STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: JANUARY 26, 2012)

DAVID FRIEDMAN; R. JEFFREY KNISLEY, in his capacity as Executor of the Estate of LEON H. CORNELL, JR.; EUSTACE T. PLIAKAS; PETER VICAN; THEONA PASCALIDES; WILLIAM P. VICAN, JR.; CONSTANTINE S. GEORAS; NICHOLAS GOLUSES, JR.; DENA PATEL; GLENN A. CAPALBO; DAVID BOLTON; and the AUDUBON SOCIETY OF RHODE ISLAND	:	
v.	:	**C.A. No. PB 05-1193**
KELLY & PICERNE, INC.	:	

DECISION

SILVERSTEIN, J. Before this Court is Defendant Kelly & Picerne, Inc.'s (K&P or General Partner) Motion to Vacate, in Part, the Court's December 6, 2010 and January 28, 2011 Decisions and this Court's Order Dated January 28, 2011 (collectively, Decisions), pursuant to Super. R. Civ. P. 60(b). K&P requests this Court vacate portions of its Decisions, which found K&P had breached its fiduciary duties and which awarded damages to the Plaintiffs[1] (Plaintiffs or Limited Partners), on the basis that this Court reserved ruling on a statute of limitations defense that may bar Plaintiffs' claims, in whole or in part.

[1] Plaintiffs are David Freeman; R. Jeffrey Knisley, in his capacity as Executor of the Estate of Leon H. Cornell, Jr.; Peter Vican; Theona Pascalides; William P. Vican, Jr.; Constantine S. Georas; Nicholas Goluses, Jr.; Dena Patel; Glenn A. Capalbo; David Bolton; the Audubon Society of Rhode Island; and Eustace T. Pliakas. Mr. Pliakas was added as a plaintiff in the Third Amended Complaint, filed April 4, 2008.

I

Facts and Travel

This case has been pending before the Court since the filing of the original Complaint on March 10, 2005. The Court's December 6, 2010 Decision sets forth in significant detail the facts underlying the Plaintiffs' claims. See Friedman v. Kelly & Picerne, Inc., No. PB 05-1193, 2010 WL 5042896 (R.I. Super. Dec. 6, 2010). In summary, this Court ruled in its Decisions that K&P, as general partner of Quaker Towers Associates (the Partnership), breached its fiduciary duty of loyalty to the Plaintiffs, the limited partners of the Partnership, in failing to fully disclose the sale of a mortgage note secured by Partnership property (the Recoll transaction), thus favoring Picerne Investment Corporation (PIC), K&P's corporate parent, and preventing the Partnership and Limited Partners from competing for the business opportunity. See id.; see also Friedman v. Kelly & Picerne, Inc., No. PB 05-1193, 2011 WL 343199 (R.I. Super. Jan. 28, 2011). Only the facts pertinent to the Court's decision on the instant Motion are presented below.

The Limited Partners filed their original Complaint March 10, 2005, asserting claims for equitable accounting and declaratory judgment and alleging breach of contract and breach of fiduciary duty. (Compl.) Particularly, with regard to Plaintiffs' allegations of breach of fiduciary duty, they allege in the original Complaint that:

> "Defendant has breached its fiduciary duties to Plaintiffs by, inter alia, failing and refusing to pay the agreed distributions for available net income and failing and refusing to pay distributions for the net proceeds of mortgage refinancing transactions." (Compl. ¶ 47.)

Plaintiffs also set forth that:

> "According to the Audited Statements, Defendant, as general partner, sold or refinanced the mortgage(s) on other occasions that are not reflected in the land evidence records. For example, according to the Audited Statements, there was at least one second

> mortgage that was taken on the property that was then sold to 'an affiliate of the general partner' in September 1995." (Compl. ¶ 27.)

Plaintiffs aver that this was the extent of their knowledge regarding mortgage transactions at the time. (Pls.' Opp'n to Def.'s Mot. to Vacate (Pls.' Opp'n) 4.)

The original Complaint included only David Friedman, Leon H. Cornell, Jr., Peter Vican, Theona Pascalides, and William P. Vican, Jr. as Plaintiffs. On August 30, 2006, Plaintiffs filed their First Amended Complaint. The Amended Complaint added all of the current Plaintiffs, with the exception of Eustace T. Pliakas. (Am. Compl.) The Amended Complaint also added new facts and information, while maintaining allegations regarding the September 1995 transaction with the affiliate of the General Partner. (Am. Compl. ¶ 33.) Plaintiffs filed a Second Amended Complaint May 9, 2007. (Second Am. Compl.) It added claims for waste and mismanagement, and still included mention of the mortgage transactions and claims of breach of fiduciary duty. (Second Am. Compl. ¶¶ 37, 59.)

Documents evidencing the Partnership's refinancing and mortgage transactions, including the Recoll transaction in September 1995, were not available to the Limited Partners until they were provided during discovery in this litigation. (Pls.' Opp'n 5.) Prior to discovery, the only information available to the Limited Partners regarding the Recoll transaction came in the form of two notes contained in the Partnership's audited financial statements. Friedman, 2010 WL 5042896 at n.20, 21. Specifically, the audited statement dated February 26, 1995 noted that "an affiliate of the general partner is currently negotiating the purchase of the second mortgage note from the lender." (Financial Statement, Feb. 26, 1995, Note 3.) The Non-Recourse Assignment Agreement for the Recoll transaction was recorded with the West Warwick Town Clerk on September 22, 1995. (Book 611, Pages 245-50.) A subsequent audited

statement dated February 29, 2006 noted that "[a]n affiliate of the general partner purchased the second mortgage note from the lender in September, 1995." (Financial Statement, Feb. 29, 2006, Note 3.) K&P, the general partner of the Partnership, did not disclose any other information regarding the transaction to the Limited Partners. Friedman, 2010 WL 5042896 at n.20.

