claim is nevertheless untimely under MCL 600.5855 because the claim must have been brought within two years of when Knaack no longer had a fiduciary

duty to plaintiff, i.e., when he was no longer employed with plaintiff. According to defendants, because Knaack's employment with plaintiff ended on December 31, 2005, its complaint must have been filed by December 31, 2007, making their September 14, 2009, complaint untimely. This Court is unsure how defendants arrived at such date, as MCL 600.5855 makes no mention of fiduciary duty for purposes of tolling. Fiduciary duty relates only to whether there must be an affirmative act for fraudulent concealment to be found. Instead, MCL 600.5855 provides that where one who is or may be liable for a claim fraudulently conceals the existence of a claim, "the action may be commenced at any time within 2 years after the person who is entitled to bring the action *discovers, or should have discovered,* the existence of the claim . . ."

The claim in this matter was an action to have an invalid assignment declared void. Plaintiff swore, in its complaint and through affidavits of its president and its controller that it did not discover the assignment until June of 2009, when it attempted to borrow against the value of the insurance policy, and the complaint was filed within a few months of plaintiff's discovery of the assignment. Defendants have provided no evidence to contradict plaintiff's allegation concerning their date of discovery. Defendants, however, claim that plaintiff *should* have discovered the existence of their claim years prior and that its own lack of due diligence prevented discovery, such that MCL 600.5855 cannot be used to toll the statute of limitations.

Defendants suggest that the deposition testimony of Zeno Windley supports their position that plaintiff should have discovered the assignment, as does the fact that plaintiffs engaged in a lengthy process of buying Knaack out of the corporation. Windley testified that he has been a director of plaintiff since 1983 and that from at least 1986 to 2008, plaintiff's accounting firm performed a comprehensive review of all of corporation's assets, including the life insurance policies plaintiff had taken out, so that plaintiff could generate financial statements. Windley further testified that the insurance companies were requested to mail the status of the policies and their cash surrender value directly to the accounting firm so that plaintiff could not manipulate the numbers in any way, and that plaintiff then received only an audited financial report, without supporting documentation, from the accounting firm. Windley testified that he was unaware of the exact information provided to the accounting firm and that neither he nor any of the other directors looked at the supporting documentation upon which the accounting firm relied to generate the corporation's audited financial statements. Windley also testified that while Knaack was CEO, he ran the meetings of the Board of Directors and reviewed the financial statements of the corporation. There is no testimony, or, as the trial judge pointed out, any evidence provided that the assignment did or would appear in the supporting documentation provided to the accounting firm. At oral argument on the summary disposition motion hearing when asked by the trial court if there was any evidence that if plaintiff had reviewed the supporting documentation supplied by the insurance company to the accounting firm, the assignment would have been revealed, defendants' counsel admitted, "We don't know the answer to that, your Honor." Moreover, the insurance policy at issue contained the following language with respect to assignments: "Policy may be assigned by the Owner as collateral . . ." Because plaintiff was the owner of the policy and has sworn through affidavits that it did not assign any right in the policy, it had no reason to expect that any assignment was in effect. Lacking any evidence whatsoever that had plaintiff done anything more, it should have and would have discovered the assignment, defendants' contention that MCL 600.5855 is inapplicable as a result of plaintiff's lack of due diligence fails.

Defendants also submit the meritless argument that MCL 600.5855 limits its applicability to situations where the fraudulent concealment takes place only before the cause of action is barred by the statute of limitations. Not only have defendants failed to provide any support for such an argument, we dismiss this argument for two additional reasons. First, as stated in *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 391; 738 NW2d 664 (2007), "MCL 600.5855 provides for essentially unlimited tolling based on discovery when a claim is fraudulently concealed." Our Supreme Court found it unnecessary to add the limiting language suggested by defendants, as do we. Second, the fraudulent concealment in this matter took place before *any* applicable statute of limitations expired. Knaack made the assignment of interest in May of 1988. As previously explained, he had a fiduciary duty at that very point in time to disclose the assignment to plaintiff and his failure to adhere to his fiduciary duty constituted fraudulent concealment. He further concealed the existence of the assignment and took actions intending to mislead plaintiff about the status of the insurance policy by signing a document mere months after the assignment was made that acknowledged that plaintiff was the owner of the insurance policy at issue and that the insurance was for the benefit of plaintiff. Assigning an interest in the policy to a third party to secure a personal loan without plaintiff's knowledge and failing to disclose the same to policy was clearly inconsistent with his acknowledgment that the policy was for the benefit of plaintiff.