The Limited Partners did not learn the details of the Recoll transaction until K&P's February 5, 2008 answers to interrogatories. (Pl's Opp'n 6.) The following month, Plaintiffs moved to amend their Complaint for the third time. (Third Am. Compl.)

The Third Amended Complaint added Plaintiff Eustace T. Pliakas. Id. Further, it set forth much more precisely the Limited Partners' claims regarding breach of fiduciary duties surrounding the Recoll transaction. See id. at ¶¶ 38, 63. The Third Amended Complaint states, in pertinent part:

> "Defendant never disclosed to Plaintiffs that this second mortgage in the amount of $1,070,000 was sold to [PIC], the affiliate, for the discounted price of $550,000. After the sale and assignment of the second mortgage, the Defendant continued to carry the second mortgage debt on [the Partnership's] books at the full value of $1,070,000. [The Partnership] continued paying interest on the full amount of the debt, accruing a part of the interest, until [the Partnership] paid the outstanding balance of $1,070,000 plus accrued interest to PIC out of the proceeds for a refinancing transaction in 2002. This self-dealing allowed the Defendant to gain for itself a secret profit at the expense of Plaintiffs, to artificially increase [the Partnership's] interest expenses, and to artificially depress or conceal refinancing proceeds and available net income that should have been distributed to the Plaintiffs." (Third Am. Compl. ¶ 38.)

Accordingly, Plaintiffs claimed:

> "Defendant has breached its fiduciary duties of loyalty and good faith by, inter alia, engaging in self-dealing and obtaining a secret profit through PIC's purchase of the second mortgage for the discounted price of $550,000 and [the Partnership's] continued payment of interest to PIC and eventual payment of the principal based on the debt's full value of $1,070,000. Defendant did not

> disclose the discounted price or other material details for the sale and assignment of the debt, nor did Defendant allow [the Partnership] or the limited partners the opportunity to participate or share in the opportunity." (Third Am. Compl. ¶ 63.)

This Court allowed Plaintiffs' amendment under Super. R. Civ. P. 15 on March 28, 2008, but reserved ruling on the statute of limitations defense raised in K&P's objection. Order, Mar. 28, 2008, ¶¶ 4-5 (providing order "without prejudice to any defense that defendant might raise" and stating "Court specifically reserves any ruling on the question of whether the claims of Eustice [sic] T. Pliakas or any of the new allegations relate back"). The Third Amended Complaint was filed April 4, 2008.

From April 2008 to November 2011, this matter proceeded without any mention by K&P of its statute of limitations defense. K&P moved for summary judgment in September 2008 without raising the statute of limitations argument. (Pls. Opp'n 7.) A four-week bench trial was held in February and March of 2009. K&P did not raise the statute of limitations defense in any of its pre-trial motions or during that trial. Id. at 8. K&P submitted a ninety-three page post-trial brief in July 2009 and a nineteen page reply in August 2009, neither of which mentioned any statute of limitations claim. Id. After this Court's Decision in December 2010, K&P moved for reconsideration, again without any discussion of a statute of limitations defense. Id.

After this Court's second Decision in January 2011, numerous briefs were submitted and multiple oral arguments were heard relating to the ordered accountings, and the Court held a two-day evidentiary hearing on the calculation of damages before issuing another Decision on September 15, 2011. During that eight-month period, K&P still did not argue any statute of limitations defense. Id. at 8-9. After that decision, an issue of prejudgment interest arose, and parties submitted memoranda in October 2011. Id. at 9. K&P still did not make a statute of

limitations argument. Id. K&P requested the opportunity to reply on the prejudgment interest issue, and reply and response briefs were submitted in November 2011.

Then, in November 2011, K&P resurrected its statute of limitations argument. Forty-three months after the Third Amended Complaint was filed, thirty-two months after the bench trial in this case, and nearly twelve months after the first Decision K&P seeks to vacate, K&P filed this Motion on November 15, 2011 to partially vacate the Decisions on statute of limitations grounds.

II

Standard of Review

"[A] motion to vacate a judgment is left to the sound discretion of the trial justice." Ryan v. Roman Catholic Bishop of Providence, 941 A.2d 174, 187 (R.I. 2008) (citing Greenfield Hill Invs., LLC v. Miller, 934 A.2d 223, 224 (R.I. 2007)); see Brown v. Amaral, 460 A.2d 7, 11 (R.I. 1983 (acknowledging Superior Court's "broad power to vacate judgments whenever that action is appropriate to accomplish justice"); see also Chase v. Almardon Mills, Inc., 102 R.I. 579, 580, 232 A.2d 390, 391 (1967) ("courts have an inherent power to . . . vacate their judgments"). However, "judgments, once entered, are not to be disturbed without substantial reason." Chase, 102 R.I. at 581, 232 A.2d at 391-92.

Under Superior Court Rules of Civil Procedure 60(b), "[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for . . . (6) any other reason justifying relief from the operation of the judgment." Rule 60(b)(6) vests this Court with its power to vacate a decision when appropriate to effectuate justice. See Brown, 460 A.2d at 11; Bendix Corp. v. Norberg, 122 R.I. 155, 158, 404 A.2d 505, 506 (1979). However, Rule 60(b)(6) "is not intended to constitute a catchall," and the "circumstances must

be extraordinary to justify relief." Bendix Corp., 122 R.I. at 158, 404 A.2d at 506 (citations omitted). Courts grant a 60(b)(6) motion only if there is "a uniqueness that puts the case outside of the normal and usual circumstances . . . ." Greco v. Safeco Ins. Co. of Am., 107 R.I. 195, 198, 266 A.2d 50, 52 (1970).

Further, a motion to vacate "shall be made within a reasonable time," and in some instances, must be made within one year of the judgment. Super R. Civ. P. 60(b); see Waldeck v. Domenic Lombardi Realty, Inc., 425 A.2d 81, 83 (R.I. 1981) (stating "one-year period represents the extreme limit of reasonableness" and "undue delay may bar relief, even if the motion is made before the one-year period has expired") (citing Murphy v. Bocchio, 114 R.I. 679, 685, 338 A.2d 519, 523-24 (1975)). A trial justice may vacate a decision, at his or her discretion, to accomplish justice in the eyes of the court. See Super. R. Civ. P. 60(b)(6); Brown, 460 A.2d at 11. But, the burden is on the moving party to show the motion to vacate is justified by legally sufficient grounds. McBurney v. Roszkowski, 875 A.2d 438, 439 (R.I. 2005); Iddings v. McBurney, 657 A.2d 550, 553 (R.I. 1995).

III

Discussion

K&P requests this Court vacate portions of its Decisions that found K&P breached its fiduciary duties to the Limited Partners in relation to the Recoll transaction and that pertain to the claims of Mr. Pliakas. (Def.'s Mem. of Law in Supp. of its Mot. to Vacate in Part (Def.'s Mem.) 1.) K&P argues that this Court reserved ruling on the statute of limitations issue, and the Court should now hold that the statute of limitations bars the Recoll transaction claims and the claims of Mr. Pliakas. Id. The Limited Partners, however, contend first that K&P's Motion should be denied based on both the law of Rule 60(b) and on equitable considerations. The Limited

Partners also maintain that the claims at issue are timely and are not barred by the statute of limitations.

A

Vacatur at Court's Discretion

Vacatur is at the discretion of the trial judge. See Ryan, 941 A.2d at 187. While litigants may attempt to persuade a judge to reconsider his or her decision through the so-called catchall—which is not intended to be a catchall—provision of Rule 60(b), the moving litigant has the burden of demonstrating extraordinary circumstances that justify relief to effectuate justice. See Brown, 460 A.2d at 11 (providing power to vacate to effectuate justice but emphasizing circumstances must be extraordinary). Specifically, "courts have refused to grant relief under Rule 60(b) when a party or his counsel, after trial, discovers applicable law that he did not perceive or raise at trial." Brown, 460 A.2d at 11 (quoting Bendix Corp., 122 R.I. at 158-59, 404 A.2d at 506) (emphasis added); see Jackson v. Medical Coaches, 734 A.2d 502, 505 (R.I. 1999) (holding "Rule 60(b) does not constitute a vehicle for the motion justice to reconsider the previous judgments in light of later-discovered legal authority that could have and should have been presented to the court before the original judgments entered"); see also Wilkinson v. State Crime Lab. Comm'n, 788 A.2d 1129, 1131 n.1 (R.I. 2002) (noting no meaningful discussion or legal briefing on issue constitutes a waiver of legal argument). A motion to vacate is not intended to permit counsel a second opportunity to present legal arguments he or she failed to raise or should have raised at trial. See Bendix Corp., 122 R.I. at 159, 404 A.2d at 507 (affirming Rule 60(b) "does not provide an avenue for relief from judgment where the only justification for that relief is the litigant's failure to argue a legal theory or to interpose an arguably applicable defense").

Moreover, a motion to vacate must be brought within a reasonable time. Super. R. Civ. P. 60(b). Undue delay, as interpreted by the court, may bar vacatur, and in some instances, motions to vacate must be brought within one year after the judgment, order, or proceeding it seeks to vacate. Id.; see Tierney v. Conley, 590 A.2d 865, 866 (R.I. 1991) ("if the facts suggest undue delay, a court may bar relief even though the motion is made before the one-year period has expired"); Waldeck, 425 A.2d at 83. A motion to vacate will not be granted after a reasonable period of time has passed.

In the case at bar, K&P is reasserting its statute of limitations defense almost forty-four months after this Court reserved judgment on the issue. See Order, Mar. 28, 2008, ¶¶ 4-5. Significantly, K&P failed to mention the statute of limitations on summary judgment, during the lengthy trial, in any of their trial motions, at any of the post-trial evidentiary hearings, or in any other manner at all until the present Motion. This Motion is brought roughly one year after the Court's first Decision. See Friedman, 2010 WL 5042896. Without doubt, this Court has expended significant judicial resources on this case. It is now just shy of seven years since Plaintiffs[2] first brought their breach of fiduciary duty claim, and Plaintiffs have dedicated much time and effort to the litigation, even since the December 2010 Decision. In the eyes of the Court, bringing this Motion now, almost a year after this Court's first decision, constitutes undue delay in arguing the statute of limitations issue. See Waldeck, 425 A.2d at 83 (holding undue delay may prevent court from granting vacatur).