In summary, because Knaack had a fiduciary duty to disclose the assignment to plaintiff and failed to do so, he fraudulently concealed the existence of plaintiff's claim to have the assignment declared void. Plaintiff presented uncontroverted evidence that it did not discover the assignment until June of 2009 and defendants have provided no evidence that plaintiff should have discovered the assignment at an earlier date. Plaintiff filed its complaint in September 2009, well within the two year period of discovery set forth in MCL 600.5855. Because Plaintiff's action was timely under MCL 600.5855, the trial court did not err in denying defendants' motion brought pursuant to MCR 2.116(C)(7).

Defendants next assert that the trial court erred in granting summary disposition in plaintiff's favor based upon MCR 2.116(C)(10) because equity requires finding the assignment of interest in the insurance policy to be valid. We disagree.

Defendants first rely on the doctrine of laches to bar plaintiff's claim. Laches is an affirmative defense primarily based on circumstances that render it inequitable to grant relief to a dilatory plaintiff. *Yankee Springs Twp v Fox*, 264 Mich App 604, 611; 692 NW2d 728 (2004). Laches applies when there has been both an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party. *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 252; 704 NW2d 117 (2005). For laches to apply, the defendant must prove a lack of due diligence on the part of the plaintiff. *Gallagher v Keefe*, 232 Mich App 363, 369–370; 591 NW2d 297 (1998).

As previously indicated, plaintiff did not discover the assignment until June 2009 and a lack of due diligence was not what prevented it from discovering the assignment at an earlier date. Once discovered, plaintiff initiated this action within a few short months. Thus, defendants have not established the basic elements of laches. Moreover, while defendants argue that they will be prejudiced if the assignment is declared invalid, to support a defense of laches, defendants are required to show harm arising from plaintiff's *delay* in pursuing their claim of

voiding the assignment, and not merely harm arising from voiding the assignment itself. Defendants have made no such showing.

Defendants next claim that the assignment should stand because Knaack had the apparent authority to make the assignment. We disagree.

"Under fundamental agency law, a principal is bound by an agent's actions within the agent's actual or apparent authority." *James v Alberts*, 464 Mich 12, 15; 626 NW2d 158 (2001). "Apparent authority arises where the acts and appearances lead a third person reasonably to believe that an agency relationship exists. However, apparent authority must be traceable to the principal and cannot be established only by the acts and conduct of the agent." *Alar v Mercy Mem Hosp*, 208 Mich App 518, 528; 529 NW2d 318 (1995); see also, *VanStelle v Macaskill*, 255 Mich App 1, 10; 662 NW2d 41 (2003). In determining whether an agent possesses apparent authority to perform a particular act, the court must look to all surrounding facts and circumstances. *Meretta v Peach*, 195 Mich App 695, 699; 491 NW2d 278 (1992).

Here, defendants have identified no acts or conduct of the principal (plaintiff) to support a claim of apparent authority. Defendant Joseph DiStefano swore in an affidavit that in 1988 he made a personal loan to Knaack and that security for repayment of the loan was given to him in the form of the $400,000.00 assignment against the life insurance policy at issue. DiStefano further swore that at the time of the assignment he believed Knaack had the full power and authority to make the assignment, based upon Knaack's representations. In an affidavit submitted to this Court (but not submitted in support of the summary disposition motions and sworn to long after the trial court's decisions and orders) Knaack agreed that the loan obtained from DiStefano was a personal loan and implied that the assignment was made to secure the personal loan. Thus, all parties to the assignment were well aware that the business at hand was personal, not corporate business, and was intended to address personal rather than corporate indebtedness. Defendants were well aware that they were dealing with Knaack on a personal basis, not as a representative of plaintiff and have offered no evidence that they spoke to or even knew anyone at plaintiff other than Knaack. It was also apparent that Knaack was using a corporate asset to secure what both recognized as a personal debt, given that the signature on the bottom of the assignment bears the designation: "Morris Associates, Inc. By: Carl W. Knaack." Defendants' suggestion that they believed Knaack had the apparent authority to bind plaintiff to secure or pay a personal debt owed by Knaack is thus without merit. The trial court did not err in granting summary disposition in plaintiff's favor.

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Karen Fort Hood