It behooves this Court not to disturb its Decisions without substantial reason or extraordinary circumstance. See Chase, 102 R.I. at 581, 232 A.2d at 391-92 (stressing

[2] That only one of the original, named Limited Partners in this case has survived the duration of these ongoing proceedings and remains living today underscores the significant passage of time in this matter.

importance of not disturbing judgments). Although K&P may have properly raised its statute of limitations argument at the time of the Plaintiffs' motion to file a third amended complaint, K&P neglected to raise that issue again until now. Cf. Catelli v. Fleetwood, 842 A.2d 1078, 1081 (R.I. 2004) (failing to raise affirmative defense results in its waiver). This Court cannot be expected to argue a defendant's case for it, nor can this Court grant a motion to vacate based on allowing K&P another opportunity to raise a legal argument it overlooked and did not press at the time of trial. See Brown, 460 A.2d at 11; Jackson, 734 A.2d at 505 (explaining Rule 60(b) not a vehicle for reconsideration on basis of legal argument that should have been argued before decision issued). Presumably, a reservation of ruling on an issue never again raised by the party until well after the decision is not the type of extraordinary circumstance contemplated by the judiciary to justify vacating a decision. See Bendix Corp., 122 R.I. at 158, 404 A.2d at 506 (requiring extraordinary circumstances justifying relief).

B

Statute of Limitations Defense on the Merits

Though the Court may deny a motion to vacate at its discretion in the interests of justice, and though the Court is convinced that there are no extraordinary circumstances justifying this motion to vacate, the Court will address, en arguendo, K&P's statute of limitations defense on the merits. The parties present a number of arguments why the statute of limitations does or does not bar this Court's award of damages for K&P's breach of fiduciary duties to the Partnership's Limited Partners. First, K&P argues that a three-year statute of limitations applies to breach of fiduciary duty claims, while the Limited Partners argue that the statute of limitations is ten years. Additionally, the Limited Partners argue that the concept of equitable tolling or the discovery rule tolled the statute of limitations. Alternatively, the Limited Partners contend the Recoll

transaction claim relates back to the original Complaint, which was brought within the ten-year statute of limitations the Limited Partners claim applies.[3] Finally, K&P presents that even under a ten-year statutory period, Mr. Pliakas was added after time expired, but the Limited Partners argue Mr. Pliakas should at least be permitted to recover on claims other than the Recoll transaction, and any late entry of Mr. Pliakas should not affect the amount of recovery awarded for the breach of fiduciary duty. This Court will address each of the statute of limitations issues in seriatim.

1

Applicable Statute of Limitations

Before reaching any discussion of the equitable tolling or relation back arguments, this Court must establish the length of the statute of limitations period, as provided by Rhode Island law, that applies to the breach of fiduciary duty claims asserted in the case at bar. Additionally, it is necessary for this Court to discuss when the statutory period commenced, unless altered by equitable tolling or relation back.

a

Statute of Limitations Period

K&P claims that breach of fiduciary duty claims are governed by the three-year statute of limitations set forth in G.L. 1956 § 9-1-14(b). Plaintiffs, however, argue that the statute of limitations is ten years, as provided by § 9-1-13(a).

[3] This is assuming the cause of action accrued at the time of the Recoll transaction in September 1995 and not previously in February 1995, when it was first briefly disclosed in a note in a financial statement that an affiliate of the General Partner was negotiating the mortgage note purchase. See supra part I (providing facts and travel); infra part III(B)(1)(b) (discussing accrual).

Rhode Island courts have applied a ten-year statute of limitations to breach of fiduciary duty actions. See Levin v. Kilborn, 756 A.2d 169, 173-74 (R.I. 2000); see also Greene v. Rhode Island, 289 F. Supp. 2d 5, 12 (D. R.I. 2003) (citing Levin for holding breach of fiduciary duty claims subject to ten-year statute). Section 9-1-13(a) states: "Except as otherwise provided, all civil actions shall be commenced within ten (10) years next after cause of action shall accrue, and not after." This statute of limitations applies to common law claims of breach of fiduciary duty as well as to other contractual and fiduciary claims. See Church v. McBurney, 513 A.2d 22, 24-26 (R.I. 1986) (applying ten-year statute of limitations to legal malpractice claim because action inhered by reason of contractual relationship).

K&P's contention that the three-year statute of limitations applies is misguided. Section 9-1-14(b) provides that "[a]ction for injuries to the person shall be commenced and sued within three (3) years next after the cause of action shall accrue . . . ." Injuries to the person, as defined by case law, includes "actions involving injuries that are other than physical," such as "injuries resulting from invasions of rights that inhere in man as a rational being" and "rights to which one is entitled by reason of being a person in the eyes of the law." Commerce Oil Refining Corp. v. Miner, 98 R.I. 14, 20, 199 A.2d 606, 610 (1964). However, injuries to the person "are to be distinguished from those which accrue to an individual by reason of some peculiar status or by virtue of an interest created by contract or property." Id. at 20-21, 199 A.2d at 610.

While it is true that some cases have applied the three-year, personal injury statute of limitations to breach of fiduciary duty claims, those cases have been squarely grounded on injuries to the person rather than on disputes of contract. See, e.g., Roe v. Gelineau, 794 A.2d 476, (R.I. 2002) (considering breach of fiduciary duty claim alongside personal injury claims under three-year statute in clergy sexual abuse case); Martin v. Howard, 784 A.2d 291, 302 (R.I.

2001) (applying three-year statute "when only injuries alleged are those to plaintiff's person" despite violation of fiduciary duty claim also asserted in clergy sexual abuse case). In Martin, the Rhode Island Supreme Court explained that where the injuries claimed as the result of unwelcome sexual conduct were emotional distress, anxiety, depression, and the like, the contract and the breach of duty claims relating to the contract were "wholly derived from and depended upon the prior existence of the personal-injury claims themselves" and "generated no new or different injuries." Martin, 784 A.2d at 302. Accordingly, in those circumstances where contract claims derive from or depend on the personal injury claims, the three-year statute of limitations applies even to the contract-based claims. See id.

The question becomes whether the injury accrues from a relationship that is contractual in nature or inheres simply by reason of being a person under law. See Church, 513 A.2d at 24. Breach of fiduciary duty and similar claims arising from a contractual relationship are not injuries to the person, except where the claims are more dependent on a personal injury and are ostensibly an action in tort. See id. at 24-25; Commerce Oil Refining Corp., 98 R.I. at 20, 199 A.2d at 610 (distinguishing actions that accrue by interest created in contract from injuries to person). But see Martin, 784 A.2d at (holding breach of fiduciary duty an injury to the person when contract derived from and depended on sexual abuse personal injury claims). Most often, breach of fiduciary duty and other claims arising from contractual relationships fall under the ten-year statute of limitation in § 9-1-13(a). See Levin, 756 A.2d at 173-74; see also Rusch Factors, Inc. v. Levin, 284 F. Supp. 85, 88 (D. R.I. 1968) (holding pecuniary loss resulting from misrepresentation not an injury to person for statute of limitations purposes).

Therefore, the Limited Partners' claims here are subject to the ten-year statute of limitations. Plaintiffs are claiming monetary damages for breach of duties created by their

partnership arrangement, exactly the kind of peculiar status or interest created by contract mentioned in Commerce Oil. See 98 R.I. at 20-21, 199 A.2d at 610. Unlike the cases limiting breach of fiduciary duty to a three-year statute for sexual abuse or similar injuries to the person, here Plaintiffs' losses are pecuniary and based on their special contractual status as partners with K&P. Compare Martin, 784 A.2d at 302 (applying three-year statute where contract claims generate no new or different injuries from personal injuries caused by sexual abuse), with Rusch Factors, 284 F. Supp. at 88 (determining pecuniary loss based on fraud or misrepresentation not a personal injury). K&P's statute of limitations claims will be judged under the ten-year limit set forth in § 9-1-13(a).

b

Statute of Limitations Accrual Date

With a ten-year statute of limitations—and not considering equitable tolling or relation back to extend the period—Plaintiffs' claims may still fall outside the statutory period. The Recoll transaction occurred in September 1995. The original Complaint was brought in March 2005 (within ten years of the date of the Recoll transaction), but the Third Amended Complaint was not filed until April 4, 2008. Accordingly, even with a ten-year period, it is necessary that the claims in the Third Amended Complaint relate back to the original Complaint (assuming it was filed within the statutory period) or that the statute of limitations tolled and did not begin running until some later date.

K&P has argued that the statute of limitations accrued in February 1995, when it was first disclosed in a financial statement note that an affiliate of K&P was negotiating for the sale of the mortgage note. If that were the case, then even the original Complaint, filed in March 2005, may have been filed outside the ten-year statutory period to recover on the Recoll transaction breach.

Generally, absent application of tolling or a statutory discovery rule, "a cause of action accrues and the statute of limitations begins to run at the time of the injury to the aggrieved party." DeSantis v. Prelle, 891 A.2d 873, 878 (R.I. 2006) (citations omitted). In this Court's December 2010 decision, the Court held that K&P breached its fiduciary duty by "favoring PIC over the Limited Partners, failing to fully disclose the Recoll sale, and preventing [the Partnership] and the Limited Partners from competing for the opportunity." Friedman, 2010 WL 5042896. This Court's impression is that although K&P likely had a duty to fully disclose the negotiations with PIC by February 1995, the injury to the Limited Partners accrued in September 1995, when the Recoll note was actually sold to PIC. At that time, the final decision was made to favor PIC over the Limited Partners, to not disclose the sale before it occurred, and to officially preclude the Limited Partners from purchasing the mortgage note from Recoll. See id. (holding breach of fiduciary duty for favoring PIC, failing to disclose sale, and preventing Limited Partners from competing); see also Niehoff v. Maynard, 299 F.3d 41, 48 (1st Cir. 2002) (holding on breach of fiduciary duty claim that absent equitable tolling statute of limitations would have accrued at moment of wrongful act when general partner owed limited partners a refund on their investment but did not pay it). However, a specific holding by this Court on when the statutory clock would have commenced ticking is not necessary in light of the forthcoming analysis infra part III(B)(2). See Shane v. Shane, 891 F.2d 976, 985 (1st Cir. 1989) (declining to determine when statute of limitations would have accrued but for application of discovery rule or equitable tolling on breach of fiduciary duty claim).

2

Equitable Tolling

In response to K&P's assertion that the statute of limitations bars recovery and began accruing as early as February 1995, Plaintiffs claim that equitable tolling or the discovery rule should delay accrual of the statutory period until the Limited Partners learned of the wrongful conduct in February 2008. Prior to that time, the only traces of information disclosed to the Limited Partners by the General Partner were two brief notes included within the February 1995 and February 1996 financial statements. See Friedman, 2010 WL 5042896 at n.20. The Limited Partners moved to amend their Complaint the month after learning the details of the Recoll transaction during discovery in this matter.

Rhode Island courts have recognized equitable tolling as an exception to the statute of limitations in some circumstances. See Johnson v. Newport Cnty. Chapter for Retarded Citizens, Inc., 799 A.2d 289, 292-93 (R.I. 2002) (recognizing equitable tolling of statute of limitations for persons of unsound mind); Roe, 794 A.2d at 485 (explaining equitable tolling for unsound mind as providing temporary relief for plaintiffs who are limited in protecting their legal rights). Any equitable tolling exception is ". . . based upon principles of equity and fairness . . . ." Johnson, 799 A.2d at 292. This Court is unaware and has not been made aware of any Rhode Island authority applying equitable tolling in the case of those with fiduciary duties to one another. In the absence of controlling precedent, this Court will look to other jurisdictions, and in particular, will look to Delaware when considering corporate and partnership fiduciary legal principles. See Bove v. Community Hotel Corp. of Newport, R.I., 105 R.I. 36, 41-42, 249 A.2d 89, 93 (1969); Friedman, 2010 WL 5042896 at n.34.

Applying Delaware law, the First Circuit Court of Appeals has determined that equitable tolling may delay accrual of the statute of limitations for a breach of fiduciary duties claim in some situations. See Niehoff, 299 F.3d at 48-49; see also In re MAXXAM, Inc./Federated Dev. S'holders Litig., Nos. 12111, 12353, 1995 WL 376942, at *6 (Del. Ch. Jun. 21, 1995) (providing Delaware equitable tolling law); Kahn v. Seabord Corp., 625 A.2d 269, 275-77 (Del. Ch. 1993) (same); Bovay v. H.M. Byllesby & Co., 38 A.2d 808, 813-20 (Del. 1944) (same).[4] The court expounded that a fiduciary arrangement in particular has ramifications on an equitable tolling analysis, and there are compelling reasons for balancing equities differently between parties in a fiduciary relationship. Id. The court explained:

> "Since trust and good faith are the essence of this relationship, it would be corrosive and contradictory for the law to punish reasonable reliance on that good faith by applying the statute of limitations woodenly or automatically to alleged self-interested violations of trust. . . . Reasonable reliance upon the competence and good faith of others who have assumed legal responsibilities towards a plaintiff have not infrequently been sufficient to toll the

[4] A brief survey of the relevant Delaware case law reinforces the First Circuit's reading of it in Niehoff. In re MAXXAM explained:

> "Underlying both [equitable tolling and fraudulent concealment] doctrines is the policy that a defendant should not be permitted to use the statute of limitations as a shield where the defendant possesses information critical to the existence of an actionable claim of wrongdoing and prevents the plaintiff from discovering that information in timely fashion." 1995 WL 376942 at *6 (citations omitted).

Kahn previously discussed the concept similarly, reasoning that "[l]egally sanctioned relationships of dependence and trust are important for the law to enforce . . ." and that there is "great social utility in the willingness of some to treat others in this way." 625 A.2d at 275. Accordingly, at least in some circumstances where there is an existing fiduciary relationship and actionable self dealing, the statute of limitations is equitably tolled. Id. at 276; see generally Gen. Video Corp. v. Kertesz, No. 1922-VCL, 2008 WL 509816, at *4 (Del. Ch. Feb. 25, 2008) (discussing standard for equitable tolling as less stringent than fraudulent concealment and applying to "claims of wrongful self-dealing . . . where a plaintiff reasonably relies on the competence and good faith of a fiduciary") (citations omitted).

> running of an applicable statute of limitations." Id. at 50 (quoting Kahn, 625 A.2d at 275).

Accordingly, the court held that equitable tolling is triggered when either the fiduciary is charged with unfair self-dealing or the fiduciary fraudulently conceals facts that are essential to the plaintiff's cause of action.[5] Id.

Simply, "[i]f the plaintiff can demonstrate that the defendant was a fiduciary who engaged in wrongful self-dealing, the test for equitable tolling is satisfied." Id. at 52 (not considering fraudulent concealment where demonstrated that defendant engaged in self-dealing). This straightforward rule is emblematic of the concept that equitable tolling "should be used to achieve some approximation of justice rather than perpetrate fraud." Id. (explaining further that "a plaintiff who is duped by a fiduciary is given far more leeway than a plaintiff who is victimized by someone in an arm's length transaction"); cf. In re Am. Bridge Products, Inc., 599 F.3d 1, 6 (1st Cir. 2010) (stating under Massachusetts law, statute of limitations on breach of fiduciary duty "begins to run once the wrongdoing comes to light); Salois v. Dime Sav. Bank of N.Y., FSB, 128 F.3d 20, 27 (1st Cir. 1997) (stating under Massachusetts law, statute of limitations tolls if through breach of fiduciary duty defendant keeps facts giving rise to claim from plaintiff); Shane, 891 F.2d at 985 (stating under Massachusetts law, where fiduciary duty is owed, failure to disclose facts tolls statute of limitations). The decision to toll the running of the statutory period and for how long to toll it is at the trial court's discretion. Id.

[5] Rhode Island recognizes tolling of the statute of limitations when there is fraudulent concealment. See Ryan, 941 A.2d at 182. However, fraudulent concealment in Rhode Island requires that the defendant made an actual misrepresentation of fact, fraudulently concealing the existence of the plaintiff's cause of action. See id. There must be express or affirmative conduct reasonably deceiving the plaintiff; mere silence is not enough. See id.; Kenyon v. United Electric Rys. Co., 51 R.I. 90, 94, 151 A. 5, 8 (1930). In the case at bar, it is not necessary that this Court determine whether K&P fraudulently concealed the Recoll transaction from the Limited Partners.

The facts considered by the First Circuit in Niehoff are not dissimilar to those presented now before this Court. In Niehoff, a number of limited partners of a real estate venture sued its general partner for breach of fiduciary duty and other related claims centered on a real estate development project. Id. at 42-45. Through discovery, the plaintiffs uncovered new information that allowed them to clarify their claims. Id. at 45-46. At trial, the defendant moved for judgment as a matter of law, claiming the statute of limitations barred recovery. Id. at 46. Judge Lisi of the federal district court in Rhode Island tolled the statute of limitations until the date of the production of the financial documents revealing the details of the wrongful transactions. Id. at 46-47. The First Circuit affirmed the ruling, applying the law as detailed above and determining equitable tolling applied. Id. at 52.

As discussed at great length in this Court's prior Decisions, it is well-settled Rhode Island law that partners owe a fiduciary duty to each other and the partnership. Friedman, 2010 WL 5042896. In a limited partnership, a general partner has a duty to exercise utmost good faith, due care, and loyalty. Id. Particularly, a general partner owes a relentless and supreme fiduciary duty of undivided loyalty to the partnership and its limited partners. Id. These concepts of Rhode Island partnership law are based, at least in part, on the corporate and partnership law of Delaware. See id. (citing Delaware case law). It follows, then, that this Court should look to the First Circuit's interpretation of Delaware law applying equitable tolling when a fiduciary engages in wrongful self-dealing.

Equitable tolling applies in the case at bar to begin the running of the statutory limitations period in February 2008, when the Plaintiffs learned the details of the Recoll transaction through discovery. This Court's Decisions have established the fiduciary nature of the relationship between K&P and the Limited Partners. Further, this Court has found that K&P breached its duty of undivided loyalty with regard to the self-dealing Recoll transaction. See Friedman, 2010 WL 5042896. The Limited Partners here cannot be found to have forfeited recovery on their

breach of fiduciary duty claim because they reasonably relied on the General Partner's good faith and loyalty. Equitable tolling is triggered to achieve justice when, as here, a fiduciary engages in wrongful self-dealing. See Niehoff, 299 F.3d at 52. Upholding the strictures of the partnership fiduciary relationship by tolling the statute of limitations in this circumstance best approximates justice. See id. (tolling statute of limitations until fiduciary revealed details of self-dealing in discovery). Accordingly, equitable tolling applies to begin the running of the statute of limitations in February 2008.

3

Relation Back

In arguing that the statute of limitations bars Plaintiffs claims, K&P presents that the Third Amended Complaint does not relate back to the date of the original Complaint. Conversely, Plaintiffs assert the claims relate back to the original Complaint, which Plaintiffs aver was brought within the ten-year limitations period. Plaintiffs present the relation-back argument in the alternative to equitable tolling; nonetheless, this Court will discuss the application of the relation-back doctrine to this case.

Superior Court Rules of Civil Procedure Rule 15(c) allows for amendments of pleadings to relate back to the date of the original pleading for statute of limitations purposes. Rule 15(c) expressly states, in pertinent part:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

The Rhode Island Supreme Court's interpretation of Rule 15(c) "favors the application of the relation-back principle to an amendment even if it changes the theory of recovery or the type of relief sought." Manocchia v. Narragansett Capital Partners Television Invs., 658 A.2d 907, 910 (R.I. 1995) (citing 1 Kent, R.I. Civ. Prac. § 15.6 at 154 (1969)) (emphasis in original). The test commonly applied by courts of this state is the "identity-of-transaction" test, coupled with a

determination of whether the other party had prior notice of the claims presented in the amended pleading. Manocchia 658 A.2d at 910; Mainella v. Staff Builders Indus. Servs., Inc., 608 A.2d 1141, 1144 (R.I. 1992) (setting forth two-part standard for relation back).

First, the court must consider "whether the amended pleading alleges a matter that arises out of the same conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Buonanno v. Colmar Belting Co., 736 A.2d 86, 87-88 (R.I. 1999) (quoting Mainella, 608 A.2d at 1143) (internal citations omitted). Second, "the determining factor is whether there is notice that [the] new claim might be asserted." Manocchia, 658 A.2d at 910. However, where the "factual situation in the original complaint remains the same . . . defendants had fair notice." Manocchia, 658 A.2d at 910.

Here, Plaintiffs' specific claims for breach of fiduciary duty arise out of the same conduct, transaction, or occurrence set forth in the original pleading. See Super. R. Civ. P. 15(c) (providing language for "identity-of-transaction" standard). Plaintiffs alleged breach of fiduciary duty with regard to mortgage refinancing transactions in the original Complaint filed in March, 2005. (Compl. ¶ 47.) Significantly, the factual assertions in the Complaint stated that a mortgage on the partnership property was "sold to 'an affiliate of the general partner' in September 1995." (Compl. ¶ 27.) This September 1995 transaction was mentioned in the First and Second Amended Complaints as well. (Am. Compl. ¶ 33; Second Am. Compl. ¶ 37.) The limited facts asserted by Plaintiffs in these pleadings were the extent of Plaintiffs' knowledge regarding the September 1995 transaction at those times. As it turned out, this September 1995 sale was the Recoll transaction in which this Court has found the General Partner breached its fiduciary duties. Regardless, the facts presented by the Plaintiffs in the original Complaint

explicitly identified the conduct, transaction, or occurrence of a mortgage note sale in September 1995—the very transaction giving rise to the amended claims.

K&P was on notice that a claim may be asserted regarding the Recoll transaction because that factual situation was identified in the original Complaint. See Manocchia, 658 A.2d at 910 (holding defendants have fair notice when claim arises from factual situation in original Complaint). Plaintiffs set forth, or at least attempted to set forth (to the extent of their knowledge), the Recoll transaction in their original Complaint, and when questionable, courts favor relation-back. See id. (favoring application of relation-back doctrine). As such, the expanded breach of fiduciary duty claims and facts presented regarding the Recoll transaction in the Third Amended Complaint relate back to the filing date of the original Complaint for statute of limitations purposes in accordance with Super. R. Civ. P. 15(c).

4

Claim of Mr. Pliakas

Lastly, K&P asserts that the claim of Mr. Pliakas is barred by the statute of limitations and does not relate back to the date of the original Complaint. Mr. Pliakas was not added as a plaintiff in this matter until the Third Amended Complaint. The Plaintiffs offer that even if Mr. Pliakas' claim to recover on the Recoll transaction was untimely, he could still recover on other claims,[6] and his lateness would not in any way alter the measure of damages awarded on the Recoll transaction. According to the Plaintiffs, the same amount in damages should be allocated among the remaining Limited Partners if Mr. Pliakas' claim is time barred.

[6] Plaintiffs contend Mr. Pliakas could still recover on any awards related to the reserve account, the Partnership's truck, and the breach of contract claim for failing to distribute available net income at least from 1997-2004. This distinction and argument need not be addressed by the Court because of its findings herein.

In its prior Decisions, the Court awarded Plaintiffs the difference between the price paid by PIC for the Recoll note and the amount paid by the Partnership to extinguish it. Friedman, 2010 WL 5042896. Because the measure of damages was in no way based on the number of plaintiffs participating in the action, there is no reason to abrogate the Recoll transaction award to any extent should Mr. Pliakas' claim be barred by the statute of limitations. Rather, if Mr. Pliakas' claim does not comply with the statute of limitations, the damages already awarded would be split among the remaining Plaintiffs. The issue, then, becomes whether Mr. Pliakas' claim relates back to the filing date of the original Complaint, so as to place his Recoll transaction claim and right to recover on it within the statute of limitations.

As with relation-back of claims in amended pleadings, relation-back of parties is also governed by Super. Ct. R. Civ. P. 15(c). The rule provides, in pertinent part:

> "An amendment changing or adding a plaintiff or defendant or the naming of a party relates back if the foregoing provision is satisfied and, within the period provided by Rule 4(l) for the service of summons and complaint, the party against whom the amendment adds a plaintiff, or the added defendant (1) has received such notice of the institution of the action that the party would not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that but for a mistake the action would have been brought by or against the plaintiff or defendant to be added." Super. Ct. R. Civ. P. 15(c).

The referenced "foregoing provision" requires that the amendment arise out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original Complaint. Id. The language of Rule 15(c) provided above reflects a June 15, 2006 amendment that rewrote the portion dealing with adding parties. See id. Compiler's Notes. Previously, the rule applied "only to amendments adding or changing the name of a party against whom a claim is asserted." Balletta v. McHale, 823 A.2d 292, 294 (R.I. 2003) (emphasis in original).

K&P's reliance on Balletta, which interpreted the old version of Rule 15(c) as applying only to the addition of defendants, does not reflect the current status of the law. The 2006 amendment to the rule made clear that either plaintiffs or defendants could be added by amended pleadings and relate back in the prescribed circumstances. See Super. Ct. R. Civ. P. 15 Committee Notes (indicating the present version is designed to restore understanding as under the Federal rules that a plaintiff may be added). This Court is unaware of any Rhode Island case law interpreting the updated rule, but under the analogous federal rule, it is clear that plaintiffs meeting the requirements may be added and relate back. See, e.g., Young v. Lepone, 305 F.3d 1, 14 (1st Cir. 2002) (stating Fed. R. Civ. P. 15(c) can be applied to amendments that change plaintiffs); In re Enron Corp. Sec., 465 F. Supp. 2d 687, 723 (S.D. Tex. 2006) (stating courts have applied federal rule 15(c) to adding plaintiffs); In re Simon II Litig., 211 F.R.D. 86, 143 (E.D.N.Y. 2002) (stating federal rule 15(c) applies to addition of plaintiffs if defendants could reasonably have expected them to be added), vacated and remanded on class certification issues, 407 F.3d 125 (2d Cir. 2005). The First Circuit, in applying the federal version of the rule, set out three requirements for the relation-back of added plaintiffs: (1) the amended complaint must arise out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original, (2) there must be a sufficient identity of interest between the old plaintiffs and the added plaintiff so that defendant can be said to have fair notice of the claim, and (3) there must not be undue prejudice to the defendant. Young, 305 F.3d at 14 (citing Allied Int'l, Inc. v. Int'l Longshoremen's Ass'n, AFL-CIO, 814 F.2d 32, 35-36 (1st Cir. 1987)).

Here, Mr. Pliakas' claims arise out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original Complaint. See supra part III(B)(3). Mr. Pliakas is another of the Limited Partners in the Partnership, and his claims directly parallel those asserted

by the other Limited Partners. As such, K&P had fair notice of the claims and was not prejudiced in defending them by the addition of Mr. Pliakas to the already-named Limited Partners. See Super. Ct. R. Civ. P. 15(c); Young, 305 F.3d at 14. Furthermore, even before the Third Amended Complaint, Mr. Pliakas contacted K&P requesting his share of the Partnership's reserve funds in exchange for granting a release of K&P's liability. (Pls. Opp'n 7.) K&P not only should have known that Mr. Pliakas would have brought a claim, but also actually knew of Mr. Pliakas' potential claim through his direct communication of it to K&P. Because K&P was on notice of the claim, both through Mr. Pliakas' communications and through the same claims brought by other Limited Partners, there is no prejudice in allowing Mr. Pliakas' claims to relate back under Super. Ct. R. Civ. P. 15(c).

IV

Conclusion

After due consideration and for all of the foregoing reasons, this Court denies Defendant's Motion to Vacate, in Part, its December 6, 2010 and January 28, 2011 Decisions and its Order dated January 28, 2011. K&P failed to prove extraordinary circumstances to justify vacating the Decisions in the interests of justice. Furthermore, K&P's statute of limitations defense fails on its merits, both because of equitable tolling and the relation back doctrine for claims and parties. Prevailing counsel may present an Order consistent herewith which shall be settled after due notice to counsel of record.